PROCEEDINGS

IN THE

EQUITY SUIT

OF THE

Commonwealth of Virginia

VS.

The State of West Virginia,

WITH AN APPENDIX.

COMPILED BY
CLARKE W. MAY, Attorney General.



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INTRODUCTORY.

In this volume will be found the proceedings in full to this time in the suit of the Commonwealth of Virginia vs. West Virginia, in the Supreme Court of the United States. There have been from time to time many requests made to me, to Governor Dawson and the other members of the Board of Public Works, from citizens of the State, for information as to the progress of this suit, and what is being done to protect the State's interests therein. And knowing of no better way by which the public could be informed of the true situation, I have prepared this volume and in it will be found all that has been done by either party to said suit to the present time.

For the further information of those interested, there is added as an appendix some sections of the ordinance of August 20, 1861, passed by the Wheeling Convention, relating to the public debt of Virginia, some sections of the first Constitution of West Virginia, the act of the General Assembly of Virginia giving the consent of that State for the formation of West Virginia, the act of Congress admitting West Virginia into the Union, resolutions of the West Virginia Legislature concerning the Virginia Debt and the report of the Commissioners appointed by the Governor of West Virginia pursuant to a resolution of its Legislature and the report of the Senate Finance Committee of 1873.

The Legislature, at its recent session, chapter 45, Acts 1907, passed an act directing the Attorney General to defend the State in this cause and authorized the Board of Public Works to employ such attorneys and agents to assist the Attorney General in such defense as in its judgment shall be necessary for the purpose; and in pursuance of this act, the Board has employed Hon. John G. Carlisle, late Speaker of the House of Representatives and Secretary of the Treasury, the law firm of Mollohan, McClintic and Mathews, of Charleston, and Hon. Charles Edgar Hogg, of Morgantown.

By reference to the opinion of the Court overruling the demurrer of the State of West Virginia, it will be noticed therein that nothing has been decided definitely against the State, as the Court in overruling the demurrer says that it is done without prejudice to any question raised in the demurrer being raised in the answer, which it

provides shall be filed by the first Monday of the next term, which term begins in October next.

The further proceedings in this case will be given in this manner from time to time, as they develop.

With the assurance that everything is being done by the Attorney General and the counsel employed to assist him in this behalf that can be done to protect the interests of the State, and that the Board of Public Works is heartily co-operating with the counsel, and that they together are giving to the case every attention that it requires, I beg leave to subscribe myself,

Very respectfully,

CLARKE W. MAY,
Attorney General.

IN THE SUPREME COURT OF THE UNITED STATES.

ORIGINAL, No. 7.

COMMONWEALTH OF VIRGINIA,

vs.

STATE OF WEST VIRGINIA.

1 To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Commonwealth of Virginia, by William A. Anderson, her attorney-general, brings this, her bill, against the State of West Virginia, and shows to the Court that:

I.

On the first day of January, 1861, your Oratrix was indebted in about the sum of $33,000,000.00 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose but a portion of her liabilities though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the State, as created under her laws amounting, the former to $1,462,993.00, and the latter to $1,543,669.05 as of the same date.

The official reports and records showing the exact character and amounts of the public debt thus contracted and how the same was created, are referred to, and will be produced upon a hearing of the case.

2 II.

That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture, and to some extent to grazing and manu-

facturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio river, that the Commonwealth of Virginia, in the first quarter of the Nineteenth century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed East of the Appalachian range, as leading up to the undeveloped territory West thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed West of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio river, since the first day of January, 1861, has increased to a very great and material ex-
3 tent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines East of said range been first constructed; and your Oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1st, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedness to be contracted was a small amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

III.

The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvement, in a very large measure for the purpose of developing the aforesaid resources of the Western portion of the State now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were

issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear
4 from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropriations. Indeed it appears from those records that a great majority of the Acts of the legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been the fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

IV.

The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local
5 purposes. As early as the year 1816 a Board of Public Works was created by law for the State, the members of which were elected by the voters of the State at large, and this Board had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this Board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by an examination of the numerous entries in the records of this Board extending through a number of years and showing such expenditures as made from time to time.

V.

On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was in-

tended to withdraw Virginia from the Union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the "Restored State of Virginia," and will be hereafter referred to in this bill as the "Restored State."

VI.

On the 20th day of August, 1861, the Restored State of Virginia, in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to "provide for the formation of a new State out of the portion of the territory of this State;" Section 9 of which ordinance was as follows, to-wit:

6 "9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the Treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.

VII.

On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein and it was provided by this Act of Congress that

7 whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the Act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operation on the date last named.

VIII.

Pending the admission of the State of West Virginia to the Union the General Assembly of the Restored State of Virginia passed February 3, 1863, the following Act:

"That all property, real, personal and mixed, owned by, or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the
8 said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state.

5. That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government."

Your oratrix is informed, believes, and so charges, that the property which was by the operation of this Act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate, to several millions of dollars, the exact amount your Oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this Act, the State of West Virginia realized and received into her Treasury from the sale thereof about Six Hundred Thousand Dollars; and that no
9 part of the property so received by West Virginia had been obtained by Virginia since April, 1861.

IX.

And by a further Act of the General Assembly of the Restored State of Virginia passed on the next day, February 4th, 1863, it was enacted.

"1. That the sum of One Hundred and Fifty Thousand Dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys
10 shall remain in the treasury and continue to be the property of this State."

And this last named sum of One Hundred and Fifty Thousand Dollars, together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

X.

The Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union contained the following provisions:

By Section 5 of Article VIII. of said Constitution it was provided:

"5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of War."

And by Section 7 of Article VIII. it was provided:

"7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank."

And by section 8 of Article VIII. it was provided:

"8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquida-
11 tion thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

At the time the Constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any "public debt" or "previous liability," except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State of Virginia above set forth. By the provisions of Section 8 of Article VIII., above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By section 5 of the same Article VIII., above set forth, her Constitution forbade the creation of any debt "except to meet casual deficits in the revenue, to redeem a previous liability of the State," &c., and there was not and could not have been any such "previous liability," except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State. And Section 7 of the same Article of her Constitution, above cited, authorized a sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks, except those acquired, as above stated, from the original State. This section of her constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have
12 been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

XI.

After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settling of any kind was ever had between the two States in regard to this debt.

XII.

The efforts looking to a settlement by the concurrent action of the two States having proved abortive, and your Oratrix being anxious to adjust the portion of the common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

The first of these was made by the General Assembly which was chosen at the close of the period of "destruction and recon-

struction," which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay
13 to the uttermost every dollar which her most exacting creditor could demand of her, was expressed in the Act of her General Assembly, approved March 30, 1871.

By the terms of settlement embodied in this Act, your Oratrix undertook to give her obligations bearing 6% interest for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest, which accrued interest to the extent of nearly $8,000,000, had been funded after the War in new bonds of Virginia, thus capitalizing at 6% not only the interest, but interest upon that interest.

It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the State debt were attempted by the Acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892. Your Oratrix will file copies of each of the Acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

XIII.

As farther indicating the great burden which your Oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your Honors that, since, January 1st, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over
14 Seventy One Million Dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as Exhibit Number 7.

It is proper in this connection to call attention to the fact that, while your Oratrix has made this large contribution towards the settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a number of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your Oratrix in reference thereto.

It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be

fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several Acts above recited.

A question may be raised as to whether such was the effect of the language used in the Act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this Court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the Act of March 30, 1871, which it was the purpose of your Oratrix that it should have.

15 XIV.

By each of the Acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your Oratrix, should be surrendered to and held by your Oratrix, who either by the express terms of the settlement provided for by said Acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your Oratrix to each creditor whose old Virginia bond was so surrendered to her.

Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obligations of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your Oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your Oratrix and to all of her people.

XV.

All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent of the aggregate of those liabilities, have been taken up and are now actually held by your Oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto.

They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your Oratrix, will, when it shall be proper to do so, be exhibited to the Master, who who shall take the accounts hereinafter prayed for.

XVI.

Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your Oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding Acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of $25,000,000, by far the greater part if it being now, of course, on account of the interest computed thereon, at the rate of 6% per annum, the then legal rate in both States.

For all of these obligations taken up and payments made on account of the common debt, your Oratrix has in her own
17 right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

XVII.

In addition to the above bonds there were outstanding on the 1st day of January, 1861, certain obligations of the State of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your Oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereinafter prayed for to be taken between the two states; and in such accounts your Oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend throughout a period of so many years' duration that it is impossible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your Oratrix thereon ascertained, under the supervision of a Court of Equity.

XVIII.

Your Oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt

18 of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

First. The area of the territory now known as the State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constituton under whch she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

Third. The State of West Virginia has further, by the repeated enactments and joint resolution of her legislature, recognized her liability for a just proportion of this debt.

Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she
19 should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

Fifth. While the transfer of this property, real and personal, and also of certain moneys of the Commonwealth of Virginia, purport to have been made to the State of West Virginia by the Act of "The Restored Government of Virginia," there were in fact represented in said "Restored Goverment" and in the legislature thereof no other people and no other territory than that which then, as now, constitute the State of West Virginia.

XIX.

The General Assembly of Virginia being anxious to effect a settlement of the portion of the common debt of the undivided State which remained unadjusted, and if possible to bring this about with the friendly co-operation and concurrence of West Virginia, adopted: *"A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of*

West Virginia to the payment of those found to be entitled to the same," approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

The efforts made by this Commission, acting under the above resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the Commission, with the active co-operation of the Honorable Charles T. O'Ferral, the then governor of the Commonwealth made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the Act approved March 6, 1900, entitled "*An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises,*" the purpose of which Act is sufficiently set forth in its title, and a copy of the Act will also be hereinafter shown as one of the exhibits herewith filed.

XX.

The Commission acting under said last-mentioned Act made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this Honorable Court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said Commission, and in strict conformity with the provisions of the said Act of March 6, 1900, all of which will be more fully and completly shown by the Report of the said Commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which Report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this Bill.

XXI.

In order that the matters hereinbefore referred to may be more fully shown to the Court, your Oratrix files herewith certain exhibits (eight in number) which she prays may be read as a part of her bill, to-wit:

Exhibit Number 1. A copy of the said Act of the General Asembly of Virginia, of March 30, 1871, entitled an Act to provide for the funding and payment of the public debt.

Exhibit Number 2. A copy of the Act of the same General Assembly of March 28, 1879, entitled an Act to provide a plan of settlement of the public debt.

Exhibit Number 3. A copy of the Act of February 14, 1882, of

the same General Assembly, entitled an Act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular payment of the interest thereon.

Exhibit Number 4. A copy of the said Act of the same General Assembly, approved February 20, 1892, entitled an Act to provide for the settlement of the public debt of Virginia not funded under the provisions of an Act entitled, etc.

Exhibit Number 5. A copy of the said Joint Resolution of the said General Assembly of March 6, 1894, providing for the apointment of a Commission.

Exhibit Number 6. A copy of the said Act of March 6, 1900, under which the powers of the said Commission were enlarged and the institution of this suit authorized.

Exhibit Number 7. Showing amounts paid off since January 1, 1861, or assumed and now carried by Virginia on account of the old debt of the undivided State.

Exhibit Number 8. A copy of the report of the said Virginia Commission made to the General Assembly of that State, dated January 6, 1906, together with the accompanying papers.

22 XXII.

Forasmuch, therefore, as your Oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your Oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this Court by such Auditor or Master as may by the Court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this Court; that the State of West Virginia may be required to produce before such Auditor or Master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this Court will adjudicate and determine the amount due to your Oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto

your Oratrix in the premises as the nature of her case may require or to equity may seem meet.

And your Oratrix will ever pray, &c.

WILLIAM A. ANDERSON,
Attorney General of Virginia.
HOLMES CONRAD.

23 EXHIBITS WITH BILL.

In the Supreme Court of the United States.

Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

24 EXHIBIT NUMBER 1.

CHAP. 282.—An Act to Provide for the Funding and Payment of the Public Debt.

Approved March 30, 1871.

(Acts G. A. of Va. 1870-1, p. 378.)

Whereas in the formation of the State of West Virginia, there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas, in the ordinance authorizing the organization of said state, it was provided that the said state shall take upon itself a just proportion of the public debt of the commonwealth of Virginia prior to the first day of January, eighteen hundred and sixty-one, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this state, and will continue to be made as long as may be necessary; and whereas the people of this commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and whereas it has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof and not to this State, as the constitution of this state provides; now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due; therefore,

1. Be it enacted by the general assembly of Virginia, That from and after the passage of this act, no bond, certificate, or other evidence of indebtedness, shall be issued for any portion of the debt of this state; nor shall any interest be paid upon any part or portion of said debt, except as hereinafter provided.

25 2. The owners of any of the bonds, stocks or interest certificates heretofore issued by this state, which are recognized by its constitution and laws as legal, except the five per centum dollar bonds, and what are known as sterling bonds, but including the stock of the old James river company, and the bonds of the James river and Kanawha company guaranteed by this state, may fund two-thirds of the amount of the same, together with two-thirds of the interest due or to become due thereon, to the first day of July, eighteen hundred seventy-one, in six per centum coupon or registered bonds of this state of the denominations of one hundred, and multiples thereof, dated that day, and to become due and payable in thirty-four years after date, but redeemable at the pleasure of the state, after ten years, the interest to be payable semi-annually on the first days of January and July in each year. The bonds shall be made payable to order or bearer, and the coupons to bearer, at the treasury of the state and bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or *vice versa*, at the option of the holder. The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues, and demands due the state, which shall be so expressed on their face; and the bonds shall bear on their face a declaration to the effect that the redemption thereof is secured by a sinking fund provided for by the law under which they are issued. The holders of the five per centum dollar bonds may in like manner fund the same in like bonds, bearing, however, five instead of six per centum interest. In the funding herein authorized, for any fractional sums less than one hundred dollars, certificates shall be issued bearing the same date and rate of interest, and payable at the same time as the bonds issued under this section; which certificates, in sums of one hundred dollars or any multiple thereof, shall be exchangeable for bonds of the char-

26 acter herein authorized to be issued; and new certificates of like character may be issued for any fractional sums less than one hundred dollars which may remain in making such exchange.

3. Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the states of Virginia and West Virginia in regard to the public debt of the state of Virgin-

ia existing at the time of its dismemberment, and that the state of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees; and provided further, that until such final settlement with West Virginia, there shall be paid upon what are known as sterling bonds, in the manner now prescribed by law, two-thirds of the interest accruing on the principal of said bonds, after July first, eighteen hundred and seventy-one; and for the interest accrued to said date certificates dated on that day shall be issued, drawing the same rate of interest as the bonds, two-thirds of which shall be paid as provided to be paid on the bonds. The remaining one-third of unpaid interest, both on the bonds and certificates, shall be payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia.

4. The treasurer is hereby authorized and directed to forthwith cause to be prepared, engraved or lithographed, registered bonds and bonds with coupons and certificates of the character mentioned in the second and third sections of this act; and when prepared
27 shall commence the issuance of the same as herein provided. The bonds and certificates shall be signed by the treasurer, and countersigned by the second auditor; the coupons shall be signed by the treasurer, or a fac simile of his signature shall be stamped or engraved thereon. Each denomination of bonds herein authorized to be issued, both registered and coupon, shall constitute a series, and the bonds of each series shall be numbered from one upwards, as they are issued; and the coupons in addition to the number of the bond to which they are attached, shall be numbered from one to sixty-seven. Each class of certificates authorized to be issued by this act shall be numbered, respectively, from one upwards, and in addition thereto, each certificate shall contain the number and date of the bond or certificate on account of which it is issued. Each bond, certificate of stock, and interest certificate, to be funded as herein provided, shall first be delivered to the second auditor, who shall calculate and determine the amount for which a bond shall be issued, and the amounts for which certificates shall be issued, under the second and third sections of this act; which calculations shall be endorsed, dated and signed by him on the back of such bond, certificate of stock, or interest certificate, and he shall cause a proper registry thereof, together with the date and number of the bond, certificate of stock, or interest certificate, to be made and kept in his office. After such endorsement and registration, the second auditor shall deliver the bond, certificate of stock, or interest certificate, to the treasurer, who shall thereupon deliver to him a bond or bonds and certificates of the character named in the second and third sections of this act, duly signed and numbered, for the several amounts, respectively, according to said endorsement. The second auditor, after making a proper registry of said bond or bonds, and certificates to be kept in his office, shall deliver the same to the person entitled to them. The treasurer shall, by proper endorsement, written or stamped, upon each bond, certificate of stock, or interest

28 certificate so surrendered and delivered to him, cancel the same, and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law. The treasurer shall also have made and preserved in his office a proper registry of every bond and certificate delivered by him to the second auditor, and whenever a coupon bond shall be issued payable to the order of any person or firm, he shall secure and preserve the signature of such person or firm as a part of such registry whenever practicable.

5. Whatever sum may be realized from the claims of this state against Seldon, Withers and Company, and the Chesapeake and Ohio Canal company, and from the sale and disposition of the stocks and bonds, and debts owned by the state in and against any and all railway or other improvement companies, and all sums which may be realized from the claims of this state against the United States, and from any sales of any real estate now belonging to the commonwealth, shall be paid into the treasury of the state to the credit of the sinking fund hereby authorized and created. In the year eighteen hundred and eighty, and annually thereafter, until all the bonds issued under and by authority of this act shall have been paid, there shall be levied and collected, the same as other taxes, a tax of two cents on the one hundred dollars of the assessed valuation of all the property, personal, real and mixed, in the state, which shall be paid into the treasury of the state to the credit of the sinking fund. The treasurer, the auditor of public accounts, and the second auditor are hereby appointed commissioners of the sinking fund, and shall have (a majority acting) the control and management thereof, and shall annually, or oftener, apply whatever sum or sums may be to the credit of the sinking fund, to the purchase and redemption of bonds issued by authority of this act.

6. All necessary expense incurred in the execution of this act shall be paid out of any moneys in the treasury not otherwise appropriated, on the certificate of the correctness of the same,
29 signed by the treasurer and second auditor, and approved by the governor.

7. This act shall be in force from and after its passage.

30 EXHIBIT NUMBER 2.

CHAP. 24—An Act to Provide a Plan of Settlement of the Public Debt.

Approved March 28, 1879.

(Acts G. A. of Va. 1878-9, p. 264.)

Whereas it is believed by the general assembly that the rate of interest heretofore agreed to be paid by the state on the public debt is greater than can be borne without destroying the industrial interests of the state and whereas the council of foreign bondholders

of London, England, and the funding association of the United States of America, limited, have, in view of this belief, expressed their willingness to jointly endeavor to obtain the consent of the creditors to an abatement in the rate of interest; and whereas it is highly expedient, in the best interest of the state, to secure an amicable settlement with the creditors by which the credit of the state may be restored and enhanced, and the aggregate amount of interest payable by the state reduced within limits which will not be too onerous to the population; therefore,

1. Be it enacted by the general assembly of Virginia, That to provide for funding the debt of the state, the governor is hereby authorized to create bonds of the state, registered and coupon, dated the first day of January, eighteen hundred and seventy-nine, the principal payable forty years thereafter, bearing interest at the rate of three per centum per annum for ten years, and at the rate of four per centum per annum for twenty years, and at the rate of five per centum per annum for ten years, payable in the cities of Richmond, New York or London, as hereinafter provided, on the first days of July and January of each year, until the principal is redeemed. The state shall have the option of redeeming any or all of said bonds by the payment of principal and accrued interest at any time after the expiration of ten years from the first day of January, eighteen hundred and seventy-nine, on public notice to the holders of its purpose to make such redemption. The coupons on said bonds shall
31 be receivable at and after maturity for all taxes, debts, dues and demands due the state, and this shall be expressed on their face. The holder of any registered bond shall be entitled to receive from the treasurer of the state a certificate for any interest thereon, due and unpaid, and such certificate shall be receivable for all taxes, dues and demands due the state, and this shall be expressed on the face of the registered bonds and on the face of such certificate. All obligations created under this act shall be forever exempt from all taxation, direct or indirect, by the state, or by any county or corporation therein, and this shall be expressed on the face of the bonds. The said bonds shall be of the denominations of one hundred dollars, five hundred dollars, and one thousand dollars, at the option of the creditors respectively, and the bonds as well as their coupons shall be payable at Richmond and New York, or if desired, may be made payable in sterling at London, at the fixed rate of exchange of one pound sterling for five dollars. The bonds hereby authorized shall be issued only in exchange for the outstanding debt of the state, as hereinafter provided.

2. For purposes of designation, the outstanding indebtedness of the state is diveded into two classes, as follows, to wit:

Class I. which shall be taken to include all tax-receivable coupon bonds, and all registered bonds and fractional certificates which are convertible under the act approved March thirtieth, eighteen hundred and seventy-one, into such tax-receivable coupon bonds.

Class II, which shall be taken to include all bonds funded under the act approved March thirtieth, eighteen hundred and seventy-one,

as amended by the act approved March seventh, eighteen hundred and seventy-two; and also two-thirds of the face value, with two-thirds of the unpaid accrued interest up to the first of July, eighteen hundred and seventy-one, on all unfunded bonds, including sterling bonds.

3. The outstanding indebtedness of the state shall be
32 funded in the new bonds, to be issued under this act, as follows: Bonds shall be presented for exchange with all coupons attached maturing after the date of presentation, and shall be exchanged at the face value of said bonds, dollar for dollar, for the new bonds, with all coupons attached maturing after the date of such presentation: Provided that the proportion of Class II, refunded, shall never exceed in amount one-third (1-3) of the total amount refunded, until eighteen million dollars of Class I have been retired. The new bonds to be issued may be coupon or registered, at the option of the holders, and at the like option coupon bonds may at any time be converted into registered bonds.

4. All due and unpaid interest may be funded under the provisions of this act at the rate of fifty cents on the dollar, and shall be fundable at that rate under the third section of this act, and taken under the provisions of said section, in lieu of bonds of Class II.

5. If on or before the first day of May, eighteen hundred and seventy-nine, the council of foreign bondholders and the funding association of the United States of America aforesaid, shall file with the governor their assent to and acceptance of the terms of this act, the same shall be taken to be a contract between the state and the said corporations, and the governor shall forthwith provide for the preparation of the bonds provided for by this act. The said corporations may present for funding, and in the proportions hereinbefore provided, at least eight millions of dollars of the outstanding obligations of the state prior to the first day of January, eighteen hundred and eighty; and during each period of six months, from and after the thirty-first — December, eighteen hundred and seventy-nine, they may present an additional amount of at least five millions of dollars, until the whole debt is funded; but any excess over said amounts, which may be presented during any of said periods may be estimated in requirement for the succeeding six months. So long as
the said corporations shall present for funding the obliga-
33 tions aforesaid, in the amounts and in the periods aforesaid, they shall have the exclusive privilege of funding the outstanding debt under the provisions of this act: Provided that the said corporations shall arrange to receive the outstanding bonds at the city of Richmond, when the holders thereof shall so desire. But if the said corporations shall fail to file with the governor their assent and agreement as aforesaid by the first day of May, eighteen hundred and seventy-nine, or shall fail to present for funding the outstanding bonds in the proportions and amounts and during the periods hereinbefore specified, then the governor may, in his discre-

tion, make a like contract with responsible parties for the funding of the debt of the state under this act.

6. The rules prescribed under the act approved March thirtieth, eighteen hundred and seventy-one, in respect to preparing, signing and issuing the new bonds and coupons, regulating the same, and in taking in, cancelling and registering the old bonds, shall be observed by the officers of the treasury in the execution of this act, except so far as the same be modified by the provisions of this act: Provided that all bonds and certificates which may be necessary to be printed, shall be printed from a plate which shall be the property of the commonwealth, and shall remain in the keeping or under the control of the second auditor. Whenever an obligation of the state shall be presented to the second auditor to be funded under this act, he shall note the fact and date on the proper register in his office, shall punch a hole through the name of the second auditor, signed or countersigned thereto, and shall issue his warrant upon the treasurer for the new obligations required. There shall be endorsed upon the said warrant a description of the old obligations, and the calculation of principal and interest for which the new obligations are to be issued. The said old obligations and warrant shall be carried by the second auditor to the treasurer, who shall note the fact and date of funding on the proper register in his office, and if he shall find the warrant correctly drawn, shall sign the proper
34 obligations to be issued, register the same in his office, clip therefrom the past-due coupons and punch the same, and deliver the said obligations to the second auditor, taking his receipt therefor upon his warrant. The second auditor shall countersign the obligation so delivered to him, register the same in his office, and deliver the same to the proper person, taking his receipt therefor. The treasurer shall jacket and file in his office the warrant upon which the new obligations were issued, with the surrendered obligations attached to said warrant, and shall number and date the jacket so as to make it easy for reference. But in cancelling and registering the bonds as above directed, in every bond and coupon surrenderd under this act holes shall be punched in one or more places, and in such a manner as to render a new funding of the same impossible, and every bond and coupon so cancelled shall be filed for reference.

7. The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the state of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange; and the state of Virginia will negotiate or aid the creditors holding all of such certificates issued under this act, or previous acts, in negotiating with the state of West Virginia for an amicable settlement of the claims of such creditors against the state of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under

this act, shall be taken and held as a full and absolute release of the state of Virginia from all liability on account of said certificates.

8. The general assembly will, by necessary and appropriate legislation, provide for the prompt payment of the interest on the bonds issued under this act.

9. In the year eighteen hundred and eighty-five, and annually thereafter until all the bonds issued under and by authority of this act are paid, there shall be levied and collected the same as, and together with other taxes, a tax of two cents on the one hundred dollars of the assessed valuation of all the property, personal, real and mixed, in the state, which shall be paid into the treasury of the state to the credit of the sinking fund. The treasurer, the auditor of public accounts, and second auditor are hereby appointed commissioners of the sinking fund, and shall have (a majority acting) the control and management thereof, and shall annually, or oftener, apply whatever sum or sums may be to the credit of the sinking fund to the purchase and redemption of bonds issued under this act. All the certificates of debt which shall be funded, redeemed or purchased under this act shall be cancelled by the second auditor, and delivered by him to the treasurer of the commonwealth at the time of payment therefor, who shall carefully preserve the same in his office. All certificates of debt acquired under the operation of the sinking fund, created by the act of March thirty, eighteen hundred and seventy-one, shall also be cancelled and delivered.

10. Executors, administrators, and others acting as fiduciaries, may invest in the bonds issued under this act, and the same shall be considered a lawful investment.

11. The treasurer shall, upon the first days of July, eighteen hundred and seventy-nine, and January, eighteen hundred and eighty, and upon the same days in each year, pay or cause to be paid to the holders thereof the half-yearly interest then due upon each of the bonds of the commonwealth issued under this act.

12. Whenever there shall not be a sufficient amount of money in the treasury of the state to meet the the accruing interest on the said bonds promptly, the auditor is hereby authorized and directed, by and with the advice of the governor of Virginia, to raise by temporary loan, to be returned out of the accruing revenues of the state, a sum sufficient to enable him to meet promptly the said interest as it accrues. And in case the auditor shall not be able to raise a sufficient sum for the said purpose by loans, he is hereby authorized and directed to issue non-interest-bearing certificates of indebtedness of this state, to be signed by himself and countersigned by the treasurer, and properly registered in the offices of the auditor and treasurer, for the sum of one dollar and multiples thereof, the same to be printed from plates, which shall be the property of the state, and to sell the same at not less than a minimum price to be fixed by the commissioners of the sinking fund, which shall not be less than seventy-five cents upon the dollars. The said certificates shall be receivable for all taxes, debts, dues and demands due the state, and this shall be expressed on their face. The amount of such

certificates which may be issued at any one time shall be fixed by the commissioners of the sinking fund, and the proceeds of the sale thereof shall be devoted exclusively to the payment of interest as aforesaid. The auditor shall report regularly to the general assembly the amount and character of certificates issued under this act, and the net proceeds thereof. In case the auditor shall not be able to borrow the sums needed as aforesaid without security, he shall be and is hereby authorized to hypothecate such amounts of the said certificates as may be fixed on by the commissioners of the sinking fund, at a value to be fixed as aforesaid, but in no case to be at a less value than seventy-five cents upon the dollar; and in case of a sale of said certificates, whether they may have been so hypothecated or not, they shall be offered for sale in suitable and proportionate amounts in the different counties, towns and cities of this state, so far as practicable, under regulations to be fixed by the commissioners of the sinking fund. The said certificates shall be received by the treasurer of the state, and be cancelled on receipt thereof, under the same regulations and prohibitions now existing in relation to coupons for interest on the public debt, except that no tax shall be deducted therefrom, and the fact of their cancellation shall be noted on the said registers.

13. The act approved March fourteenth, eighteen hun-
37 dred and seventy-eight, and all acts inconsistent with the provisions of this act, are hereby repealed.

14. This act shall be in force from its passage.

38 EXHIBIT NUMBER 3.

CHAP. 84.—An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon.

Approved February 14, 1882.

Preamble.—Whereas to the end which this act comprehends, a full statement of the debt is essential; and whereas the following has been carefully made up from the records of the second auditor's office of the State, it is confidently submitted as presenting a true state of the account between the State and her creditors—the account is as follows:

			Interest.	Principal.
	Principal outstanding at this date:			
1861, January 1st,	Sterling debt bearing 5 per cent. interest	$ 1,973,000 00		
	Dollar debt bearing 6 per cent. interest	29,533,582 90		
	Debt guaranteed bearing 6 per cent. interest	294,130 00		
	Total principal			$31,800,712 90
	Interest:			
	Past due and uncalled for at this date	101,023 63		
	Maturing at this date, January 1st, 1861	944,156 38		
	Total interest		$1,045,183 01	
1863, July 1st.	The State of West Virginia was formally admitted into the Union June 20th, 1863. The property and resources of Virginia, upon which the above debt has been founded, were by this partition of the old State, reduced, one-third of her territory and one-fifth of her population going to form West Virginia. This and the consequences of war to her and her people made a loss of full $500,000,000 of property, and her taxable values were reduced from $723,000,000 to $336,000,000, and her annual revenues from over $4,000,000 to $2,500,000.			
39	*Principal July 1st, 1863:*			
	Sterling debt bearing 5 per cent. interest	$1,973,000 00		
	Dollar debt bearing 6 per cent. interest	29,827,712 90		
	Bonds issued since January 1st, 1861, in discharge of debts contracted, and appropriations made prior to that date	1,340,500 02		
	Total principal July 1st, 1863			33,141,212 92
	Interest July 1st, 1863:			
	Past due January 1st, 1861, and uncalled for	1,045,183 01		
	Accrued between January 1st, 1861, and July 1st, 1863, inclusive	4,909,533 07		
	Total interest to July 1st, 1863, inclusive		5,954,716 08	

1863, July 1st.	Two-thirds of the above debt, principal and interest, to this date is assumed as Virginia's equitable portion, in consideration of the partition of her territory, population, and resources, upon the well established principle that debt in such cases follows territory. Upon that basis, Virginia's portion of the debt of the entire State is—			
	Principal:			
	Two-thirds of $1,973,000 sterling debt		1,315,333 34	
	Two-thirds of $31,168,212.92 dollar debt		20,778,808 62	
	Total principal, two-thirds, to July, 1863, inclusive			22,094,141 96
	Interest:			
	Two-thirds of $5,954,716.08, amount in arrears at that date, inclusive		3,969,810 72	
	Less amount of interest paid by Virginia since January 1st, 1861, exclusively out of revenues of the present State of Virginia, the territory and resources of West Virginia being inaccessible during that period, and contributing nothing thereto		3,662,434 55	
	Balance of interest due and unpaid July 1st, 1863, inclusive			307,376 17
1871, July 1st.	Principal July 1st, 1863, in sterling bonds as above		1,315,333 34	
	Principal July 1st, 1863, in dollar bonds as above	$20,778,808 62		
	Less amount of dollar bonds redeemed between July 1st, 1863, and this date	3,710,449 67		
	Total dollar bonds		17,068,358 95	
	Total principal			18,383,692 29
	Interest from July 1st, 1863, to July 1st, 1871, inclusive:			
	On $1,315,333.34 sterling bonds at 5 per cent.		526,133 28	
	On $20,778,808.62 dollar bonds at 6 per cent.		9,973,828 14	
			10,499,961.42	

	Less amount covering average time of the redemption of the $3,710,449.67 dollar bonds redeemed	445,257 58			
	Less amount paid in money during that period—July 1st, 1863, to July 1st, 1871, inclusive	3,594,289 11			
			4,039,546 69		
				6,460,414 73	
	Interest:				
	Two-thirds of $5,954,716.08, amount in arrears at that date, inclusive		3,969,810 72		
	Less amount of interest paid by Virginia since January 1st, 1861, exclusively out of revenues of the present State of Virginia, the territory and resources of West Virginia being inaccessible during that period, and contributing nothing thereto		3,662,434 55		
	Balance of interest due and unpaid July 1st, 1863, inclusive			307,376 17	
1871, July 1st.	Principal July 1st, 1863, in sterling bonds as above		1,315,333 34		
	Principal July 1st, 1863, in dollar bonds as above	$20,778,808 62			
	Less amount of dollar bonds redeemed between July 1st, 1863, and this date	3,710,449 67			
	Total dollar bonds		17,068,358 95		
	Total principal				18,383,692 29
	Interest from July 1st, 1863, to July 1st, 1871, inclusive:				
	On $1,315,333.34 sterling bonds at 5 per cent.		526,133 28		
	On $20,778,808.62 dollar bonds at 6 per cent.		9,973,828 14		
			10,499,967 42		
	Less amount covering average time of the redemption of the $3,710,449.67 dollar bonds redeemed	445,257 58			

Less amount paid in money during that period—July 1st, 1863, to July 1st, 1871, inclusive	3,594,289 11			
		4,039,546 69		
			6,460,414 73	
Add interest accrued to July 1st, 1871, as above		6,767,790 90		
Total		18,041,288 93		
Less amount paid between July 1st, 1871, and October 1st, 1881—in money	$2,415,973 56			
In coupons	8,707,615 50			
Less amount covering average time of the redemption of the $1,540,658.12 bonds redeemed	331,800 00			
Less tax-receivable coupons outstanding October 1st, 1881, and to be paid as part of the floating debt	895,722 00			
Less tax-receivable coupons maturing in January and July, 1882	1,117,724 87			
Amount of interest (special):				
Redeemed and cancelled	380,110 02			
Total deductions		13,848,945 95		
Balance of interest to July 1st, 1882			4,192,342 98	
Total debt to July 1st, 1882:				
Principal, as above				16,843,034 17
Interest, as above				4,192,342 98
Total				21,035,377 15

Including bonds held by the literary fund to the amount of $1,428,245.25, an interest on the same—in arrears July 1st, 1881, $516,322.19—and interest added from that date to July 1st, 1882, $85,694.71, making $602,016.90 included in the above sum of $4,192,342.98.

Total debt	$21,035,377 15

41 And whereas by this account it appears that Virginia owes her creditors, as of the first — July, eighteen hundred and eighty-two, including the bonds held by the Literary fund and arrears of interest thereon cast to such date, twenty-one million, thirty-five thousand, there hundred and seventy-seven dollars and fifteen cents; and that she may cause to be issued her own bonds for the same, and provide for the certain payment of interest thereon; that is for her equitable share of the bonds known as consols, and here designated as class A, and whereof there are outstanding fourteen million three hundred and sixty-nine thousand nine hundred and seventy-four dollars and eighty-one cents; and for her equitable share of the bonds known as ten-forties, and here designated as class B, and whereof there are outstanding eight million five hundred and seventeen thousand six hundred dollars; and for her equitable share of the bonds known as peeler, and here designated as class C, and whereof there are outstanding two million three hundred and ninety-four thousand three hundred and five dollars and twelve cents; and for her equitable share of the interest thereon, designated as class D, and whereof there is now in arrears nine hundred and twenty-eight thousand eight hundred and eight-seven dollars and forty-five cents, and counted to the first of July, eighteen hundred and eigthy-two, makes the amount of such interest then to be in arrears, one million seventy-two thousand five hundred and forty-five dollars and seventy-five cents; and for her equitable share of the bonds known as unfunded bonds—dollar and sterling—here designated as class E, and whereof there are now outstanding, computed at two-thirds, three million seven hundred and seventy-three thousand four hundred and ninety-three dollars and sixty-eight cents; and for her equitable share of the interest thereon now in arrears, two million six hundred and thirty-six thousand four hundred and forty-four dollars and thirty-four cents, and counted to the first of July, eighteen hundred and eighty-two, making as of that date (two hundred and twenty-six thousand four hundred and nine dollars and sixty-two cents more) the sum of two million eight hundred and sixty-two thousand eight hundred and fifty-three dollars and ninety-six cents, and here designated as class F; and for her equitable share of the bonds held by the commissioners of the Literary fund, whereof there are one million four hundred and twenty-eight thousand two hundred and forty-five dollars and twenty-five cents; and whereas the rate of interest which any people can safely undertake to pay must be determined by the measure of their productive resources; and whereas these have long been burdened by a rate of taxation which is conceded to be as high as can be endured; and whereas the means of prompt and certain payment should be apparent to the creditor, while the people have assurance for the support of the government and the maintenance of their schools, as required by the constitution; and whereas the net revenues of the state, remaining and so derived, after providing for the proper and gradual liquidation of the balance of the moneys heretofore diverted from
42 the public free school fund, after liquidating gradually the ar-

rearages to the Literary fund, and leaving some small margin for the immediate and subsequent exigencies, which are, and are likely to be demanded by the public welfare—notably in respect of the humane institutions now inadequate to the proper accommodation of that unfortunate class of every population—do not warrant the assumption of a larger rate of interest than three per centum upon the full amount of Virginia's equitable share of the debt of the old and entire state, as the same is ascertained and now formally declared by the foregoing account; therefore,

1. Be it enacted by the general assembly of Virginia, That the board of commissioners of the sinking fund of the state, be, and they are hereby empowered and directed to create bonds, registered and coupon, to such extent as may be necessary to comply with the provisions of this act.

2. The said bonds shall be dated July first, eighteen hundred and eighty-two, and be payable at the office of the treasurer of the state on the first day of July, nineteen hundred and thirty-two; provided that the state may, at any time and from time to time, after July first, nineteen hundred, redeem any part of the same, principal and interest, at par. In case of such redemption before maturity, the bonds to be paid, shall be determined by lot by said board of commissioners, and notice of the bonds so selected to be paid, shall be given in a newspaper published in Richmond, New York, and London, England, when interest from and after ninety days from the date of such publication in London, shall cease upon the bonds so designated to be paid.

3. The form of the bond shall be as follows, to-wit:

The commonwealth of Virginia asknowledges herself indebted to —— —— (in the case of a coupon bond to the bearer, and in the case of a registered bond, inserting the name of the person or corporation) in the sum of —— dollars, which she promises to pay in lawful money of the United States at the office of the treasurer of the state, Richmond, Virginia, on the first day of July, nineteen hundred and thirty-two, with the option of payment at par, principal, and interest, before maturity, at any time after July first, nineteen hundred; and interest at the office of the treasurer of the state, in such lawful money, on the first days of January and July, at the rate of three per centum per annum until paid (according to the tenor of the annexed coupons, in the case of coupon bonds).

In testimony whereof, witness the signature of the treasurer and the counter-signature of the second auditor, hereto affixed according to law.

——— ———, *Treasurer.*

——— ———, *Second Auditor.*

4. The form of coupon for coupon bonds shall be as follows, to-wit:

43 No. —— (of bond).

The commonwealth of Virginia will pay to bearer —— dollars, in

lawful money of the United States, at the office of the treasurer, Richmond, Virginia, on the first day of January and July, alternately—the first coupon to be payable January first eighteen hundred and eighty-three.

—— ——, *Treasurer.*

$——.

Each coupon to be impressed on the back with its number, in the order of maturity, from one forward.

5. The said board of commissioners are authorized to issue such bonds, in denominations of five hundred and one thousand dollars, as may be necessary to carry out the provisions of this act, each denomination to be of a different tint: Provided that registered bonds may be issued of any denomination, multiple of one hundred; all registered bonds to be of the same tint; and they are authorized and directed to issue such bonds, registered or coupon, in exchange for the outstanding evidences of debt hereinbefore numerated, including the bonds held by the literary fund, as follows, that is to say:

(*a*) For her equitable share of class A, at the rate of fifty-three per centum; that is to say, fifty-three dollars of the bonds authorized under this act (principal and accrued interest, at par, from the preceding period of maturity to the date of exchange,) are to be given for every one hundred dollars, face, principal and accrued interest from the preceding semi-annual period of maturity to the date of exchange of such evidences of debt, and for any interest which may be past due and unpaid upon the same, funded bonds issued under this act may be given dollar for dollar.

(*b*) For her equitable share of class B, at the rate of sixty per centum, reckoning and accounting for any interest, as provided in the case of class A.

(*c*) For her equitable share of class C, at the rate of sixty-nine per centum, reckoning any current interest, at the date of exchange, as in the cases of classes A and B, and accounting for the same as provided in class D.

(*d*) For her equitable share of class D, at the rate of eighty per centum.

(*e*) For her equitable share of class E, at the rate of sixty-nine per centum, reckoning any current interest, at the date of exchange, as in the cases of classes A, B, and C, and accounting for the same as provided in class F.

(*f*) For her equitable share of class F, at the rate of sixty-three per centum.

(*g*) For her equitable share of the bonds of the Literary fund, as in the case of class C; her equitable share of the arrearages of interest—three hundred and seventy-nine thousand two hundred seventy dollars—to be paid in money.

6. For all balances of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate as follows:

44 No. ——.

The commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for —— dollars, held by ——, dated the —— day of ——, and numbered ——, leaving a balance of —— dollars, with interest from ——, to be accounted for by the state of West Virginia, without recourse upon this commonwealth.

Done at the capitol of the state of Virginia, this —— day of ——, eighteen ——.

—— ——, *Second Auditor.*
—— ——, *Treasurer.*

7. The said board of commissioners are empowered to issue for any fractional part of one hundred dollars of the indebtedness funded under this act, the following certificate:

Fractional Certificate.

Register No. —. Transaction No. —.

This certificate entitles the holder hereof to the sum of —— dollars, fundable at its face in the bonds of the commonwealth of Virginia, authorized by an act approved —— day of ——, eighteen hundred and eighty-two, when presented with certificate of like tenor or in conjunction with other evidences of debt fundable under said act in amounts of one hundred dollars and multiples thereof.

Done at the capitol of Virginia, this — day of ——, eighteen hundred and eighty ——.

—— ——, *Second Auditor.*
—— ——, *Treasurer.*

The certificates so issued shall be registered by the second auditor in a register kept for that specific purpose, giving the date and number of the transaction to which it relates, the amount of the same, and the name of the person or corporation to whom it was issued; and as such certificates are refunded, the same shall be canceled and preserved as herein provided in respect to the evidences of debt refunded.

8. All the bonds and certificates of debt and evidences of past-due and unpaid interest taken in under the provisions of this act, shall be canceled by the treasurer in the presence of the board of commissioners of the sinking fund as the same are required, and by the treasurer the same shall be carefully preserved until such time as the General Assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so canceled, from time to time, shall be certified by said board and filed with the treasurer for preservation.

9. All the coupons and registered bonds and fractional certificates issued under this act, shall be separately registered by the second

auditor in books kept for the specific purpose; and in each case giving the date, number and amount of the obligations issued, and the name of the person or corporation to whom issued, and the date, number, amount and description of the bond, bonds or indebtedness surrendered.

10. The plates from which the bonds and fractional certificates authorized by this act, are printed, shall be the property of the commonwealth, and shall remain in the keeping of the said board of commissioners of the sinking fund.

11. In the year eighteen hundred and ninety, and annually thereafter until all the bonds issued under and by authority of this act are paid, there shall be set apart of the revenue collected from the property of the state each year, two and one-quarter per centum upon the bonds at the time outstanding, which shall be paid into the treasury to the credit of the sinking fund; and the commissioners of the said sinking fund shall, annually or oftener, apply the same to the redemption or purchase (at a rate not above par) of the bonds issued under this act, and the bonds so redeemed shall be canceled by the said board, and the same registered by the second auditor in a book to be kept for the purpose, giving the number, the date of the issue, the character, the amount, and the owner at the time of purchase of the bonds so redeemed and canceled; and in case no such purchase of bonds can be made, then the amount which can be redeemed shall be called in by lot as provided in section two of this act.

12. Executors, administrators and others acting as fiduciaries, may exchange any state bonds held by them as provided, for bonds issued under this act, when so authorized by the court having jurisdiction in the premises, and the same, when so made, shall be considered a lawful investment.

13. The treasurer of the commonwealth is authorized and directed to pay the interest on the bonds issued under this act, as the same shall become due and payable, out of any money in the treasury not otherwise appropriated.

14. All necessary expenses incurred in the execution of this act, shall be paid out of any money in the treasury not otherwise appropriated, on the warrants of the auditor of public accounts drawn upon the treasurer, on the order of the board of sinking fund commissioners.

15. That from and after the passage of this act, no bonds, certificates, or other evidences of indebtedness, shall be issued for any portion of the debt of this state, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided.

16. This act shall be in force from its passage.

EXHIBIT NUMBER 4.

CHAP. 325. An act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled An act to ascertain and declare Virginia's equitable share of the debt

created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of the interest thereon, approved February 14, 1882.

Approved February 20, 1892.

(Acts G. A. of Va. 1891-92, p. 533.)

Whereas by a joint resolution of the general assembly of the state of Virginia, adopted on the third day of March, eighteen hundred and ninety, a commission was appointed on the part of Virginia to receive propositions for funding the debt of the state not funded under the act known as the "Riddleberger bill," approved February fourteenth, eighteen hundred and eighty-two, from a properly constituted representative of her creditors; and

Whereas said Virginia debt commission has submitted a report to the general assembly, wherein it appears that under a certain agreement, dated May twelfth, eighteeen hundred and ninety, lodged with the Central Trust Company of New York, Frederick P. Olcott, William L. Bull, Henry Budge, Charles D. Dickey, Junior, Hugh R. Garden, and John Gill, constituting a committee for certain of the creditors of Virginia, called the "Bondholders' committee," have proposed to said commission to surrender to the state in bulk not less than twenty-three million of dollars of the public debt, unfunded under said act approved February fourteenth, eighteen hundred and eighty-two, in exchange for an issue of new bonds, as hereinafter specified, the same to be apportioned between the several classes of creditors by a tribunal which the said creditors have them-
47 selves appointed; and that, in pursuance of said proposal an agreement has been entered into unanimously between the said commission and the said bondholders' committee, subject to approval by the general assembly, whereby in exchange for the said unsettled obligations of the state held by the public, which were issued prior to February fourteenth, eighteen hundred and eighty-two (exclusive of evidences of debt held by the public institutions of the commonwealth pursuant to law and by the United States,) together with the interest thereon to July first, eighteen hundred and ninety-one, inclusive, aggregating about twenty-eight million of dollars, there shall be issued nineteen million of dollars of new bonds, dated July first, eighteen hundred and ninety-one, and maturing one hundred years from said date, with interest thereon at the rate of two per centum per annum for ten years from said first day of July, eighteen hundred and ninety-one, and three per centum per annum for ninety years thereafter to the date of maturity, said interest to be payable semi-annually of which aggregate debt of about twenty-eight million of dollars the said bondholders committee represent that they now hold and agree to surrender not less than twenty-three million of dollars and

Whereas said report and agreement contemplate the surrender of the obligations held by the bondholders' committee as an entirety, and do not contemplate an apportionment by the general assembly

between the various classes of creditors so represented by said bondholders' committee, the same having been committed to a distributing tribunal, as hereinbefore recited and

Whereas it is the desire and intention of the general assembly that a settlement of all the other outstanding obligations of the state (except those issued under the act of February fourteenth, eighteen hundred and eighty-two, the evidences of debt held by the public institutions of the state in pursuance of law and by the United States) as well as those controlled by the bondholders' committee, as aforesaid, shall be made under the provisions of this act; therefore,

1. Be it enacted by the general assembly of Virginia, That
48 the commissioners of the sinking fund, a majority of whom may act, be, and they are hereby, empowered and directed to create "listable" engraved bonds, registered and coupon, to such an extent as may be necessary to issue nineteen million of dollars of bonds in lieu of the twenty-eight million dollars of outstanding obligations, not funded under the act approved February fourteenth, eighteen hundred and eighty-two, hereinbefore recited.

2. The said bonds shall be dated July first, eighteen hundred and ninety-one, and be payable at the office of the treasury of the state, or at such agency in the city of New York, as may be designated by the state, on the first day of July, nineteen hundred and ninety-one, and shall bear interest from date, payable semi-annually on the first days of January and July in each year, at the rate of two per centum per annum for the first ten years and three per centum per annum for the remaining ninety years; the said interest may be payable in Richmond, New York and London, or at either place, as may be designated by the state; provided that the state may at any time, and from time to time, after July first, nineteen hundred and six, redeem at par any part of the principal with accrued interest. In case of such redemption before maturity, the bonds to be paid shall be determined by lot by said commissioners of the sinking fund, and notice of the bonds so selected to be paid shall be given by publication beginning at least ninety days prior to an interest-due date, in a newspaper published in Richmond, Virginia, one in New York city, and one in London, England; and the interest from and after the next succeeding interest-due date shall cease upon the bonds so designated to be paid: provided that no registered bonds shall be so redeemed while there are any coupon bonds outstanding.

3. The form of the bonds shall be substantially as follows, to-wit: Issued under act of assembly, approved —— day of ——, eighteen hundred and ninety-two.

The commonwealth of Virginia acknowledges herself to be
49 indebted to —— —— (in case of a coupon bond to the bearer, and in case of a registered bond inserting the name of a person or corporation, or assigns), in the sum of —— dollars, which she promises to pay in lawful money of the United States, at the office of the treasurer of the state, or at such agency in the city of New York as may be designated by the state, on the first day of July, nineteen hundred and ninety-one, with the option of payment at par with

accrued interest, before maturity at any time after July first, nineteen hundred and six, and interest, at the office of the treasurer of the state, or at the agencies of the state in New York city and London England, or at either place, as may from time to time be designated by the state, in such lawful money aforesaid, at the rate of two per centum per annum for ten years from the first day of July, eighteen hundred and ninety-one, and at the rate of three per centum per annum thereafter until paid, payable semi-annually on January first and July first in each year (according to the tenor of the annexed coupon bearing the engraved signature of the treasurer of the commonwealth in case of coupon bonds). And this obligation is hereby made exempt from any taxation by the said commonwealth of Virginia, or any county or municipal corporation thereof.

In testimony whereof, witness the signature of the treasurer and the countersignature of the second auditor of the commonwealth of Virginia, hereto affixed according to law.

[SEAL.] —— ——, *Treasurer.*
—— ——, *Second Auditor.*

4. The form of coupon for coupon bonds shall be substantially as follows, to-wit:

Coupon No. —.

On the first day of —— the commonwealth of Virginia will pay to bearer —— dollars in lawful money of the United States, at the office of the treasurer of the state, or at the agencies of the state in New York city or London, England, or at either place, as may be designated by the state; the same being six months' interest on bond number ——. —— dollars.

—— —— *Treasurer.*

Each coupon to be impressed on the back with its number, in order of maturity, from number one consecutively.

5. Said commissioners of the sinking fund are authorized to issue coupon bonds in denominations of five hundred and one thousand dollars each, as may be necessary to carry out the provisions of this act: provided that registered bonds may be issued of the denominations of one hundred dollars, five hundred dollars, one thousand dollars, five thousand dollars, ten thousaid dollars and they are authorized and directed to issue said bonds, registered or coupon, in exchange for the said outstanding obligations up to and including July first, eighteen hundred and ninety-one (exclusive of evidences of debt held by public institutions of the commonwealth as aforesaid and by the United States) as follows:

A. Said bondholders' committee may at any time on or before the thirtieth day of June, eighteen hundred and ninety-two, present to said commissioners for verification bonds and other evidences of debt, and coupons or other evidences of interest thereon, obligations of the state of Virginia, held by said committee, for exchange as

aforesaid; and said commissioners shall determine whether the obligations so presented are genuine obligations of the state and whether the coupons or other evidences of interest represent interest accrued on such obligations (exclusive of evidences of debt held by public institutions of the commonwealth as aforesaid and by the United States).

B. Such of the obligations so presented for verification as may be determined by said commissioners to conform to the requirements of paragraph A hereof, shall be sealed in convenient packages as the examination proceeds. Each of the packages shall be numbered, and upon each package shall be endorsed the amount and character of the obligations therein contained. Such endorsement on each package shall be signed by said commissioners or a majority thereof, and the package shall then be delivered to said committee or its agent. Said commissioners shall keep in a book to be provided for the purpose a record of the numbers of all such packages and of the amount and character of the obligations contained in each. Such obligations presented by said bondholders' committee as do not conform to the requirements of paragraph A hereof shall be returned to said committee; but said commissioners shall keep a record thereof in the book aforesaid.

C. After said bondholders' committee shall have presented to said commissioners for verification bonds and other evidences of debt and coupons, or other evidence of interest thereon accrued on or before July first, eighteen hundred and ninety-one, obligations of the state of Virginia, all conforming to the requirements of paragraph A hereof, as determined by said commissioners, and amounting in the aggregate to not less than twenty-three million of dollars, after deducting one-third of the principal and interest of such obligations as were issued prior to the thirtieth day of March, eighteen hundred and seventy-one, and also deducting one-third of the principal and interest of such obligations as were issued under the act approved the thirtieth day of March, eighteen hundred and seventy-one, as do include West Virginia's proportion, said bondholders' committee may at any time on or prior to the thirtieth day of June, eighteen hundred and ninety-two, present the same in bulk to said commissioners for surrender and exchange as herein provided. All coupons matured or to mature on coupon bonds after July first, eighteen hundred and ninety-one, or coupons of like class and amount, or the face value thereof in cash, shall be surrendered with such bonds, the said cash to be returned if proper coupons are subsequently tendered. And when the said bondholders' committee shall have presented for exchange the obligations aforesaid to an amount of
52 twenty-three million of dollars or more, if the engraved bonds hereinbefore authorized are not ready for exchange, the said commissioners shall, upon application of said bondholders' committee, issue to said bondholders' committee a manuscript registered bond of the state of Virginia, substantially of the form of the bond hereinbefore specified, for the aggregate amount to which the said committee may be entitled for the obligations so presented under

this act, the said bond to be exchangeable for the engraved bonds aforesaid of character and amount required by said committee, as prescribed in this act, and interest in the meantime on said manuscript bond shall be paid as herein provided for on the engraved bonds.

D. The said new bonds shall be issued to said bondholders' committee by the said commissioners in the following proportion, to-wit: nineteen thousand dollars of the new bonds to be created under this act shall be issued for every twenty-eight thousand of old outstanding obligations (principal and interest to July first, eighteen hundred and ninety-one), as aforesaid, surrendered by said bondholders' committee to the said commissioners, after the deductions provided for in paragraph C of this section and a proportionate amount of said new bonds shall be issued for smaller sums of said outstanding obligations so surrendered: provided that no certificates issued on account of the proportion of West Virginia of the obligations of the state shall be funded under this act. When said bondholders' committee shall have surrendered and exchanged such obligations as aforesaid to the amount of at least twenty-three million dollars, said committee may at any time thereafter up to and including the thirtieth day of June, eighteen hundred and ninety-two, present to said commissioners for verification, surrender, and exchange additional obligations, principal and interest, as aforesaid all coupons matured or to mature on coupon bonds after July first, eighteen hundred and ninety-one, or coupons of like class and amount,
53 or the face value thereof in cash, to be presented with such bonds, the cash, if paid, to be returned if proper coupons are subsequently tendered. After said commissioners shall have determined that said obligations conform to the requirements of paragraph A hereof, said commissioners shall accept the obligations so presented for surrender and exchange by said committee, and shall deliver to said committee in exchange therefor new bonds issued under the provisions of this act in the same proportion as is set out in this paragraph of this section, after making the deductions provided for in paragraph C of this section.

E. If on making the exchange provided for in this act said committee shall be found entitled to a fractional amount or amounts less than one hundred dollars in addition to the new bonds delivered to it, said commissioners of the sinking fund shall issue to the committee a certificate or certificates for such amount or amounts. Such fractional certificates shall be exchangeable for the bonds authorized by this act to be issued in sums of one hundred dollars, or any multiple thereof, and certificates of like character shall be issued for any fractional amount which may remain in making the exchange.

6. For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:

No. —. The commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for —— dollars, dated —— day of ——, and No. —, leaving a balance of —— dollars, with enterest from ——, to be accounted for to the holder of this certificate by the state of West Virginia, without recourse upon this commonwealth.

Done at the capitol of the state of Virginia, this —— day
54 of ——, eighteen hundred and ninety-two.

—— ——, *Second Auditor.*

—— ——, *Treasurer.*

The certificates so issued under sections five and six of this act shall be recorded by the second auditor in a book kept for that purpose, giving the date and number of the transaction to which it refers, the amount of certificates, and the name of the person or corporation to whom issued and delivered and as such certificates, authorized by paragraph E, section five of this act, are exchanged, the same shall be cancelled and preserved as herein provided in respect to the evidences of debt refunded.

7. The commissioners of the sinking fund are hereby authorized and required to receive on deposit for verification, classification and exchange such of the said obligations of the state as may be presented to said commissioners; provided, that said commissioners shall not receive on deposit for the purposes aforesaid any outstanding obligations of the state which have been once deposited with the bond-holders' committee, or may be hereafter deposited with them; the said verification and exchange for the new bonds of the obligations so deposited to be conducted in the same manner as hereinbefore provided with respect to the obligations deposited with the said bond-holders' committee, and the said commissioners of the sinking fund shall issue to and distribute amongst said depositing creditors after they have fully complied with the terms of this act, in exchange for the obligations so deposited, bonds authorized by this act as follows, namely to each of the several classes of said depositing creditors the same proportion, as nearly as may be found in their judgment practicable by the commissioners of the sinking fund, as the same class shall receive under the distribution which shall be made by the commission for the creditors represented by the bondholders' committee: provided that no obligations shall be received for such deposit after the thirtieth day of June, eight-
55 een hundred and ninety-two, nor shall any coupon bonds be received which do not have attached thereto all the coupons maturing after July first, eighteen hundred and ninety-one but for any such coupons as may be missing, coupons of like class and amount, or the face value thereof in cash, may be received the said cash, if paid, to be returned if proper coupons are subsequently tendered and each depositor shall, when he receives his distributive share of the said new issue of bonds, pay to the commissioners of the sinking fund three and one-half per centum in cash of the par value of the bonds received by him, or a commission equal in amount to that which may at any time hereafter be fixed by the said com-

mittee of bondholders upon any bonds deposited with them, not, however, in any case to exceed three and one-half per centum; and said sinking fund commissioners shall cover the fund thus received into the treasury of the commonwealth.

8. All the coupon and registered bonds issued under this act shall be separately recorded by the second auditor in books provided for the specific purpose, in each case giving the date, number, amount of obligations issued, and the name of the person or corporation to whom issued, and the date, number, amount and description of the obligations surrendered.

9. All the bonds and certificates of debt, and evidences of past due and unpaid interest, taken in under the provisions of this act, shall be cancelled by the treasurer in the presence of the commissioners of the sinking fund, or a majority thereof, as the same are acquired, and by him carefully preserved, subject to disposition by the general assembly; a schedule of the bonds, certificates, and other evidences of debt so cancelled shall be certified by said commissioners and filed by the treasury for preservation.

10. In the year nineteen hundred and ten, and annually thereafter, there shall be set apart of the revenue collected from the property of the state each year up to and including the year nine-
56 teen hundred and twenty-nine, one half of one per cent, upon the bonds issued under this act, as well as upon the outstanding bonds issued under act approved February fourteenth, eighteen hundred and eighty-two; and in the year nineteen hundred and thirty, and annually thereafter until all the bonds issued under this act and the said act approved February fourteenth, eighteen hundred and eighty-two, are paid, there shall be set apart of the revenue collected from the property of the state each year one per cent. upon the outstanding bonds issued under the aforesaid acts, which shall be paid into the treasury to the credit of the sinking fund, and the commissioners of the sinking fund shall annually, or oftener, apply the same to the redemption or purchase at a rate not above par and accrued interest) of the bonds issued under the foresaid acts, and the bonds so redeemed shall be cancelled by the said commissioners and the same registered by the second auditor in a book to be kept for that purpose, giving the number and date of issue, the character, the amount, and the owner at the time of purchase, of the bonds so redeemed and cancelled; and in case no such purchase of bonds can be made, then the amount which can be redeemed shall be called in by lot, as provided in section two of this act. All bonds of the state issued under the provisions of the act aforesaid, approved February fourteenth, eighteen hundred and eighty-two, and now held by said commissioners of the sinking fund, shall, as soon as at least fifteen million of dollars of new bonds shall have been issued and delivered pursuant to the provisions of this act, be cancelled by said commissioners and preserved in the office of the treasurer of the commonwealth.

11. Executors, administrators and others acting as fiduciaries may participate in the settlement of the debt herein specified in the man-

ner hereinbefore provided, and such action shall be deemed a lawful investment of their trust fund. Executors, administrators and others acting as fiduciaries may invest in the bonds issued under this act, and the same shall be considered a lawful investment.

57 12. All coupons heretofore tendered for taxes and held by said tax-payers in pursuance of such tender, shall be received in payment of the taxes for which they were tendered, and upon their delivery to the proper collector or the amount thereof in money, the judgments obtained against the said tax-payers for such taxes shall be marked satisfied: provided the said tax payers shall have paid in money and not in coupons the costs of said judgments. All coupons heretofore tendered for taxes and held by the officers of the commonwealth for verification, in pursuance of the statute in such case made and provided, shall be received in payment of the taxes for which they were tendered, and the money collected for such taxes returned to the parties from whom it was received: Provided the said tax-payers shall have paid in money, and not in coupons, all costs incurred in legal proceedings to verify said coupons.

13. The treasurer of the commonwealth is authorized and directed to pay the interest on the bonds issued under this act as the same shall become due and payable out of any money in the treasury not otherwise appropriated.

14. The plates from which the bonds and fractional certificates authorized by this act are printed shall be the property of the commonwealth.

15. All necessary expenses incurred in the execution of this act shall be paid out of any money in the treasury not otherwise appropriated on the warrants of the auditor of public accounts, drawn upon the treasury on the order of the commissioners of the sinking fund.

16. The act entitled "an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon," approved February fourteenth, eighteen hundred and eighty-two, and the amendments

58 thereto- towit: an act entitled "an act to declare the true intent and meaning of, and to amend and re-enact section five of chapter eighty-four of acts eighteen hundred and eighty-one and eighteen hundred and eighty-two, approved February fourteenth, eighteen hundred and eighty-two," approved August twenty-seventh, eighteen hundred and eighty-four; and the act entitled "an act to amend and re-enact an act approved August twenty-seventh, eighteen hundred and eighty-four, entitled an act to declare the true intent and meaning of, and to amend and re-enact section five of chapter eighty-four of acts of eighteen hundred and eighty-one and eighteen hundred and eighty-two, approved February fourteenth, eighteen hundred and eighty-two," approved November twenty-ninth, eighteen hundred and eighty-four, are hereby repealed.

17. The commissioners of the sinking fund are authorized, if it

shall seem to them for the best interest of the commonwealth, to make one extension of the time for the funding of the said twenty-eight million of dollars of outstanding evidences of debt for a period not exceeding six months from the thirtieth day of June, eighteen hundred and ninety-two.

18. The commissioners of the sinking fund are authorized to exchange coupon bonds issued under this act into registered bonds in the denominations hereinbefore provided, and to arrange for the transfer of registered bonds. For every bond so issued in exchange a fee of fifty cents shall be charged by, and paid to the second auditor, and shall, upon his order, be covered into the treasury to the credit of the sinking fund; and bonds so taken in exchange shall be cancelled in the manner hereinbefore prescribed.

19. This act shall be in force from its passage.

59 EXHIBIT NUMBER 5.

CHAP. 747. A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same.

(Approved March 6, 1894.)

(Acts G. A. of Va., 1893-4, p. 867.)

Whereas the general assembly of Virginia is required by the constitution of Virginia to provide by law for adjusting with the state of West Virginia the proportion of the public debt of the original state of Virginia proper to be borne by West Virginia; and

Whereas the general assembly has heretofore passed four several acts in relation to the funding and settlement of her public debt, as follows, to-wit:

First. An act entitled an act to provide for the funding and payment of the public debt, approved March thirtieth, eighteen hundred and seventy-one.

Second. An act entitled an act to provide a plan of settlement of the public debt, approved March twenty-eight, eighteen hundred and seventy-nine.

Third. An act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two; and

Fourth. An act entitled an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the parti-

tion of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of the interest thereon, approved February fourteenth, eighteen hundred and eighty-two, approved February twentieth, eighteen hundred and ninety-two; and

Whereas in each of said acts provision is made for issuing to creditors of the original state of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the state of West Virginia, to-wit: one third of the amount of said obligations, of which certificates this state holds a large amount, through the agency of the commissioners of its sinking fund and literary fund; and

Whereas the present state of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original state; now, therefore,

Be it resolved by the senate of Virginia (the house of delegates concurring), That a commission of seven members is hereby created and provided for, of whom the present chairman of the committee on finance and banks of the senate shall be one, and the present chairman of the committee on finance of the house of delegates shall be another; of the other five, two shall be chosen by the senate from among the persons now members of that body; two by the house of delegates from among the persons now members of that body, and one, to be a resident of this state, shall be appointed by the governor. No member of said commission shall cease to be a member thereof by reason of ceasing to be a member of the general assembly.

Said commission shall choose its own chairman and secretary; vacancies therein occurring or exisitng during recess of the legislature shall be filled by the governor on notification thereof by the chairman; and a majority of said commission shall be competent to act.

Said commission is hereby authorized and directed to negotiate with the state of West Virginia a settlement and adjustment of the proportion of the public debt of the original state of Virginia
61 proper to be borne by West Virginia.

But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the state through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the state of West Virginia in full settlement of the one-third of the debt of the original state of Virginia which has not been assumed by the present state of Virginia. But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof.

All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement, or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the state to any expense on this account.

And their action shall be subject to the approval or disapproval of the general assembly, and shall not be binding on the state until approved by the general assembly. The governor is requested to communicate this joint resolution to the governor and legislature of West Virginia.

This joint resolution shall be in force from its passage.

62 EXHIBIT NUMBER 6.

CHAP. 825. An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises.

Approved March 6, 1900.

(Acts G. A. of Va., 1899-1900, p. 902.)

Whereas the general assembly of Virginia has heretofore passed certain acts with respect to the settlement of her public debt as follows, to-wit:

First. An act entitled an act to provide for the funding and payment of the public debt, approved March thirtieth, eighteen hundred and seventy-one.

Second. An act entitled an act to provide a plan of settlement of the public debt, approved March twenty-eighth, eighteen hundred and seventy-nine.

Third. An act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two; and

Fourth. An act entitled an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of the interest thereon, approved February fourteenth, eighteen hundred and eighty-two, approved February twentieth, eighteen hundred and ninety-two; and

Whereas in each of said acts provision is made for issuing to creditors of the original state of Virginia who should accept
63 the new bonds provided for by said several acts, certificates

for such proportion of the obligation surrendered by them as was deemed proper to be borne by the state of West Virginia, to-wit: one-third of the amount of said obligations, of which certificate this state holds a large amount, through the agency of the commissioners of its sinking fund and literary fund; and

Whereas the general assembly is required by the constitution of Virginia to provide by law for adjusting with the state of West Virginia the proportion of the debt of the original state of Virginia proper to be borne by West Vrginia, but no such adjustment has ever been had; and

Whereas it appears that while Virginia has satisfactorily settled the two-thirds of the original debt which she assumed, yet it is possible that complications will arise with respect to said certificate which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt; now, therefore,

1. Be it enacted by the general assembly of Virginia, That the commission created and appointed under a joint resolution of this general assembly entitled a joint resolution to provide for adjusting with the state of West Virginia the proportion of the public debt of the original state of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same, approved March sixth, eighteen hundred and ninety-four, be, and said commission hereby is, authorized to receive and take upon deposit the certificates aforesaid or have the same otherwise placed or held on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the said holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia
64 on said certificate as a full settlement of all their claims thereunder.

2. If at least two-thirds in amount of the said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the state through the agency of the board of education and the sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney-general of Virginia to take such action and institute such proceedings on behalf of the state as may in the judgment of said commission and attorney-general be needful and proper to protect the interest of the state and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate

holders, as provided in the joint resolution aforesaid, and the state shall not be subject to any expense on that account.

3. This act shall be in force from its passage.

65 EXHIBIT NUMBER 7.

Showing Amounts Paid Off Since January 1, 1861, or Assumed and Now Carried by Virginia on Account of the Old Debt of the Undivided State.

* * * * * * * * *

Amount of interest paid, as shown by the records of the Second Auditor's Office, from January 1st, 1861, to February 1st, 1906	$35,551,642.82
Bonds heretofore paid off, taken up, and retired by Virginia to Sept. 30, 1905. See 2nd Auditor's Report for 1905, p. 21, and now held by Virginia	10,771,791.49(*)
New Bonds of Virginia issued for the portion of the unpaid debt funded and assumed by her— See Second Auditor's Report for 1905, p. 9 ...	25,537,820.00
	$71,861,253.31

(*) NOTE.—This sum of $10,771,791.49 probably does not include some considerable amounts of ante bellum bonds of Virginia paid her by some of the Railroad Companies of the State, and by the Dismal Swamp Canal Company in payment for the share and interest of the State in such Companies or for property sold them by the State; nor does it include considerable amounts of said bonds received by the State from the sureties of certain Sheriffs—nor does the Statement include amounts paid by Virginia since 1861 in settlement of open accounts or unfounded ante bellum debts of the undivided State. These amounts can be ascertained from the records of the Board of Public Works, the First and Second Auditor's offices and the Acts of Assembly.

EXHIBIT NO. 8.

66 Report of the Commission appointed and acting under the joint resolution of the General Assembly of Virginia, approved March 6th, 1894, and the act of the said General Assembly, approved March 6th, 1900, with respect to certain certificates issued by the State in connection with the debt of the original State of Virginia and known as Virginia Deferred Certificates.

RICHMOND, VA., January 9th, 1906.

To the General Assembly of Virginia:

Your Commission appointed and acting under the joint resolution of the General Assembly entitled "A joint resolution to provide for

adjusting with the State of West Virginia the proportion of the debt of the originial State of Virginia proper to be bourne by West Virginia for the application of whatever may be received from West Virginia to the payment of those found entitled to the same," approved March 6th, 1894, and an Act of the General Assembly entitled "An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises," approved March 6th, 1900, beg leave to make a further report of their proceedings, as follows:

It will be noted that it appears from the first report of your Commission, dated January 28th, 1896, and printed as Senate Document No. 10 in the Senate Journal and Documents of 1896, and as House Document No. 4 in the House Journal and Documents of that session, that the conditions required by said joint resolution having been complied with, your Commission was ready and desirous to open negotiations with West Virginia for a settlement as provided for in said joint resolution, and this fact was communicated to the Governor of West Virginia by the Governor of this State
67 with the request that such negotiations might accordingly be opened, which communication was laid before the Legislature of West Virginia, but that body, by a joint resolution, declined to enter into negotiations on the subject.

By a subsequent report of your Commission to this General Assembly, dated February 7th, 1900, and to be found printed as Senate Document No. 6 in Senate Journal and Documents for the session of 1899-90, it was further shown that the control and disposal of a majority of said certificates had been again tendered your Commission by a Committee, of which John Crosby Brown of New York was chairman, acting under a depositing agreement of July 28th, 1898, and the said Committee offering to accept whatever might be realized from West Virginia on the certificates in full settlement of their claims. A copy of said depositing agreement of July 28th, 1898, under which said Committee was constituted, was filed with said last report, and the same is also now herewith filed, showing who constituted said Depositing Committee and what their powers and functions were, and also that Brown Brothers & Company, Bankers of New York, N. Y., were the depository of the said Committee in whose hands the said certificates had been placed.

Upon the coming in of this last report, the Act of March 6th, 1900, was passed by the General Assembly, by which the powers and duties of your Commission were very materially enlarged, and it was provided that if at least two-thirds of the certificates of 1871 outstanding in the hands of the public, and a majority of all the other certificates so outstanding, were deposited and placed subject to the control of your Commission upon the agreement that the creditors would accept whatever might be realized thereon from West Virginia in full settlement of their claims, then your com-

mission was authorized, by and with the advice and approval of the Attorney General of the State, to take such action and institute such proceedings on behalf of the State as might, in the judgment of your Commission and the Attorney General, be needful and proper to protect the interests of the State and bring about and carry into effect a settlement in the premises, but all the expenses in connection with any of the matters involved were to be borne by the certificate holders. A copy of this Act is for convenience of reference herewith filed.

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At the time of the passage of this Act the Depositing Committee did not hold the two-thirds in amount of the certificates of 1871, required by the Act as a basis for negotiations or action by your Commission, but having acquired them later, the Committee, on the 18th of September, 1902, submitted to your Commission a proposition in writing, bearing date on that day, by which they tendered and placed subject to the control of your Commission, in accordance with the terms of said Act, $8,565,095.70 of the certificates of 1871, being more than the requisite two-thirds of these certificates outstanding, and $1,782,475.13 of the other certificates outstanding, being a majority thereof, upon the agreement and arrangement on the part of your Commission acting for the State of Virginia that they would enter into negotiations with the State of West Virginia, or the constituted authorities thereof, for the purpose of effecting a settlement with that State with respect to said certificates, and that your commission would, by and with the advice and approval of the Attorney General, take such action as they might deem needful in the premises, any amount realized on such settlement to be accepted in full of all claims on said certificates as in said Act provided.

This proposition was accompanied by the statement of Brown Bros. & Co., the depository, showing that the certificates referred to were held by them, and it was stated in the proposition that upon its acceptance by your Commission it should constitute a contract between the parties to continue in force for three years, but subject to renewal or extension by the parties, and to such amendment or modification as might be agreed on. It was on the day of its date accepted in writing by the unanimous action of your Commission, and the acceptance thereof duly endorsed thereon, and the same was approved by the Attorney General on September 29th, 1902; and a copy of the same showing its acceptance and the endorsements thereon is herewith filed and is referred to as showing in detail the action taken by your Commission. This agreement constitutes an arrangement with Virginia under said Act of March 6th, 1900, for obtaining a settlement with West Virginia and thus precluded the right which any certificate holder might, under the terms of the depositing agreement, otherwise have had to withdraw his certificate after October 1st, 1902.

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On December 3rd, 1902, a plan of settlement as provided in the said depositing agreement of July 28th, 1898, was formulated, approved and recommended by the Depositing Committee and Advis-

ory Board created under said agreement, by which the provisions of the foregoing contract of September 18th, 1902, were adopted as included in their plan of settlement, with the right to the Depositing Committee to make such further contracts with the Virginia Commission as might be deemed needful to bring about a settlement with West Virginia under said joint resolution and Act of the Virginia Assembly.

This plan of settlement provided for a full compliance on the part of the Depositing Committee with the terms of said joint resolution and Act, and clothed the Committee with ample powers to act in the premises, and notice of it was duly published in New York and London, as required in the agreement of July 28th, 1898, so as to afford opportunity to any dissenting depositor of certificates to give notice of his unwillingness to accept the pro-
70 posed settlement, which notice the agreement provided was to be given within thirty days from the completion of the publication, but no such notice appears to have been given at any time by any depositor. The depositing agreement also provided that in the absence of such notification from a majority of the depositors, the proposed plan should become effective and final, and that the declaration in writing of this fact by the Committee to the depository should be conclusive on this point; and such declaration in writing by the Depositing Committee to Messrs. Brown Bros. & Co., the depository, was accordingly so made in writing on December 13th, 1904. A copy of this plan of settlement and the certificates of the publication thereof, together with the said declaration in writing of the Committee, are all herewith filed and are referred to as parts hereof.

On December 14th, 1904, the amount of said certificates deposited with Brown Brothers and Company, as aforesaid, had increased to $11,607,298.64, of which $9,360,062.96 were those of 1871, and your Commission proposing to again attempt to open negotiations for a settlement with the legislature of West Virginia (which was then about to convene) it was thought advisable to enter into a contract by way of amendment to that of September 18th, 1902, by which the complete control of all these certificates should be placed in the hands of your Commission, and such additional agreement, bearing date December 14th, 1904, was accordingly entered into between the said Depositing Committee and your Commission, and approved by the Attorney General; and cotemporaneously therewith by a receipt or certificate bearing date on the same day, the said Brown Brothers and Company acknowledged and certified that they held all the certificates last aforesaid to the amount of $11,607,298.64 on deposit for and subject to the control and disposition of your Commission without reservation or condition of any kind.

A copy of this agreement and receipt of December 14th,
71 1904, together with the Attorney General's approval, will be found filed herewith. By a subsequent communication of January 23rd, 1905, from Brown Bros. & Company to your Com-

mission, it was shown that said deposits, so placed under the control of your Commission, had increased to $12,910,555.89, of which $10,639,776.42 were those of 1871, and a copy of this communication will also be found herewith filed.

Desiring, as above stated, to open communication with West Virginia, your Commission, on December 14th, 1904, appointed a sub-committee consisting of Messrs. Randolph Harrison, Chairman, H. D. Flood, H. H. Downing and John B. Moon, who, together with the Attorney General, should be authorized to open negotiations with the proper authorities of West Virginia looking to a settlement of the matters at issue. This sub-committee endeavored to do this by the presentation of a memorial to His Excellency, A. B. White, Governor of the State of West Virginia, signed by the sub-committee and approved by the Attorney General, bearing date January 25th, 1905, a copy of which is herewith filed. This memorial was presented to the Governor of West Virginia at Charleston, W. Va., by the Attorney General and the chairman of the sub-committee, and was by him, on the 27th day of January, 1905, transmitted to the Senate of West Virginia by a special message to that body, but without any recommendation on his part, a copy of which message is also herewith filed.

It was arranged, however, by the Senate and House Committees on Finance of the West Virginia Legislature to give to the sub-committee a hearing upon the subject at Charleston on February 1st, 1905, at which hearing the Attorney General of Virginia, the chairman of the sub-committee and the chairman of your Commission attended, and the memorial of your Commission above referred to was read, and a full presentation was made by Mr. Harrison, chairman of the sub-committee, of the reasons why West Virginia should, at least, enter into negotiations in regard to a settlement in an address made by him to the Senate and House Finance
72 Committees aforesaid. It was considered by your Commission that Mr. Harrison's address dealt with the questions involved in so clear and able a manner and showed so conclusively that it was both the right and duty of Virginia to ask for a settlement, that they caused it to be printed, and a copy of it is herewith filed.

The Legislature of West Virginia, however, failed and declined to enter into any negotiations or to empower any committee or other official to do so, but on the contrary passed the following resolutions: "Resolved by the Legislature of West Virginia: That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so called debt of Virginia, and that this Legislature is opposed to any negotiations whatsoever on that subject." Indeed your Commission are advised that resolutions of a similar import have been passed by all, or nearly all, of the Legislatures of West Virginia which have met since your Commission first communicated with them on the subject in 1896, thus showing a persistent and determined refusal on the part of West Virginia

to pay any portion of what they are bound for on account of the debt of the original State, or to enter into any accounting or negotiations whatsoever on the subject.

The deferred certificates of 1871 issued by the State of Virginia are in the following form:

"*Copy of Certificate under Act of March 30, 1871.*

"COMMONWEALTH OF VIRGINIA.

"No. —.

"TREASURER'S OFFICE, RICHMOND, VA.

"This is to certify that there is due unto —— —— heirs, executors, administrators or assigns $—, being one-third of bond surrendered under the provisions of an Act approved March 30th, 1871, entitled, 'An Act to provide for the funding and payment of the public debt,' namely, Bond No. —, with interest, amount-
73 ing to $—. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded in trust for the holder hereof or his assigns.

"In testimony whereof this certificate has been signed by the Treasurer and countersigned by the Second Auditor, as provided by law.

"_____ _____,

"*Treasurer of the Commonwealth of Virginia.*

"_____ _____,

"*Second Auditor of Virginia.*"

So it would appear that if the contention of West Virginia is correct; the responsibility that attaches to the issuing of these certificates must rest with Virginia alone and West Virginia be responsible for nothing in connection with the debt of the original State.

By a recent enactment of the State of South Dakota suit was authorized against any state whose over-due bonds might be donated or deposited in her treasury, and under this law a suit was brought by the South Dakota and judgment given against North Carolina in the Supreme Court of the United States upon some past due bonds of the latter state as see the case of South Dakota *vs.* North Carolina, 192 U. S. Reports, 286,—and a like statute has lately been enacted by the State of New York authorizing similar suits. Your Commission are informed that such suits have lately been proposed against the State of Virginia under these statutes upon the certificates of 1871 and have only been restrained and prevented
74 by the prospect of some definite action on the part of Virginia.

So your Commission were confronted with the alternative of

either a suit by Virginia as plaintiff on these certificates with indemnity to her against liability as proposed by the Depositing Committee, or a suit against her without any such indemnity, and your Commission had no doubt as to the safe and proper course to pursue, especially as Virginia herself holds through the agency of her Sinking and Literary funds $2,578,518.68 of the certificates of 1871 and $166,943.33 of the certificates of other classes which would be entitled to their distributive share in whatever may be realized from West Virginia.

The contract of December 14th, 1904, would have expired by limitation on September 18th, 1905, but in order to allow time for the drawing of a final contract, the same was by an agreement endorsed thereon on September 9th, 1905, extended to December 1st, 1905; and on the 24th day of November, 1905, a final contract was drawn up and entered into between your Commission and the Depositing Committee. This last contract was annexed to that of December 14th, 1905, as an extension and enlargement thereof, it having been provided in all of said contracts that they might be extended, modified and changed by the act of the parties.

A copy of said last contract of November 24th, 1905, annexed to that of December 14th, 1904, together with the extensions aforesaid and the approval of the Attorney General thereon endorsed, are herewith filed. It will be seen from said last contract that the reasons are therein set forth which led the Commission to the conclusion that no alternative remained in the premises except a suit against West Virginia; and they accordingly by and with the advice and approval of the Attorney General undertook to bring such suit and the Depositing Committee agreed as provided in said Act
75 of March 6th, 1900, to accept the amount recovered in such suit or the adjudication therein or any amount realized by your Commission on a compromise with West Virginia in full of all claims on the certificates deposited.

This contract also further provides that all certificates thereafter deposited with Brown Brothers and Company should be included thereunder, and that your Commission should have complete control of all certificates so deposited; and a further and additional receipt or statement was accordingly given your Commission by Brown Brothers and Company bearing date January 4th, 1906, showing that since their statement and receipt of December 4th, 1904, additional certificates to the amount of $1,566,136.77, of which $1,491,231.13 were those of 1871, had been deposited with them and were subject to the control and disposal of your Commission, making total deposits to that date $13,173,435.31, of which $10,851,294.09 were those of 1871. This last statement was verified by the oath of William Gerard Vermilye, cashier of Brown Brothers and Company, attached thereto; and on January 5th, 1906, your Commission caused all of these certificates to be removed from the custody of Brown Brothers and Company and placed on deposit for your Commission and subject to their order with the Central Trust

Company of New York, N. Y., whose acknowledgment of the receipt thereof stated that the certificates were held on deposit for and subject to the order, control and disposal of your Commission, and the keys to the boxes containing said certificates were delivered to the Secretary of your Commission—Copies of this last named statement of Brown Brothers and Company, with the affidavit of the said Vermilye attached, and of the receipt and acknowledgment of the Central Trust Company are herewith returned.

Your Commission caused these certificates to be removed from Brown Brothers and Company, not from any want of confidence in them, because your Commission have every reason to believe
76 them to be entirely responsible, but because it was deemed best to place the certificates in the hands of some custodian who never had any connection with the Depositing Committee, and who would be responsible to your Commission alone in connection therewith.

To recapitulate, your Commission will say that the whole amount of the deferred certificates outstanding is $18,227,153.60, as shown in the statement of the Second Auditor, John G. Dew, dated September 17, 1902, and herewith returned, which statement shows also the different classes of certificates.

Of the certificates of 1871, there are in all $15,281,970.47, of which $2,578,518.68 are held by the State through the Sinking and Literary funds, leaving outstanding in the hands of the public $12,703,451.79; and of this last amount there have been deposited with your Commission $10,851,294.09, as above stated.

Of the other certificates there are in all $2,845,183.13, of which the Literary Fund holds $166,943.33, leaving in the hands of the public $2,778,239.80, and of this last amount there have been deposited with your Commission $2,322,141.32 as above stated.

It thus appears that your Commission hold more than five-sixths of all the certificates of 1871 outstanding, and about six-sevenths of all the others outstanding.

It will be noted that since the first agreement of Sept. 18, 1902, was entered into the certificates deposited with Brown Brothers and Company have increased from $10,347,570.83 to $13,173,435.41, which are now in the hands of your Commission; and there is reason to believe that this amount will be still further increased upon the institution of the proposed suits.

Respectfully submitted.

JOHN B. MOON.
J. THOMPSON BROWN.
77 H. T. WICKHAM.
H. D. FLOOD.
H. H. DOWNING.
RANDOLPH HARRISON.
W. F. RHEA.

Attest: JOS. BUTTON, *Secretary.*

AGREEMENT.

78 This agreement between John Crosby Brown, George Coppell, J. Kennedy Tod and Clarence Cary, herein styled "The Committee," parties of the first part, and such holders of the certificates herein mentioned as deposit hereunder, parties of the second part.

Whereas, the present State of Virginia enacted laws providing for issuing certificates for one-third of the debt of the original State, and more than $12,000,000 of such certificates recite:

"That payment will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of Virginia existing at the time of its dismemberment."

And Whereas, it is believed that West Virginia's proportion of said debt, if ascertained as provided by the Ordinance under which Virginia was divided, is less than the amount of the certificates which have been issued by Virginia; and it is considered that, under such circumstances, neither State should, or will, incur any obligations respecting said debt unless its legislature has an undoubted guarantee that substantially all of the certificates will be promptly surrendered in exchange for whatever amount West Virginia agrees to pay and the creditors of West Virginia may agree to accept.

Witnesseth:

1st. The following gentlemen shall constitute an Advisory Board in this behalf, to-wit: Thomas F. Bayard, W. Pinkney Whyte, Edward J. Phelps and George G. Williams.

The function of said Board is to examine such plan of settlement as may be proposed by the Committee, representing the holders of the certificates, and submitted to them in accordance with this agreement, and to state their recommendation thereof of the contrary.

Said board may add to their number, and any vacancy
79 may be filled by the remaining members.

2d. The function of the Committee is:

(*a.*) To bring about the deposit, under this agreement, as far as may be practicable, of said certificates, or of the trust receipts heretofore issued to represent them.

(*b.*) To formulate a plan of settlement, and after it has been recommended by the Advisory Board, cause the same to be published and submitted to depositing creditors for their acceptance as herein provided.

(*c.*) To act as agent of the depositing creditors in carrying out the purposes of this agreement.

(*d.*) The Committee shall appoint one or more depositories to receive said certificates or trust receipts, and issue therefor its proper receipt.

Subject to the restrictions herein, the Committee shall have power to perform any act to accomplish a settlement, and this includes

power to make arrangements with either Virginia or West Virginia to insure the prompt surrender of all or any of the certificates in exchange for such amount as West Virginia may pay and her creditors agree to accept, and also includes power to execute, in behalf of the depositing creditors, any release or acquittance which will exclude any demand on Virginia beyond the amount she may receive from West Virginia; provided that no settlement shall be concluded until it has been recommended by the Advisory Board, and has also been submitted to creditors and accepted as follows, to-wit:

(1.) As soon as a plan of settlement has been recommended by the Advisory Board, the Committee shall, before proposing it to the State, advertise for at least twice a week for three weeks in
80 two of the newspapers published in New York City and London, that a plan of settlement has been formulated, and notifying parties in interest where said plan may be obtained in said cities without cost.

(2.) If within thirty days after the first publication of said advertisement holders of a majority of the face value of the deposited certificates notify the Committee, in writing, either directly or through any depository, of their unwillingness to accept the proposed settlement, then said settlement shall not be consummated. If the Committee is not so notified within said thirty days, then it shall be assumed that the proposed plan, being satisfactory to a majority, is accepted by all the depositing creditors, and it shall be offered to said States or either of them to be carried into effect by appropriate legislation.

(3.) After a plan of settlement has become effective (of which fact the declaration in writing of the Committee to the several depositories shall be conclusive), each depository shall, in the manner directed by the Committee, surrender to either State, as may be necessary, any or all of the certificates deposited with it, and receive in exchange therefor the amount or kinds of securities called for by the plan of settlement.

The amount so received in settlement shall be immediately delivered to depositing creditors, in accordance with the terms of settlement.

The Committee may arrange for the purchase and sale of such fractional interests as may be necessary to equalize distribution.

(4.) Each depositor shall, when he receives his new bonds, in settlement, pay to the depository, for account of the Committee, such a commission as the Committee may assess for the charges
81 and expenses of settlement, including the compensation of the Committee, Counsel and Advisory Board, but such assessment shall in no event exceed five per cent. in cash on the par of any certificate deposited under this agreement.

If the Committee decide at any time that a settlement satisfactory to holders cannot be promptly effected, they may publish a notice requiring holders to pay so much of twenty cents per $100 of certificates as may be necessary to reimburse the expenses actually in-

curred by the Committee. Any certificate, assessment on which is not paid within six months after such notice has been published twice a week for three consecutive weeks in two of the newspapers in New York and London, may be sold by the Depository and the proceeds, after paying its assessment, held for the holder of its corresponding receipt.

Any certificate may be withdrawn from deposit at any time after October 1, 1902, upon payment of its pro rata of expenses, not to exceed twenty cents per $100 of certificates, unless a settlement has been previously arranged, or unless an arrangement has been made with Virginia for obtaining a settlement with West Virginia.

(5.) The Committee may add to their number, and any vacancy may be filled by the remaining members. By unanimous consent of the members of the Committee any member may act by proxy.

In testimony whereof, the Committee have hereto set their hands this 28th day of July, 1898.

82 An act to provide for the settlement with West Virginia of the portion of the public debt of the original State of Virginia properly to be bourne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises.

Approved March 6th, 1900.

Whereas the General Assembly of Virginia has heretofore passed certain acts with respect to the settlement of her public debt as follows, to-wit:

First. An act entitled an act to provide for the funding and payment of the public debt, approved March thirtieth, eighteen hundred and seventy-one.

Second. An act entitled an act to provide a plan of settlement of the public debt, approved March twenty-eighth, eighteen hundred and seventy-nine.

Third. An act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two; and

Fourth. An act entitled an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of the interest thereon, approved February fourteenth, eighteen hundred and eighty-two, approved February twentieth, eighteen hundred and ninety-two; and

Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept

83 the new bonds provided for by said several acts, certificates

for such proportion of the obligation—surrendered by them as was deemed proper to be borne by the State of West Virginia—to-wit: one-third of the amount of said obligations, of which certificates this State holds a large amount, through the agency of the commissioners of its sinking fund and literary fund; and

Whereas the General Assembly is required by the constitution of Virginia to provide by law for adjusting with the State of West Virginia the proportion of the debt of the original State of Virginia properly to be borne by West Virginia, but no such adjustment has ever been had; and

Whereas it appears that while Virginia has satisfactorily settled the two-thirds of the original debt which she assumed, yet it is possible that complications will arise with respect to said certificates which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt; now, therefore,

1. Be it enacted by the General Assembly of Virginia, That the commission created and appointed under a joint resolution of this General Assembly entitled a joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia properly to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same, approved March sixth, eighteen hundred and ninety-four, be, and said commission hereby, is authorized to receive and take upon deposit the certificates aforesaid or have the same otherwise placed or held on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates
84 that if the said commission will secure a settlement with West Virginia with respect to said certificates the said holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia on said certificates as a full settlement of all their claims thereunder.

2. If at least two-thirds in amount of the said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the state through the agency of the board of education and the sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney-general of Virginia to take such action and institute such proceedings on behalf of the state as may in the judgment of said commission and attorney-general be needful and proper to protect the interests of the state and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate

holders, as provided in the joint resolution aforesaid, and the state shall not be subjected to any expense on that account.

3. This act shall be in force from its passage.

85 *Proposal*

To the Virginia Commission as constituted under a joint resolution of the General Assembly of Virginia approved March 6, 1894, and the act of the said General Assembly approved March 6, 1900:

Whereas your Commission was constituted as set forth in said joint resolution and act of Assembly for the purpose of negotiating and bringing about a settlement with the State of West Virginia with respect to the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia and in connection with which the present State of Virginia has issued certain certificates under four acts of its General Assembly, approved, respectively March 30th, 1871, March 28th, 1879, February 14th, 1882, and February 20th, 1892.

And whereas your commission was, under the said act of March 6, 1900, further authorized to receive and take upon deposit the certificates aforesaid, or to have the same otherwise placed or held on deposit subject to your control, upon the agreement and contract on the part of the holders of said certificates that if your commission would secure a settlement with West Virginia with respect to said certificates, the said holders of said certificates, so deposited, would accept the amount realized on such settlement from West Virginia as a full settlement of all their claims thereunder; and said act further provided that if at least two-thirds of the amount of the said certificates issued under said act of 1871, (exclusive of those held by the State through the agency of the Board of Education and the sinking fund commissioners) and at least a majority in amount of all the other certificates should be so deposited or placed subject to the control of your commission upon the agree-

86 ment and contract aforesaid, then your commission should be authorized, by and with the approval of the Attorney-General of Virginia, to take action in the premises as might be needful to protect the interest of the State and bring about and carry into effect a settlement as aforesaid.

And whereas by a certain agreement of July 28th, 1898, a committee on behalf of the holders of the said certificates was constituted to bring about the deposit, as far as practicable, of said certificates in such depository as the committee should appoint with powers in the committee to act as agent of the certificate holders so depositing in bringing about a settlement of their claims upon such plan, as might be recommended by the Advisory Board named in said agreement and as should become effective thereunder; it being further stated in said agreement that all the said certificates so deposited would be promptly surrendered in exchange for whatever

amount West Virginia might agree to pay and the creditors of West Virginia might agree to accept as aforesaid.

And whereas more than two-thirds in amount of all the said certificates of 1871, outstanding as aforesaid, to-wit, $8,565,095.70 and a majority of all the other certificates aforesaid, to-wit, $1,782,475.13, have been duly deposited with said committee and are in custody of Brown Brothers & Company, Bankers of New York City, N. Y., the depository named by said Committee, and are held subject to the control of the said committee under the said agreement, so that the same can be duly placed and held subject to the control of your commission in accordance with the said agreement and in pursuance of such plan of settlement as is now proposed or as may hereafter become effective.

In view of the premises the undersigned, the committee aforesaid, do now hereby tender and place subject to the control of your commission all the aforesaid certificates, so held on deposit, upon the agreement and arrangement on the part of your commission,
87 acting for the State of Virginia under the said joint resolution and act of Assembly aforesaid, that your commission will enter into negotiations with the State of West Virginia or the constituted authorities thereof for the purpose of effecting a settlement with West Virginia with respect—the said certificates in accordance with the said agreement of July 28th, 1898, and in accordance with such plan of settlement as is now proposed or as may hereafter become effective; and that your commission will by and with the advice and approval of the said Attorney-General take such action as they may deem needful in the premises; and in event such a settlement is so made, then it is hereby agreed that the amount realized thereon shall be accepted in full satisfaction of all the claims of the certificate holders thereunder and the undersigned Committee will surrender to your commission, in exchange for such amount the certificates aforesaid so deposited.

If this proposal be accepted by your commission, the same shall constitute an arrangement and contract with the State of Virginia for obtaining a settlement with West Virginia and the same shall continue binding upon the undersigned committee and upon the holders of said certificates so deposited for the period of three years next ensuing from the date hereof for the purpose of allowing time for a settlement aforesaid; and the same shall be subject to renewal and extension for such further time as may be agreed upon and to such modification and amendment as may be agreed upon, and shall apply to and include any and all such certificates as aforesaid as may hereafter be deposited with and held by the said Committee under said agreement of July 28th, 1898.

Respectfully submitted,

JOHN CROSBY BROWN, *Chairman.*

ROBERT L. HARRISON, *Secretary.*

Richmond, Va., September 18th, 1902.

88 The undersigned, Brown Brothers & Company, Bankers of New York City, N. Y., the depository referred to in the foregoing proposal, do hereby certify that they now hold as such depository and subject to the control of the Committee therein referred to, the certificates which are referred to in the foregoing proposal as being deposited with them, to-wit:

$8,565,095.70 certificates of 1871
1,782,475.13 " " 1879
1882
1892

September 18th, 1902.

BROWN BROTHERS & CO.

In pursuance of a resolution of the Virginia Commission this day unanimously adopted, the foregoing proposition of the Certificate holders Committee is hereby accepted by the said Commission and becomes an agreement between the said Committee and the said Commission.

JOHN B. MOON,
Chairman of the Virginia Commission.

Attest:
JOS. BUTTON, *Secretary.*
Richmond, Va., Sept. 18th, 1902.

The above action of the Virginia Debt Commission is approved Sept. 29th, 1902.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

89 *Plan for the Settlement of the West Virginia Debt.*

Under an agreement of July, 1898, a Committee was constituted for the purpose of assembling the Virginia deferred certificates, with certain powers and functions as in the agreement specified, and by the same agreement an Advisory Board was constituted whose functions were also specified in the agreement.

In pursuance of this agreement, a certain plan of settlement was, on the 21st day of June, 1899, formulated and recommended by the Committee and Advisory Board, which among other things, contained the following provision:

"The Committee may surrender to either State (Virginia or West Virginia) any of the deposited certificates and receive in full satisfaction therefor their pro rata of such an amount in State Bonds, or cash as may be agreed upon between the Committee and the representatives of Virginia or West Virginia, as the maximum amount which West Virginia will assume on account of her proportion of the debt of the original State."

Since the date last named the General Assembly of Virginia, on the 6th day of March, 1900, passed an Act authorizing a commission

which had been appointed and constituted on her behalf in the premises, by and with the advice and approval of her Attorney General, to take such action and institute such proceedings as might, in the judgment of the Commission and Attorney-General, be needful and proper to bring about and carry into effect a settlement of said certificates; but it was further provided in this Act that such action should be taken only in the event that at least two-thirds of all the certificates of 1871 (exclusive of those held by the State) and a majority of all the other certificates, should be deposited with or placed subject to the control of the Commission upon an agreement on the part of the holders of such certificates that if the Commission would secure a settlement with West Virginia with respect to said certificates, they would accept the amount realized from West Virginia on such settlement in full of all their claims there-
90 under. On the 18th of September, 1902, the Committee held on deposit $8,565,095.70 of the certificates of 1871, being more than two-thirds thereof, (*) as above stated, and $1,782,457.13 of all the other certificates, being a majority thereof; and the Committee accordingly on that day entered into a contract with the Virginia Commission, by which it was stipulated that the said certificates should, for the period of three years, be held subject to the control of the Commission upon the agreement and arrangement on the part of the Commission that they would enter into negotiations with the state of West Virginia for the purpose of effecting a settlement with respect to said certificates, and would by and with the advice and approval of said Attorney-General, take such action as they might deem needful in the premises; the amount realized on such settlement to be accepted in full of said certificates as above stated, which contract was duly approved by the Attorney-General of Virginia on September 29th, 1902.

In view of this Act of the Virginia Assembly, and of the recent action taken thereunder, it is deemed desirable to make the plan of settlement heretofore recommended, more definite with respect to the matters now involved; and to this end the following is hereby formulated, approved and recommended by the Committee and the Advisory Board by way of supplement and addition to the original plan:

I. The above named Committee shall pledge or deposit the certificates now or hereafter received under the agreement of July 28, 1898, with the Virginia Commission, in conformity with the Act of March 6, 1900, for the purpose of taking such action and instituting such proceedings, by and with the advice and approval of the Attorney-General of Virginia as may be deemed needful to bring about and carry into effect a settlement as in said Act provided; such pledge or deposit to be for such length of time as may be agreed on;

(*) On March 2nd the figures were $9,231,602.13 of the certificates of 1871 and $2,239,451.62 of all the other certificates.

and the said agreement of September 18, 1902, shall continue in force for the period therein specified; and the Committee may enter into such further agreements with the said Commission as may be deemed needful to bring about a settlement in the premises.

II. In the event that no settlement shall be effected by
91 the Virginia Commission either under the agreement of September 18, 1902, within the period therein specified, or under any other agreement which may be entered into between the Committee and the said Commission within such time as may be limited therein, the Committee may, after any and all such agreements with the said Commission shall have expired, take such other and further proceedings and make such other and further agreements and settlement in the premises as the Committee may deem judicious.

III. The Committee shall be authorized to make such disposition by pledge, sale or otherwise, of the certificates, now or hereafter deposited, under the agreement of July 28, 1898, as may be necessary to carry into effect any proceedings taken and any agreements or settlements made by them as above stated, with or through the said Commission or otherwise, or for the payment of expenses now or hereafter to be incurred, whether a settlement is effected or not, not to exceed, however, the limit fixed by said agreement, and may give such release and acquittance as may be necessary to that end.

IV. The amount realized on or the proceeds of any such settlement, after deducting proper charges under the agreement of July 28, 1898, shall be apportioned and distributed among the different certificate holders in such manner and according to such percentages as may be ascertained and established for the different classes of certificates by a tribunal to be constituted as follows *as follows:* one member thereof to be appointed by the Committee, one member by the Advisory Board, and the third by the two so appointed; and if it be impracticable in the judgment of such tribunal to distribute in kind any bonds or securities which may be received in any such settlement, then the same may be sold and converted into money for the purposes of such distribution. If a vacancy occur in such tribunal the same shall be filled by the remaining members.

New York, December 3d, 1902.

G. WILLIAMS.
M. PINKNEY WHYTE.
WAYNE MacVEAGH.
LYMAN J. GAGE.
Advisory Board.

JOHN CROSBY BROWN.
Chairman Committee.

92 The following are the affidavits showing publication in two newspapers in London and New York on the notice given under Article 2 of the Agreement of July 28, 1898:

STATE OF NEW YORK, *City and County of New York, ss:*

Thomas Mulhearn being duly sworn, says he is Principal Clerk of the Publisher of the Mail and Express, a daily newspaper published in the city of New York; and that the notice, of which the annexed is a printed copy has been regularly published in the said Mail and Express six times to-wit: January 13th, 16th, 20th, 23d, 27th and 30th, 1903.

THOMAS MULHEARN.

Sworn before me this 25th day of February, 1903.
R. E. A. DON, JR.,
Notary Public, City and County of New York.

To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th day of July, 1898:

NOTICE is hereby given, pursuant to Article 2, paragraph *d*, Section 1 of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved of by the Advisory Board appointed under said agreement and all parties in interest are notified that the plan may be obtained, without cost in the city of New York, at the office of Messrs. Brown Brothers & Company, 59 Wall Street, and in the city of London, England, at the office of Messrs. Brown, Shipley & Company, Founders Court, Lothbury, E. C. and 123 Pall Mall, W.

Dated New York, January 13th, 1903.

JOHN CROSBY BROWN, *Chairman.*
CLARENCE CARY,
J. KENNEDY TOD,
BARTLETT JOHNSTON,
VIRGINIUS NEWTON,
R. P. CHEW,
Committee.

ROBERT L. HARRISON, *Secretary.*

93 STATE OF NEW YORK, *City and County of New York, ss:*

Theodore L. Peverelly, being duly sworn saith that he is the Principal Clerk of the Publisher of the New York Times, a daily newspaper printed and published in the city and County of New York; that the advertisement hereto annexed has been regularly published in the said New York Times six times to-wit: on January 14, 17, 21, 24, 28, 31st, 1903.

THEODORE L. PEVERELLY.

Sworn to before me this Feb. 25th, 1903.

[SEAL.] EUGENE C. MAUBORGNE,
Notary Public, New York County.

To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th day of July, 1898:

NOTICE is hereby given, pursuant to Article 2, paragraph d, Section 1 of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved of by the Advisory Board, appointed under said agreement, and all parties in interest are notified that the plan may be obtained, without cost in the City of New York at the offices of Messrs. Brown Brothers and Company, 59 Wall Street, and in the City of London, England, at the office of Messrs. Brown, Shipley and Company, Founders Court, Lothbury E. C. and 123 Pall Mall, W.

Dated New York, January 13th, 1903.

JOHN CROSBY BROWN, *Chairman.*
CLARENCE CARY,
J. KENNEDY TOD,
BARTLETT S. JOHNSTON,
VIRGINIUS NEWTON,
R. P. CHEW,
Committee.

ROBERT L. HARRISON, *Secretary.*

94 (Copy.)

KINGDOM OF GREAT BRITAIN AND IRELAND,
City of London, England, ss:

I, Rowland Lee, Assistant Manager of the Advertisement Department of the Daily Telegraph newspaper, published in the City of London, England, make oath and say that the advertisement "To Depositors of West Virginia Deferred Stock Certificates" attached hereto, was ordered for, and duly appeared in the Daily Telegraph on the following dates: January 15, 19, 22, 26, 29, February 2, 5, 9, 12, 16, 19, 23—all of 1903.

(Signed) ROWLAND LEE.

Sworn before me

FRANCIS W. FRGOUT,
Deputy Consul-General of the United States of America at London, England, at 12 St. Helens Place, London, England.

March 18, 1903.

Copy of Advertisement Referred to Above.

To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th, July, 1898:

NOTICE is hereby given, pursuant to Article 2, Paragraph d, Sec-

tion 1, of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved by the Advisory Board appointed under the said agreement, and all partid in interest are notified that the plan may be obtained, without cost in the City of New York, at the offices of Mess. Brown Brothers & Company, 59 Wall Street, and in the City *City* of London, England, at the offices of Messrs. Brown, Shipley & Company, Founders-court, Lothbury, E. C., and 123 Pall Mall, W.

95 Dated New York, January 13, 1903.

JOHN CROSBY BROWN, *Chairman.*
CLARENCE CARY,
J. KENNEDY TOD,
BARTLETT S. JOHNSTON,
VIRGINIUS NEWTON,
R. P. CHEW,
Committee.

ROBERT L. HARRISON, *Secretary.*

96 (Copy.)

I, Gilbert Plumbridge, Chief Clerk, in the employment of the proprietors of the Times newspaper, published in the City of London, England, make oath and say that the attached advertisement, "To Depositors of West Virginia Deferred Certificates," was orcered for, and duly appeared in the said newspaper on the following dates: Jan. 14, 17, 21, 24, 28, 31; February 4, 7, 11, 18, 21, all of 1903.

(Signed) GILBERT PLUMBRIDGE.

Sworn before me, Richard Westcott, Vice and Deputy United States Consul-General, at 12 St. Helens Place, London, England, on the 4th, March, 1903.

(Signed RICHARD WESTCOTT,
Vice and Deputy Consul-General of the United States of America at London, England.

This is the advertisement referred to in the above declaration.

To depositors of "West Virginia deferred certificates" under agreement of deposit, dated the 28th of July, 1898:

NOTICE is hereby given, pursuant to Article 2, Paragraph d, Section 1, of the said agreement, that a plan of settlement of the public debt of West Virginia has been formulated and has been approved by the Advisory Board appointed under said agreement, and all parties in interest are notified that the plan may be obtained, without cost, in the City of New York, at the offices of Messrs. Brown Brothers & Company, 59 Wall Street, and in the City of London, England, at the offices of Messrs. Brown, Shipley & Company,

Founders Court. Lothbury, E. C., and 123 Pall Mall W.
97 Dated New York, January 13, 1903.

JOHN CROSBY BROWN, *Chairman.*
CLARENCE CARY,
J. KENNEDY TOD,
BARTLETT S. JOHNSTON,
VIRGINIUS NEWTON,
R .P. CHEW,
Committee.

ROBERT L. HARRISON, *Secretary.*

98 *West Virginia Debt Settlement.*

Committee.		Advisory Board.
John Crosby Brown, Chairman.	George F. Baker,	W. Pinkney Whyte.
J. Kennedy Tod,	Bartlett S. Johnston,	Wayne MacVeigh.
Clarence Cary,	Wm. C. Legendre,	Lyman J. Gage.

R. P. Chew, of West Virginia.
Robert L. Harrison, Secretary.

Depository

Brown Brothers & Company.

Copy

NEW YORK, *Dec. 13th,* 1904.

Messrs. Brown Brothers & Company, Depository:

We, the undersigned Committee, heretofore appointed and constituted under the certain agreement of July 28, 1898, between ourselves and the holders of deposited certificates of indebtness or securities known as the Virginia Deferred Certificates, hereby declare that the certain plan of settlement made and approved by the undersigned Committee and the Advisory Board, under date of December 3, 1902, became effective by such approval and by the due publication of such plan under the terms of the said agreement and further by reason of the absence of any notification in writing, or otherwise, from or on the part of the holders of any of the deposited certificates, for more than thirty days after the said publication, of any unwillingness to accept such proposed settlement.

(Signed) JOHN CROSBY BROWN, *Chairman.*
ROBERT L. HARRISON, *Secretary.*

The above was received in due form this 13th day of December, 1904.

(Signed) BROWN BROTHERS & CO.

99 EXECUTIVE DEPARTMENT,
CHARLESTON, WEST VIRGINIA, *January* 27, 1905.

To the Honorable President and Members of the State Senate:

GENTLEMEN: The accompanying papers after oral statements

had been made to me by a Committee representing the State of Virginia, consisting of Hon. Randolph Harrison, Chairman, Col. Joseph Button, Secretary, and Hon. William A. Anderson, Attorney General of that State, were duly presented to me for transmission to the Legislature of West Virginia.

The papers consist of an address or statement of the Committee, representing the Commission appointed by the State of Virginia "to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia" and of a copy of the Act of March 6th, 1900, of the State of Virginia, enlarging the powers and duties of said Commission.

I deem it my duty to transmit these papers for your information.

Respectfully yours, ALBERT B. WHITE, *Governor.*

The papers accompanying the communication of the Governor are as follows:

To His Excellency A. B. White, Governor of the State of West Virginia:

SIR: Under and by virtue of a joint resolution of the General Assembly of the State of Virginia, approved March 6th, 1894, a commission consisting of Hons. Taylor Berry, H. T. Wickham, H. D. Flood, John B. Moon, Randolph Harrison, H. H. Downing and William F. Rhea was continued for the purpose of opening
100 negotiations with the State of West Virginia looking to the adjustment of the proportion of the debt of the original State of Virginia proper to be borne by West Virginia, and by a communication bearing date on the 7th day of January, 1895, from the Hon. Chas. T. O'Ferral, then Governor of Virginia, the Honorable William A. MacCorkle, then Governor of West Virginia, was informed of this fact.

Since the date last named the Honorable Taylor Berry has departed this life, and Honorable J. Thompson Brown has been made a member of the Commission in his stead. And by an act of the General Assembly of Virginia, approved March 6th, 1900, the powers and functions of the Commission have been materially changed and enlarged, as will be seen by an inspection of said act, a copy of which is herewith submitted.

It will be observed that under the provisions of this act the Commission acting by and with the advice and approval of the Attorney General of Virginia, is authorized to make a final settlement and adjustment with West Virginia with respect to the debt of the original State, provided at least two-thirds in amount of the securities known as Virginia Deferred Certificates issued under the Virginia Act of 1871, and a majority of all the other certificates issued by Virginia with reference to said settlement, exclusive of those held by the Literary Fund and Sinking Fund of Virginia, were deposited with or placed subject to the control of the Commission.

On the 14th day of December, 1904, there were so placed on deposit in the name of the Commission, and subject to the control and disposal, $12,910,555.89 of such certificates, embracing much more than two-thirds of those of 1871, as aforesaid, and a very large majority of all the others, so that the Commission is now authorized, and empowered by and with the advice and approval of the
101 Attorney General, to make a settlement and adjustment with West Virginia as provided in said act of March 6th, 1900. The evidence of the deposit of the said certificates with the Commission as above stated is of course subject to inspection by Your Excellency and the proper authorities of West Virginia on request.

Looking to opening negotiations with West Virginia, the Commission at a meeting thereof, held in Richmond, Virginia, December 14th, 1904, authorized the appointment of a sub-committee, consisting of the undersigned Randolph Harrison, Chairman, H. D. Flood, H. H. Downing and John B. Moon, who together with the Attorney General of Virginia should invite the attention of Your Excellency to the unsettled matters between the two States and endeavor to negotiate a settlement of the same on some equitable basis to be agreed upon by the authorities of the two States.

The undersigned, the sub-committee so constituted, acting by and with the advice of the undersigned Attorney General of Virginia, therefore beg leave to call to the attention of Your Excellency the unsettled matters between the two States above referred to, growing out of the debt of the original State, and so respectfully request that they may be laid before the legislature of your State, now in session for their consideration; and that some action may be taken by the Legislature of your State for the purpose of entering into negotiations with the undersigned for a settlement between the two States of the matters aforesaid on some equitable basis either by the appointment of a committee to conduct such negotiations on behalf of your State, or by such other action as the legislature of your State may deem appropriate.

And the undersigned further beg in this connection to call attention to the following facts:

1. That when the State of West Virginia was formed, the original State of Virginia was deprived of more than one-third of
102 its white population and about one-third of its territory, embracing that portion of its territory which by reason of its mineral wealth has since proven to be the most valuable and productive part of the original State.

2. The ordinance of the convention which met at Wheeling in 1861, in providing for the formation of the State of West Virginia, further provided that: "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the

moneys paid into the Treasury of the Commonwealth from the counties within said new State during the same period." The obligation to assume an equitable proportion of the said debt was again recognized in the first constitution of West Virginia, which was ratified by a vote of her people in 1863, and in which article eight, section eight provided as follows: "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1961, shall be assumed by this state; and the Legislature shall ascertain the same as soon as practicable and provide for the liquidation thereof by a Sinking Fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." The Constitution of West Virginia of 1872, contains these provisions, article ten, section four: No debt shall be contracted by this State except to meet casual deficits in the revenue to redeem a previous liability of the State," etc., etc., and section five specifies that "The power of taxation of the Legislature shall extend to provisions for the payment of the State debt and interest thereon," etc.

3. The public debt of the original State of Virginia, at the time of the dismemberment, amounted to something more than
103 $30,000,000 no part of which has ever been borne by West Virginia, nor has any settlement or adjustment been made by West Virginia, either with the present State of West Virginia, or with the creditors of the Original State, to ascertain what her liability might be with respect to said debt, but the whole of it has been left for adjustment to the people of the present State of Virginia.

4. It has been understood that West Virginia was not willing to negotiae directly with the creditors of the original State, and for that reason, and also in order to comply with the requirements of said act of March 6th, 1900, the deposit of said certificates of December 14th, 1904, was made with the Virginia Commission; so that the Commission with the Attorney General of Virginia are now authorized both on behalf of the State of Virginia, and also on behalf of a large majority of all certificate holders interested, to make a final settlement and adjustment of the matters above referred to, and thus finally conclude and dispose of questions which have been long left unsettled to the detriment, it is believed, of both States.

The undersigned only seek to present these matters to your Excellency and through you to the Legislature of your State, because they believe it to be their duty to their own State to do so; and while no accounting or adjustment in the premises has ever been had by West Virginia, either with Virginia or the creditors of the original State, yet inasmuch as the matters involved are now presented by the undersigned, with new and enlarged powers on their part to make and carry into effect a complete and final settlement between the States, it is hoped that the suggestions herein contained will re-

ceive favorable consideration and action on the part of your Excellency and the Legislature of your State.

Respectfully submitted.

(Signed) RANDOLPH HARRISON
H. H. DOWNING
H. D. FLOOD
JOHN B. MOON
Committee.

Approved:
WILLIAM A. ANDERSON,
Attorney General of Va.

January 25, 1905.

Here follows copy of act of March 6, 1900.

104 ADDRESS

On Behalf of the Virginia Debt Commission

BEFORE

THE JOINT COMMITTEES ON FINANCE OF THE WEST VIRGINIA LEGISLATURE.

In Relation to West Virginia's Contributive Share of the Debt of Virginia.

By RANDOLPH HARRISON.
Charleston, West Virginia, February 1, 1905.

Mr. Chairman, and Gentlemen of the Finance Committees of the two Houses of the Legislature of West Virginia:

We had the honor a few days ago to present to His Excellency, the governor of West Virginia, a communication in behalf of the State of Virginia in relation to the unsettled matters between the two states, growing out of the debt created before the dismemberment of Virginia. We were officially advised that that communication had been transmitted to the legislature, and by it referred to the appropriate committees for further consideration.

We appear before you tonight in response to an invitation from the two finance committees of this body for the purpose of more fully stating the reasons which impel Virginia to invite your attention to this subject.

It gives us pleasure to avail ourselves of this opportunity to make known to you the object of our mission here.

In considering the question as to West Virginia's obligation to bear a just proportion of the public debt of Virginia, it will be necessary for us to review the origin of that debt, the manner in which and the purposes for which it was created, and West Virginia's relation to the subject.

Beginning with the year 1825 Virginia entered upon an extensive system of internal improvements. She had in mind the development of her western territory. Her statesmen had known for many years prior to that time that the territory now composing
105 the state of West Virginia contained immense resources of wealth, but there had been no definite ascertainment of that fact. They realized that it was essential, in order to ameliorate the condition of her people, who resided in that territory, and in the interest of all the people of Virginia, to develop that section, and establish communication between it and the Virginia seaboard. It was for this purpose that Virginia assumed the burden of a public debt. The development of this system of public improvements was progressive. During the first twenty-five years the debt had grown to about ten millions of dollars; between 1850 and 1861 it was increased by twenty millions of dollars. It is a matter of interest in passing to refer to the fact that the members of the Virginia legislature representing the counties that now compose this State unanimously voted to increase the debt. It is a notable fact that on several occasions it would not have been increased but for the united support of the delegates representing this section of the state, for the eastern and tidewater counties generally opposed the system of internal improvements which Virginia had undertaken. I do not mention this in any critical spirit; it was natural that the residents of this part of the state should want to develop their territory, and I am sure that any one similarly situated at that time would have been goverened by the same considerations. The great argument advanced for the increase of the public debt was that, by the development of this section of the state by the construction of turnpikes, canals, bridges, railroads, etc., the wealth of Virginia would be so materially increased that she could bear the burden of the debt without feeling it. And so it came to pass that on the 1st of January, 1861, the public debt of Virginia amounted to about thirty millions of dollars, every dollar of which had been expended in works of internal improvements, the primary object of which was the development of this section of Virginia's territory.

On the 17th of April, 1861, the state of Virginia passed the ordinance of secession, withdrawing from the Union. Shortly thereafter, in the month of May, a number of citizens residing in
106 the town of Clarksburg, met together and called a convention to meet in Wheeling on the 11th of June following. That convention assembled in Wheeling, and organized what was known as the "Restored Government of Virginia." They ignored the government at Richmond, denounced it as revolutionary, and declared that it did not represent the state of Virginia. On June the 20th this convention elected Francis H. Pierpont governor of Virginia, and called a legislature together at Wheeling on July the 1st, 1861, which it declared to be the only true and lawful legislature of the state. This legislature, on July the 9th, elected two United States senators, and provision was made for the election of three congress-

men. Both Houses of Congress admitted these members as from the State of Virginia.

A second convention assembled at Wheeling on the 20th of August, 1861. The "Restored Government of Virginia," having been previously organized, this convention, claiming to represent the state of Virginia, met for the purpose of "creating a new state," and on the 20th of August, 1861, it adopted an ordinance declaring it to be the sense of that convention that a new state should be formed "out of a portion of the territory of Virginia," and to embrace the counties specified in the ordinance.

This ordinance contained the following provision as the condition upon which the new state should be created:

"The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof and a just proportion of the expenses of the state government since any part of said debt was contracted, and deducing therefrom the moneys paid into the treasury of the Commonwealth from the counties within said new state during the same period."

This was the first step towards the formation of the state of West Virginia, and in taking this step it was expressly stipulated
107 that the old state would consent to her dismemberment only on condition that the State should assume a just proportion of her public debt.

This convention authorized delegates to be elected to another convention to assemble in Wheeling on the 26th day of November, 1961, for the purpose of forming a constitution for the new state in accordance with the terms of the ordinance of August the 20th. Accordingly a third convention, claiming to represent Virginia, assembled in Wheeling on November 26th, 1861, and prepared a constitution for the State of West Virginia, the eighth section of the eighth article thereof providing as follows:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accrued interest and redeem the principal within thirty-four years."

This provision was adopted in pursuance of the binding ordinance of the organic convention of August the 20th, 1861; it not only pledged the new State to bear a just proportion of the public debt of Virginia, but required her Legislature to ascertain the same and provide for its payment. Does not that seem fair to you? It seems so to me. West Virginia had helped to create the debt, and reaped a share of its benefit. Do you not think in fairness and justice she ought to bear a just proportion of it, as she agreed to do?

On the 3rd of May, 1862, this constitution was submitted to the people of the counties composing the new State of West Virginia for

ratification, and it was duly reported as ratified by a majority of the voters at the polls.

108 On the 13th of May, 1862, the legislature of the "Restored Government of Virginia" passed an act giving Virginia's consent to the formation of the new state, "under the provisions set forth in the constitution for the state of West Virginia." By that act Virginia expressly stipulated that her consent was given "under the terms stated in the constitution of the state of West Virginia," and this constitution, as we have seen, expressly provided that the new state would bear "its just proportion of the debt of the old state."

The "Restored Government of Virginia" instructed her representatives and senators in Congress to use their influence in furtherance of the passage of an act to create the state of West Virginia.

On the 31st day of December, 1862, the act was passed creating the state of West Virginia. The debates in Congress show that West Virginia would not have been admitted as a state but for her promise to bear a just proportion of the debt of the old state. A brief extract from the debates, when the bill providing for the admission of West Virginia was under consideration, will serve my purpose tonight:

Mr. OLIN: "I desire to ask what will become of the bonds and other obligations which Virginia has issued or incurred by the recognition of a new state?"

MR. HUTCHINS: "I will answer my friend from New York. Here is the provision of the Constitution of West Virginia in reference to that matter: 'An equitable portion of the debt of Virginia prior to January the first, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable.'"

MR. CRITTENDEN: "* * * There is another question; the state of Virginia owes a large debt. How is this debt to be divided?"

Mr. BLAIR: "The constitution framed by the convention of the people of the proposed new state binds the new state to pay its just proportion of the debt owed by Virginia prior to the ordinance of secession."

Mr. CRITTENDEN: "I only knew that in this bill there was
109 no provision made for a division of the said debt. The gentleman tells us there is provision made for it in the constitution, and I am satisfied with that. As it has been attended to, I have no more to say about it." (Extract from Congressional Globe, 37th Congress, quoted by Hon. J. M. Mason in pamphlet published by him on the subject of the Virginia debt.)

No one can doubt, therefore, that West Virginia owes her existence to her promise to bear a just proportion of the debt of the old state.

The act admitting West Virginia into the Union was signed, as I have stated, on the 31st day of December, 1862, and on June 20, 1863, in pursuance of the proclamation of the president, she took her place in the family of states.

I have given this sketch of the origin of the state of West Virgin-

ia in order to show that she is solemnly pledged to bear a just proportion of the debt of Virginia.

The constitution of West Virginia adopted in 1872 contains the following provisions relating to the public debt:

Article X, Sec. 4, provides that no debt shall be contracted except * * * to redeem a previous liability of the state; and sec. 5 provides that the power of taxation shall extend to provisions for the payment of the state debt and interest thereon. There was no public debt for West Virginia to provide for except her obligation to bear her just proportion of the debt of the state of Virginia.

The legislature of the "Restored Government of Virginia" on the 4th of February, 1863, passed an act transferring to the state of West Virginia all the property of the state of Virginia in the territory of the proposed new state, but on condition that West Virginia "should account for it in the settlement to be had with Virginia."

It is hardly necessary for me at this time to refer to the value of the property so transferred. Suffice it to say that by that act several millions of dollars worth of property was transferred to West Virginia; but the transfer was made on the condition that West
110 Virginia should account for it in the settlement to be had with Virginia.

The stock owned by Virginia in banks alone situated within the territory of West Virginia amounted to several hundred thousand dollars, and in respect to this stock West Virginia, in her Constitution of 1863, authorized the legislature to dispose of the same, but expressly provided that the proceeds of such sale should be applied to the liquidation of the public debt; thereby again recognizing in her fundamental law her obligation to share with Virginia the burden of her public debt.

So, gentlemen, I think you must agree with me that West Virginia's obligation to pay a just proportion of the debt of Virginia is the foundation of her political existence. It is an essential part of the very Constitution under which Congress admitted her into the Union. West Virginia has not always been unmindful of her obligation and duty in this respect. After the war an effort was made by the two states to ascertain by negotiation the fair proportion of the old debt which each should bear. In February, 1870, Virginia sent delegates to Wheeling, West Virginia, then the capital of this state, for the purpose of inviting the governor and the legislature of West Virginia to unite with her in making a statement and settlement of this account. But the governor of West Virginia did not think the time opportune to deal with the subject because the suit between the two states involving the two counties of Jefferson and Berkeley had not then been decided. Soon thereafter the governor of West Virginia sent commissioners to Virginia with authority to state the account, but at that time Governor Walker of Virginia did not feel that he had authority to appoint commissioners, because the legislature of Virginia had in the meantime passed an act to submit the question to arbitration, and so nothing came of this effort to settle the controversy.

I am aware of the fact that at that time some feeling existed on the part of the commissioners of West Virginia as to the man-
111 ner in which they had been received by the authorities in Virginia; but it is, of course, difficult to determine at this distance the cause for any misunderstanding between those commissioners and Governor Walker. The records only show that the Governor of Virginia felt constrained to decline to appoint commissioners for the reason stated, and renewed his invitation to the State of West Virginia to submit the question to arbitration.

Again in recognition of West Virginia's obligation to Virginia in this matter, the Governor of West Virginia had this to say in a letter dated May 16, 1881:

"The people of this State are willing and anxious to adjust with the mother State the amount of their liability on account of the public debt. The liability can be readily ascertained when the mother state is willing to state the account with us. The convention of the State of Virginia held in Wheeling on the 20th of August, 1861, in giving its consent to the formation of this state out of the territory of the mother state, provided by Section IX of the ordinance passed that day as follows:

"The new State shall take upon itself a just proportion of the debt of Virginia prior to January 1, 1861, to be ascertained by charging to it all state expenditures within the limits thereof and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted and deducting therefrom the moneys paid into the treasury from the counties included within the new state during the same period."

"The validity of this ordinance and the convention which passed the same has received the sanction of every department of the national government.

The Supreme Court of the United States, in a suit in that court instituted by the state of Virginia against West Virginia to
112 recover jurisdiction over the counties of Jefferson and Berkley, now a part of this state, adjudged said ordinance valid and binding. This state was admitted in pursuance of this ordinance. We admit it is binding authority, and hold ourselves ready at all times to settle with our mother state on that basis. Our obligation is to the mother state, and not to creditors of that state." (Extract from letter published by Hon. J. M. Mason in a pamphlet by him on the subject of the Virginia debt.

So, gentlemen, you perceive that the public authorities of West Virginia in the past fully acknowledged the binding obligation resting on your state to bear a just proportion of the debt. That obligation is none the less binding now than it was then.

Nothing having resulted from the efforts of the two states to ascertain and adjust their respective liabilities, Virginia felt obliged to make some arrangement for the funding of her debt. The war had intervened and left her prostrate and impoverished, but still she recognized her duty to make a fair adjustment with her creditors who had purchased her bonds when her credit was higher than that

of any other state, and to that end, on the 30th of March, 1871, her Legislature enacted what is known as the Funding Bill.

By the terms of this act Virginia assumed responsibility for two-thirds of the Debt. The act provided that a new bond should be issued for two-thirds of each old bond, and that a certificate should be given to represent the other one-third, to bear interest at six per cent., and await payment until Virginia and West Virginia had come to a settlement; and Virginia agreed to hold the old bond, so far as unfunded, in trust for the holder of said certificate.

The debt of Virginia at that time, with interest added, amounted to about forty-five millions of dollars, of which Virginia assumed as her just proportion, two-thirds, or about thirty millions of dollars. The form of the certificate issued, as provided by the Funding Bill, was as follows:

Copy of Certificate under Act of March 30, 1871.

113 "COMMONWEALTH OF VIRGINIA.

No. ——. $——.

TREASURER'S OFFICE, RICHMOND, VA.

"This is to certify that there is due unto —— —— heirs, executors, administrators or assigns $—, being one-third of bond surrendered under the provisions of an act approved March 30th, 1871, entitled 'An Act to provide for the funding and payment of the public debt,' namely, Bond No. —, with interest amounting to $—. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the state of Va. and W. Va. in regard to the public debt of the state of Virginia existing at the time of its dismemberment, and the State of Va. holds said bond so far as unfunded in trust for the holder hereof or his assigns.

"In testimony whereof this certificate has been signed by the Treasurer and countersigned by the Second Auditor, as provided by law.

"—— ——,
"Treasurer of the Commonwealth of Virginia.

"—— ——,
"Second Auditor of Virginia."

Under the foreging act about fifteen million dollars of these certificates were issued, and the old bonds were delivered up and are now held by Va., so far as unfunded, in trust to secure the payment of said certificates. These certificates do not in terms release Va. from liability for their payment; they clearly import that there would be a settlement between Va. and W. Va., and that they would be paid when such settlement was had. Va. undoubtedly intended that when a settlement was had the certificate holders must accept W. Va.'s share in full payment of the unsettled one-third of the

debt; but under the form of the certificate it might be contended that Va. was liable for the difference between the face of the certificates and the amount ascertained to be due by W. Va. Hence you will observe that it is of the greatest importance to Virginia to bring about, if possible, a settlement of this controversy, not only
114 because it is a duty she owes the creditor, but especially for her own protection.

In 1879 the legislature of Virginia passed another act for the funding of her debt by which provision was made the issuance of new bonds to take the place of those outstanding. With the bonds so issued certificates were issued for the unsettled one-third of the debt similar in form to the certificates of 1871, with this important difference, namely, that it was expressly stipulated in the certificate that its acceptance should be a full and absolute release of Virginia from all liability on account of said certificates. While the certificates issued under the act of 1879 imposed no liability, therefore, on Virginia they nevertheless provided that Virginia would aid the creditors holding such certificates, or certificates issued under previous acts, in negotiating with West Virginia for a friendly settlement of the claims of such creditors against the State of West Virginia.

In 1882 a third act for the funding of Virginia's debt was passed and under that act the certificates issued to represent the unpaid one-third of the debt expressly provided that they should be accepted without recourse on Virginia for their payment. These certificates, therefore, like those issued under the act of 1879, impose no liability on Virginia.

By act approved on the 20th of February, 1892, Virginia made a full and final settlement with her creditors and the certificates issued under this act, like those issued under acts of 1879 and 1882, expressly provided that they should be accepted without recourse on Virginia and hence they impose no liability on Virginia.

In as much as the unsettled one-third of the debt of the original state of Virginia is represented by the foregoing four classes of certificates, it becomes important to know the amount of those certificates outstanding.

The office of the second auditor of Virginia shows as fol-
115 lows in respect to these certificates:

Under the act of March 30, 1871, there were issued of these certificates	$15,281,970.47
Of these certificates Virginia holds in her sinking fund and in her literary fund	2,578,518.68
Leaving outstanding in the hands of the public of the certificates of March 30, 1871	$12,703,451.79

The foregoing certificates do not in terms release Virginia from liability for their payment.

Under the act of March 28, 1879, there were issued, and are outstanding in the hands of the public, certificates amounting to	$564,258.87

Under the act of February 14, 1882, there were issued of these certificates	1,775,603.48
Of these certificates Virginia holds in her sinking fund	166,943.33
Leaving outstanding in the hands of the public	$1,609,660.15
Under the act of February 20, 1892, there were issued certificates outstanding in the hands of the public	$605,320.78

The three last mentioned classes of certificates were issued and accepted without recourse on Virginia.

The total issue of certificates, therefore, representing the unpaid one-third of the debt of the original state of Virginia is	$18,227,153.60
Of that amount Virginia holds in her sinking fund and in her literary fund	2,745,465.01
Leaving outstanding in the hands of the public of all classes of certificates	$15,481,691.59

A debt or claim of that magnitude cannot be disposed of by ignoring it, or attempting to waive it aside. The only way to dispose finally of it is to settle it.

Realizing the importance to her own interests of bringing about a friendly settlement of the matter, and in fulfillment of her promise to the creditors to aid in bringing it about Virginia, by
116 resolution of March 6, 1894, appointed commissioners for the purpose of negotiating with West Va. for an adjustment of the proportion of the debt proper to be borne by her.

In January, 1895, Governor O'Ferrell of Virginia communicated a copy of that resolution to Governor McKorkle of W. Va. No response was ever made by W. Va., but we learned through the press that your legislature declined to negotiate with Va. on the basis stated in the resolution creating her commission. We think the purpose and intent of that resolution was misunderstood, but at all events, nothing was done.

Subsequently, by an act of the General Assembly of Va., approved March 6, 1900, the powers of this commission were materially enlarged and the commission was authorized under the terms stated in the act to conclude a settlement with W. Va. or to take such action to that end as might be approved by the attorney general of Va. Under the provisions of this act the commission acting by and with the advice and approval of the attorney general of Va., is fully empowered to make final settlement with W. Va., provided at least two-thirds of the certificates of 1871 and a majority of all the other certificates outstanding in the hands of the public were deposited with or placed subject to the control of the commission. The requirements of that act have been complied with in a manner which far exceeded our most sanguine expectations, for there have been deposited, subject to the control of the commission, more than five-sixths of the entire issue of the certificates. This unexpected and

desirable result has been brought about through the instrumentality of Brown Brothers & Co., bankers of New York, the agents of the certificate holders' committee. The standing of this house is doubtless known to you, or certainly to many of you; it does not engage in "frenzied finance," but on the contrary it is known as one of the most reliable and responsible firms in the financial world.

Through the agency of Brown Bros. Co. more than five-sixths of all the certificates outstanding in the hands of the public have been assembled and are held on deposit subject to the control of
117 the Virginia commission under an agreement with the owners of those certificates to accept whatever may be received from West Virginia in full discharge of the unsettled one-third of the debt of Virginia.

Of the certificates of 1871 outstanding in the hands of the public (amounting to $12,703,451.79) Brown Bros. & Company now hold $10,639,776.42.

Of the certificates of 1879 outstanding in the hands of the public (amounting to $564,258.87) Brown Bros. & Company now hold $440.642.61.

Of the certificates of February 14, 1882, outstanding in the hands of the public (amounting to $1,608,660.15) Brown Bros. & Company now hold $1,285,680.55.

Of the certificates of February 20, 1892, outstanding in the hands of the public (amounting to $605,320.78) Brown Bros. & Company now hold $544,456.31.

The aggregate amount of all certificates held by Brown Bros. & Company is, therefore, $12,910,555.89.

The Virginia commission has full power and authority to deliver up those certificates as an entirety to be cancelled upon payment by West Virginia of whatever may be ascertained to be her just proportion of the debt of Virginia—be it much or little. We stand ready, of course, to exhibit the evidence of the deposit of those certificates with us to the proper authorities of West Virginia.

The contract under which these certificates are deposited subject to the control of the Virginia Commission, will expire in September, 1905, unless, in the meantime, negotiations for a settlement, or some action looking to that end, have been undertaken.

At a meeting of the Virginia commission held in Richmond on December 14, 1904, a sub-committee was appointed who, together with the attorney general of Virginia, were requested to communicate these facts to the governor and legislature of West Vir-
118 ginia, and invite their co-operation in a friendly adjustment and settlement of the account betwen the two states. Our visit here is in discharge of the duty assigned us. Do not imagine that Virginia has the slightest intention of meddling with the affairs of West Virginia, or of volunteering advice. She has ventured to bring the subject to your attention in compliance with her undertaking to the creditors, and especially because her own interests are involved. Virginia felt that she would be derelict in her duty to herself and in her duty to your state if she failed to bring to your

notice the exceptional opportunity now presented to dispose finally of this vexatious question.

Is there any reason why West Virginia should not join Virginia in stating this account? I am sure, gentlemen, you cannot dissent from the propositon that your state is liable for some part of the debt, whatever the amount may be. As far as it is possible for a state to be committed by the solemn provisions of its organic law and by the repeated declarations of its public authorities, West Virginia is bound—bound in equity and good conscience—to bear whatever may be ascertained to be her fair proportion of the debt of Virginia. No account has ever been stated between the two states. How then, can West Virginia declare that she owes no part of this debt until the account is stated? She is solemnly pledged to state this account. Ought she not to redeem this pledge? No state can refuse to do what is fair and right in respect to her public obligations and not suffer for it. We do not ask that West Virginia shall commit herself as liable in any specific amount. We make no claim against her for any definite sum. We do not know what a statement of the account will show; if it shows that West Virginia is not liable for any amount that will end the matter. We only ask that your state will, through the proper authorities, unite with Virginia in stating the account betwen the two states in order that the question of
119 her liability, if any, may be authoritatively ascertained. The work of your commission will, of course, be subject to such action as West Virginia might deem proper in the premises.

Would any one of you, if a man thought he had an honest claim against you, be afraid to meet him and consider it with him? Then why should you hesitate to commit your state to the same course in this respect which you as an individual would not hesitate to take?

West Virginia has always taken the position that her liability on account of this debt was to Virginia and not to the creditors, and that her liability must be ascertained on the basis of the Wheeling ordinance. This ordinance not only committed West Virginia to bear her just proportion of the debt of Virginia, but states how the account shall be stated in order to ascertain the amount of the debt for which West Virginia is liable. We are ready to unite with you in stating the account on the basis of the Wheeling ordinance, or West Virginia may choose any other just and equitable basis, if she prefers, on which the account shall be stated, and we will abide by her choice. We have no interest whatever in this matter except to discharge our duty to our state by bringing about, if possible, a fair and final settlement of this controversy. Unless the two states can dispose of it we may confidently expect it to be referred to the courts for settlement, and in that event the decision of the court has already been plainly forshadowed. In the case of Hartman *v.* Greenhow (decided October term, 1880), 102 U. S., page 672, the Supreme Court reviewed the legislation of Virginia in relation to her public debt, and in referring to West Virginia's liability for a portion of it the court, through Justice Field had this to say:

"It appears from the statutes to which we are referred—and we

know the fact as a matter of public history—that prior to the late civil war Virginia had become largely indebted for moneys borrowed to construct public works in the state. The moneys were obtained upon her bonds, which were issued to an amount exceeding
120 $30,000,000. Being the obligation of a state of large wealth, which never allowed its fidelity to its promises to be questioned anywhere, the bonds found a ready sale in the markets of the country. Until the civil war the interest on them was regularly and promptly paid. Afterwards the payments ceased, and until 1871, with the exception of a few small sums remitted in coin during the war to London for foreign bondholders, or paid in Virginia in Confederate money, and a small amount paid in 1866 and 1867, no part of the interest or principal was paid. During the war a portion of her territory was separated from her, and by its people a new state, named West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But, as the whole state had created the indebtedness for which the bonds were issued, and participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new state. Writers on public law speak of the principle as well established that where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On this subject Kent says: "If a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common." (I Com., 26.) And Halleck, in speaking of a state divided into two or more distinct and independent sovereignties, says: In that case the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of the courts, and the practice of nations." (Internat. L., ch. 3, sec. 27.)

"In conformity with the doctrine thus stated by Halleck, both states—Virginia and West Virginia—have recognized in their constitutions their respective liability for an equitable proportion of the old debt of the state, and have provided that measures should be taken for its settlement. * * *

"The Constitution of West Virginia, which went into effect in 1863, declared that "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," should "be assumed" by the state, and that the legislature should "ascertain the same as soon as practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." (Art. 8, sec. 8.)

Virginia lost by the formation of the state of West Virginia one-

third of her territory and more than one-third of her white population. To that extent she was deprived of possessions which belonged to her when the debt was contracted. Suppose fifty of the remaining counties of Virginia should decide to organize themselves into a new state to be called "Eastern Virginia;" would you say it was fair and right for them to do so and take the public property within their borders, and leave the remaining counties constituting the state of Virginia to bear the burden of a debt created for the benefit
121 of the whole? The Supreme Court of the United States has, as we have just seen, answered that question in the negative, and I am sure your sense of justice would impel you also to answer "No." In that event you could not justify West Virginia in declining to bear a just proportion of the debt of the mother state.

Another decision of the Supreme Court of the United States has an important bearing on the liability of the two states on account of this debt. I refer to the recent decision of South Dakota against North Carolina (decided February 1, 1904), 192 U. S., page 286. North Carolina had issued certain bonds which were outstanding in the hands of purchasers. She declined to make provision for their payment, feeling that she was justified in that course. In order to test the liability of North Carolina a holder of a large amount of those bonds donated ten of them of the face value of $10,000.00 principal to the state of South Dakota, with the understanding that South Dakota, would institute suit against North Carolina to enforce payment. An individual cannot sue a state, but the right of one state to sue another is expressly preserved by the Constitution of the United States. South Dakota accepted the gift and instituted suit in the Supreme Court of the United States against North Carolina, and the court gave judgment against North Carolina for the amount of the bonds with accrued interest.

If when the contract under which we hold control of the certificates expires nothing has been done looking to a settlement, and those certificates should be released and restored to the owners, it may prove to be the opening of a veritable Pandora's box. Under the authority of the South Dakota-North Carolina case, the attempt might be made to enforce collection of this debt by donating some of the certificates of the issue of 1871 to a state on condition that a suit should be instituted against Virgina and West Virginia to compel the statement of the account between them, and the payment of the liability apportioned to each one. We are reliably
122 informed that the governor of one of the states has already been approached with an offer to donate to his state $100,000.00 of those certificates on condition that he would cause such a suit to be instituted. He declined, but some other governor might not be influenced by as delicate sense of propriety.

We feel that these considerations should appeal strongly to you to unite with Virginia in the effort to make a friendly settlement of this matter. Surely the two states can make a far better settlement than the courts can make for them. If we do not take the matter in our own hands the only alternative is a settlement by complusion.

Resolutions that we do not owe anything will not avail. The holders of a debt amounting to about fifty millions of dollars will not be satisfied with your statement or with ours that we do not owe it. Unless your state will join Virginia in the effort to dispose finally of this question, you may rest assured that, like Cæsar's ghost, it will meet you at Philippi. The unsettled one-third of this debt now amounts to about fifty millions of dollars. No one can say what the extent of West Virginia's liability will be if the controversy is settled in court, but I will venture the assertion that in a friendly adjustment, it is entirely probable that we can effect a settlement within one-tenth of that sum. In this connection I cannot forbear a reference to what Virginia has done towards bearing the burden of this debt. The records of the office of the second auditor of Virginia show the following amounts paid by Virginia on account of the public debt of the old state since January1, 1861:

123 Amount of interest paid from January 1, 1861, to January, 1905		$34,551,642 85
Bonds now held in sinking fund	$1,111,500 00	
Bonds paid off and cancelled	8,863,994 49	
		9,975,441 49
Total of interest and bonds paid off		$45,527,134.34
New bonds of Virginia issued for portion of debt funded and assumed by her		26,850,820 00
Total sum of principal and interest paid off and assumed and now carried by Virginia on account of the old debt		$72,377,954 34

From the foregoing you will observe that the public debt of Virginia is now $26,850,820.00, and on this sum she pays an annual interest charge of $877,862.27. (Report of the second auditor of Virginia for 1904 in relation to the public debt.)

Do you not think that Virginia has borne her share of this common burden, especially in view of the trials and adversity through which she has passed? During four long years she withstood the shock of battle, and came out of that trying ordeal crushed, impoverished and dismembered. Then followed the night of reconstruction, when for five years she endured the bitterness and humiliation of military rule. But so soon as she regained control of her own affairs she met her creditors and, in spite of her poverty, endeavored to do her duty by them.

In adjusting her liability with her creditors and providing for its payment she has done all that she could do, and no more could be expected of her. The trials and sacrifices through which she has passed have left no trace of bitterness—least of all does she cherish any resentment against her youngest daughter. On the contrary, she rejoices in the wealth and power with which a benignant Providence has blessed you. She only appeals to you not to let pass the

present golden opportunity to finally dispose of the only remaining question in connection with her public debt. She earnestly hopes that her suggestion will commend itself to your good judgment, and that your legislature will authorize the appointment of commissioners, with power to co-operate with us in stating the account
124 between the two states. If, however, your action shall be unfavorable, Virginia will feel that she has done her duty, and that responsibility for the consequences will not lie at her door.

In taking leave of you, gentlemen, I cannot refrain, on behalf of myself and associates, including the attorney general, an eminent citizen of my state, from expressing to you our sincere appreciation of the cordial reception accorded us here not only by His Excellency, your governor, but by your committees to-night. I can assure you that whatever may be the result of our mission, we will recall with pleasure the considerate attention you have shown us.

125 Memorandum of agreement, made this 14th day of December, 1904, between the Depositing Committee of the securities known as the Virginia Deferred Certificates as constitutd under the contract of July 28th, 1898, and of which John Crosby Brown is Chairman, and Robert L. Harrison, Secretary, acting under the plan of settlement approved on December 3rd, 1902, by the Advisory Board referred to in the said contract, hereinafter referred to as the Depositing Committee, party of the first part, and the Commission constituted on behalf of the State of Virginia for the purpose of bringing about a settlement with the State of West Virginia with respect to said certificates as constituted and acting under the joint resolution of the General Asesmbly of the State of Virginia, approved March 6, 1894, and the act of said General Assembly, approved March 6, 1900 and of which John B. Moon is Chairman, and Joseph Button is Secretary hereinafter referred to as the Virginia Commisison, party of the second part:

Whereas, by an agreement entered into between the above parties on the 18th day of September, 1902, certain of the certificates aforesaid amounting in the aggregate to $10,347,570.85 were tendered by the Depositing Committee Aforesaid to the said Virginia Commission, and were placed subject to the control of the said Commission upon the agreement and arrangement on the part of the said Commission acting for the State of Virginia under the said joint resolution and Act of Assembly aforesaid, that the said Commission should enter into negotiations with the State of West Virginia or the constituted authorities thereof for the purpose of effecting with West Virginia a settlement with respect to the said certificates, in acordance with the said contract of July 28th, 1898, and in accordance with such plan of settlement as was then proposed or might thereafter become effective, and that the said Commission would, by and with the advice and approval of the Attorney General of Virginia, take such action as they might deem needful in the premises; and that in the event such a settlement was so made, then it
126 was agreed that the amount realized thereon should be ac-

cepted in full satisfaction of all the claims of the certificate-holders thereunder, and that the said Committee would surrender to the said Commission, in exchange for such amount, the certificates so placed subject to the control of said Commission. And it was further specified in the said agreement of September 18, 1902, that the same should apply to and include all such certificates as might thereafter be deposited with and held by the said Committee under the said contract of July 28, 1898, and the the said agreement should constitute an arrangement and contract between the said Committee acting for the said certificate-holders with the State of Virginia for obtaining a settlement with West Virginia, and that the same should continue binding upon the parties and upon the holders of the certificates so deposited for the three years next ensuing from the date of the said agreement; that is to say, until the 18th day of September 1905. And the said agreement further provided that the same should be subject to renewal and extension for such further time as might be agreed upon between the parties and to such modification and amendment as might thereafter be agreed upon; and

Whereas, the said agreement of September 18, 1902, was approved by the Hon. William A. Anderson, Attorney General of Virginia, by his endorsement at the foot thereof on the 29th day of September, 1902; and

Whereas, the provisions of the said agreement last named were fully approved and recommended on the 3rd day of December, 1902, by the Advisory Board referred to in the said contract of July 28, 1898, as appears by the plan of settlement made and approved by the said Committee and the Advisory Board and bearing date December 3rd, 1902, of which plan of settlement publication was duly made as provided in the said contract of July 28, 1898, and no notification whatsoever was given to the said Committee, either directly or through any depository, by any of the holders of the deposited certificates, of their unwillingness to accept the proposed set-
127 tlement as set forth in the said plan so published and more than thirty days having elapsed after the said publication was completed, and the said plan of settlement having therefore become complete; and of this fact the declaration in writing of the Committee having been duly made to the only depository under the said contract, to wit Messrs. Brown Brothers & Company, of 59, Wall Street, New York, the said plan of settlement thereupon became effective and final; and

Whereas, it is now proposed under the terms of the said agreement of September 18, 1902, and by way of modification thereof as therein provided, to place more fully and completely under the control of the said Virginia Commission all the certificates aforesaid which had up to that date been deposited, and also all thereafter deposited so that the said Virginia Commission may be given full and complete control of all the said certificates in their proposed negotiations with the State of West Virginia, and also in any action and proceeding which may be taken or instituted by the said Virginia

Commission by and with the advice and approval of the said Attorney General under the said Act of the General Assembly of Virginia March 6, 1900:

Now therefore this agreement witnesseth: that the aforesaid Depositing Committee does hereby authorize and direct their said Depository Messrs. Brown Brothers & Company to issue to the Virginia Debt Commission a certificate that all the aforesaid Virginia Deferred Certificates which have up to this time been deposited with the said Brown Brothers and Company under the said depositing agreement of July 28, 1898, and all which may hereafter and before the 18th day of September, 1905, be so deposited with the said depository are held by the said depository on deposit for and subject in all respects to the control and disposition of the said Virginia Commission in pursuance on the said joint resolution and Act of the General Assembly of Virginia; and to this end the said Messrs. Brown Brothers & Company are authorized and instructed to
128 issue such certificate to the said Virginia Commission in such form as to show that all of the certificates aforesaid have been received and are held by them on deposit for the said Virginia Commission and subject to the control and disposal of the said Commission:

But this agreement shall continue in force only until the said 18. day of September, 1905, when the said certificate issued by the said Brown Brothers and Company to the said Virginia Commission for the purpose of making a settlement with West Virginia as aforesaid shall be returned to the said Depositing Committee, unless a settlement shall have been before that time negotiated with West Virginia is pursuance of said contract of September 18th, 1902, or unless negotiations be then pending with the properly constituted authorities of West Virginia for such settlement upon some equitable basis which has been agreed to by said Commission and the authorities of West Virginia aforesaid. Provided, however, that it is fully understood and agreed that the time for continuing in force this agreement may be extended by the consent and agreement of the parties hereto indorsed hereon at the foot hereof, for such length of time and upon such conditions as the parties may hereafter specify; and this agreement may be changed, modified and amended with respect to the action and proceedings to be taken or instituted by the said Commission in the premises, as may hereafter be agreed upon by the parties and the indorsed as aforesaid, or as may be specified in a further and supplemental agreement between the parties.

In testimony whereof the signatures of the Chairman of the said Depositing Committee and of the Virginia Commisison, attested by the respective Secretaries thereof, are herunto affixed on the day and year first above written.

JOHN CROSBY BROWN, *Chairman.*
ROBERT L. HARRISON, *Secretary.*
JOHN B. MOON,
Chairman of Virginia Commission.
JOSEPH BUTTON, *Secretary.*

129 The foregoing agreement is hereby approved as having been entered into by my advice and approval.

WILLIAM A. ANDERSON.
Attorney General of Virginia.

Dated December 14, 1904.

130 The foregoing agreement of December 14th, 1904, together with the contract of September 18th, 1902, therein referred to, are hereby extended in all their provisions until December 1st, 1905, and they shall remain in full force until that date just as if December 1st, 1905, instead of Sept. 18th, 1905, had been the date originally named therein for their limitation, with the right of extension, enlargement and modification on or before Dec. 1st, 1905, in all respects as therein specified.

Given under our hands this 9th day of Sept, 1905.

JOHN CROSBY BROWN,
Chairman Depositing Committee.

ROBT. L. HARRISON, *Secretary.*

JOHN B. MOON,
Chairman Virginia Commission.

JOS. BUTTON, *Secretary.*

The above extension of the contracts above referred to is hereby approved, this 9th day of September, 1905.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

131 Upon the execution of the foregoing contract of December 14, 1904, hereto annexed, Messrs. Brown Bros. & Co., Bankers of New York, N. Y., the depository referred to in said contract, issued to the Virginia Commission therein named the certificate provided for in said contract, which was also in the form of a receipt and showed that Virginia deferred certificates of 1871 to the amount of $10,639,776.42 and certificates of other dates to the amount of $2,270,779.47 were held by said Brown Bros. & Co. on deposit for and subject to the control and disposal of said Commission; thus placing subject to the complete control and disposal of the Commission considerably more than two-thirds of the total of $12,703,451.79 of the certificates of 1871 outstanding and in the hands of the public, and a large majority of the total of $2,778,239.80 of the other certificates so outstanding.

Thereafter, in January and February, 1905, the Virginia Commission, through its properly constituted sub-committee acting with the Attorney General of Virginia, made to the Governor and Attorney General of West Virginia, and to the Finance Committees of the Legislature of that State, which was then in session, a full statement and presentation of the maters outstanding and unsettled between the two States in connection with the deferred certificates known as the Virginia Deferred Certificates under a joint resolution of the General Assembly of Virginia approved March 6, 1894, and an act of the said General Assembly approved March 6, 1900, and of

aforesaid, accompanied by an urgent plea on behalf of the State of Virginia that the Legislature of West Virginia would, at least, appoint a Committee or other public functionery with authority to take up the questions involved for the purposes of discussion and negotiation, but the Commission was again met, as it had been in a previous attempt to open negotiations on the subject, by an absolute refusal on the part of the authorities of West Virginia to treat on the subject at all thus leaving to the Virginia Commission
132 and Attorney General of that State no possible means of bringing about the settlement, which they are charged with the responsibility of making, except by a resort to the Court having jurisdiction of controversies between States.

Now, therefore, it is hereby stipulated and agreed by and between the Depositing Committee, named as the party of the first part in the said foregoing contract of December 14th, 1904, and the Virginia Commission therein named as the party of the second part, the said Commission acting in this behalf by and with the advice and approval of the Attorney General of Virginia, that in accordance with the provisions contained in the said foregoing contract and addendum thereto of September 9th, 1905, the same is hereby amended, modified and extended as follows, to wit:

1st. Neither the said foregoing contract of December 14th, 1904, nor the contract therein referred to between the same parties, bearing date September 18th, 1902, shall expire on the first day of December, 1905, but the same shall continue in force in all respects just as if no time limit had been named in either of said contracts, and this agreement shall be taken as a continuation, modification and extension of said contracts.

2nd. The certificate or certificates heretofore given by Brown Bros. & Co., the depository of the said Committee, to the said Virginia Commission, covering the deferred certificates aforesaid, shall be retained by the said Commission and shall remain in full force and effect without regard to time limit and the said Brown Bros. & Co. shall issue and give to the said Commission such other and further certificates and receipts in the premises, by way of amendment or in lieu of those already given or otherwise, as may be deemed needful or desirable in order to place said deferred certificates more completely and finally under the control and at the disposal
133 of the said Commission for the purpose of carrying out this agreement; and especially shall they give such certificates or receipts to cover all such Virginia deferred certificates as have been or may be deposited with them and not covered by certificates or receipts previously given to the Commission; and the said Virginia Commission are hereby given and invested with the full and complete control and right to dispose of all deferred certificates now or hereafter covered by or embraced in the receipts and certificates of Brown Bros. & Co., as aforesaid.

3rd. The said Virginia Commission hereby stipulate and agree,

by and with the advice and approval of the Attorney General of Virginia, that, in their judgment, it is needful and proper, in order to protect the interest of the State and bring about and carry into effect a settlement in the premises, that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States asking for a adjudication and settlement by that Court of the matters aforesaid unsettled and undetermined between the two States, arising or growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the Act of the General Assembly of Virginia, of March 6th, 1900, referred to in said contract of December 14th, 1904; and the said Virginia Commission acting by and with the advice and approval of the Attorney General of that State, do hereby undertake and agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid, as soon as the pleadings, papers and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said
134 Court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said Act of the General Assembly of Virginia and the Joint Resolution of the said General Assembly of March 6th, 1894, also referred to in said contract of December 14th, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia as to the deferred certificates placed subject to the control of the Commission as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said Commission, notwithstanding the institution and pendency of such suit.

4th. And the Virginia Commission do further undertake and agree that, in accordance with the terms and conditions of the said Joint Resolution and Act of the General Assembly of Virginia, they will account for, pay over and deliver such amount, either in cash or securities, as may be realized from West Virginia through any settlement made by the said Commission with that State, either by means of an adjudication or recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, to the said Depositing Committee in full settlement and satisfaction of all claims under said certificates; and the said Depositing Committees agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said Commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settle-
135 ment as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in the said certificates respectively, in

full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

5th. It is further understood and agreed that if from any cause the said Commission shall fail or be unable to bring about such adjustment or settlement or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said Commission to restore to the control of the said Depositing Committee all such deferred certificates as may have been placed subject to the control and disposal of said Commission as aforesaid.

Richmond, Va., November 24th, 1905.

JOHN CROSBY BROWN, *Chairman.*
R. P. CHEW.
WM. C. LEGENDRE.
CLARENCE CARY.
J. KENNEDY TOD.
GEO. F. BAKER.
BARTLETT S. JOHNSTON.
Depositing Committee.
JOHN B. MOON.
WM. F. RHEA.
H. D. FLOOD.
H. H. DOWNING.
H. T. WICKHAM.
RANDOLPH HARRISON.
J. THOMPSON BROWN.
Virginia Commission.

Attest:
JOS. BUTTON.
Sec'ty Va. Commission.
RO. L. HARRISON.
Secretary Committee.

136. The foregoing contract of this date was entered into by and with the advice and approval of the undersigned, William A. Anderson, Attorney General of Virginia, as in said contract state and set forth; and the same is concurred in by him as such Attorney General.

Richmond, Va., November 24th, 1905.

(Signed) WILLIAM A. ANDERSON,
Attorney General of Virginia.

137. This is to certify that we, the undersigned, Brown Brothers & Company (Bankers), of 59 Wall Street, New York City, N. Y., have received of the Commission of the State of Virginia, constituted and authorized to act with respect to the securities

which John B. Moon, of Charlottesville, Va., is Chairman, and Joseph Button, of Appomattox, Va., is secretary, the following Virginia Deferred Certificates, which we hold on deposit for and subject to the control and disposition of said Commission, to wit:

Certificates of 1871:			
Principal		$9,317,009.30	
Sterling scrip	$10,666.66		
Dollar scrip	32,387.00	43,053.66	
			$9,366,062.96
Certificates of 1879:			
Principal		$403,362.62	
Dollar scrip	$33,890.83		
Sterling scrip	3,389.16	37,279.99	
			440,642.61
Certificates of 1882:			
Principal		$716,416.07	
Scrip		545,787.36	
			1,262,203.43
Certificates of 1892:			
Principal		$259,825.71	
		$284,563.93	
			544,389.64
			$11,607,298.64

And we further agree to hold on deposit for and subject to the control of said Commission as aforesaid such further certificates as may be deposited with us through or for the said Commission, between this and the 18th day of September, 1905.

Given under our hands this 14th day of December, 1904.

BROWN BROTHERS & CO.

138 Brown Brothers & Co., 59 Wall Street.

West Virginia Debt Settlement. (C)

NEW YORK, *January 23rd*, 1905.

Hon. John B. Moon, chairman Virginia debt commission, Charlottesville, Va.

DEAR SIR:—Since we gave you the receipt and certificate of Deposit of December 14th, 1904, there have been deposited with us, and we hold for and subject to the control and disposition of your Commission, the following Virginia Deferred Certificates:

Issued under act of	1871,	to amount of	.....	$1,279,713.46
do.	1882,	do.	.....	23,477.12
do.	1892,	do.	.....	66.67
Total additional certificates			.....	$1,303,257.25

These certificates are held by us for your Commission in like

manner, and on the same terms and conditions as those specified in our said receipt and certificate of December 14th, 1904.

We remain, yours very truly,

BROWN BROTHERS & CO.

P. S.—The complete statement is as follows:

Issue of 1871:			
Principal		$10,596,402.76	
Sterling scrip	$10,666.66		
Dollar scrip	32,707.00	43,373.66	
			$10,639,776.42
Issue of 1879:			
Principal		$403,362.62	
Dollar scrip	$33,890.83		
Sterling scrip	3,389.16	37,279.99	
			440,642.61
Issue of 1882:			
Principal		$738,819.72	
Scrip		546,860.83	
			1,285,680.55
Issue of 1892:			
Principal		$259,825.71	
Scrip		284,630.60	
			544,456.31
Total deposit to January 23rd, 1905			$12,910,555.89

B. B. & CO.

139 Brown Brothers & Co., 59 Wall Street

West Virginia Debt Settlement. (T.)

NEW YORK, *January 4th*, 1906.

Hon. John B. Moon, chairman Virginia debt commission, Charlottesville, Va.

DEAR SIR: Since we gave you the receipt and Certificate of Deposit of December 14th, 1904, there have been deposited with us, and we hold for and subject to the control and disposition of your Commission, the following Virginia Deferred Certificates:

These certificates are held by us for your Commission in like manner, and on the same terms and conditions as those specified in our said receipt and Certificate of December 14th, 1904.

We remain, yours very truly,

BROWN BROTHERS & CO.

Issued under the act of	1871,	to amount of	.....	$1,491,231.13
do.	1879,	do.	.....	23,250.00
do.	1882,	do.	.....	51,588.97
do.	1892,	do.	.....	66.67
Total additional certificates			.....	$1,566,136.77

P. S.—The complete statement is as follows:

Issue of 1871:			
Principal	.....	$10,806,785.43	
Sterling scrip	$10,666.66		
Dollar scrip	33,842.00	44,508.66	
			$10,851,294.09
Issue of 1879:			
Principal	.....	$426,612.62	
Dollar scrip	$33,890.83		
Sterling scrip	3,389.16	37,279.99	
			463,892.61
Issue of 1882:			
Principal	.....	$757,653.05	
Scrip	.....	556,139.35	
			1,313,792.40
Issue of 1892:			
Principal	.....	$259,825.71	
Scrip	.....	284,630.60	
			544,456.31
Total deposit to January 4th, 1906			$13,173,435.41

BROWN BROTHERS & CO.

140 STATE OF NEW YORK,
County of New York, To-wit:

I, Wm. Gerard Vermilye, being first duly sworn, do depose and say that I am one of the Cashiers of Brown Brothers & Co., bankers of New York, N. Y., and have charge of their vaults and of the securities therein deposited, including the securities known as Virginia deferred Certificates, and that I have had charge of the filing of said certificates deposited with said Brown Brothers & Co. and of the keeping of a record thereof as filed; and that the statement or certificate of the said Brown Brothers & Co. hereunto annexed made to John B. Moon, Chairman of the Virginia Debt Commission, bearing date January 4th, 1906, correctly sets forth the said Virginia Deferred Certificates so deposited and placed in the vaults of said Brown Brothers Co. which said certificates to the amount set forth in said statement of Brown Brothers & Co. have been by order of the said Virginia Commission this day placed in sealed boxes and transferred to the Central Trust Company of New York, N. Y.

WM. GERARD VERMILYE.

The foregoing affidavit was this day subscribed and sworn to by Wm. Gerard Vermilye before me, a Notary Public in and for the State and County of New York.

Given under my hand and Notarial Seal this 5th day of January, 1906.

LEGRAND VAN VALKENBURGH,
NOTARIAL SEAL. *Notary Public, Kings County.*

Certificates filed in New York County.

141 Central Trust Company of New York.
54 WALL STREET, *January 5th*, 1906.

The undersigned, the Central Trust Company of New York, N. Y., hereby certifies and acknowledges that it has this day received from Brown Brothers & Co. three boxes under seal said to contain the Virginia deferred Certificates to the amount of $13,173,435.41 referred to in tht communication of said Brown Brothers & Company to John B. Moon, Chairman of the Virginia Commission, bearing date January 4th, 1906, which said sealed boxes and their contents are held by the undersigned Trust Company on deposit for and subject to the order and control of the Virginia Commission, constituted and authorized to act with respect to said Deferred Certificates under a joint resolution of the General Assembly of the State of Virginia, approved March 6th, 1894, and an act of the said General Assembly approved March 6th, 1900, of which John B. Moon, of Charlottesville, Va., is Chairman, and Joseph Button, of Appamatox, Va., is Secretary, the said certificates having been turned over to the undersigned Trust Company by said Brown Brothers & Company to be held by the undersigned on deposit for and subject to the control and disposal of said Virginia Commission as above stated.

CENTRAL TRUST CO., OF N. Y.,
(Signed) F. L. GRANT, *Sec'y*.

142 Virginia, Second Auditor's Office.

(Statement Made Sept. 17, 1902.)

West Virginia Certificates Issued by Virginia in Funding Her Debt.

			In hands of the public.
Act March 30, 1871	$15,281,970 47		
" " " " held by Com.			
" " " " sinking fund..	2,026,439 39		
" " " " literary fund.	552,079 29		
		$2,578,518 68	
			$12,703,451 79
Act March 28, 1879			564,238 87
Act Feb. 14, 1882		$1,775,603 48	
Held by literary fund		166,943 33	
			1,608,660 15
Act Feb. 20, 1892			605,320 78
Total amount in the hands of the public			$15,481,691 59
Total amount held by the Com. S. fund			2,026,439 39
Total amount held by the literary fund			719,022 62
Total amount of W. Va. script issued			$18,227,153 60
In hands of public		$15,481,691 59	
Held by State of Virginia		2,745,462 01	
Total issue of W. Va. script		$18,227,153 60	

I hereby certify that the above statement correctly sets forth the amount of West Virginia certificates, issued by Virginia in funding her old obligations, as shown by the books of this office.

(Signed) JNO. G. DEW,
Second Auditor of Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

DEMURRER

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL NO. 7.

Commonwealth of Virginia
vs.)
State of West Virginia.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of West Virginia, one of the United States of America, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General, humbly prays leave to file the sworn demurrer herewith presented, to the bill of complaint in the above entitled cause.

It is humbly submitted that, by an examination of the bill of complaint in this cause, it will be observed that there is nothing in said bill contained showing a controversy between said Commonwealth of Virginia and said State of West Virginia justifiable in this court.

Wherefore, your petitioner humbly prays leave to file her said demurrer, and that a day may be fixed by your Honors for the hearing of the same.

And as in duty bound your petitioner will ever pray.

_____
Governor of West Virginia.

_____
Attorney General of West Virginia.

_____,

_____,

_____, *Counsel.*

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL NO. 7.

COMMONWEALTH OF VIRGINIA
vs.)
STATE OF WEST VIRGINIA.

The demurrer of the State of West Virginia, defendant above named, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General of said State of West Virginia, to the bill of complaint of the Commonwealth of Virginia, complainant, by William A. Anderson, Attorney General of said Commonwealth of Virginia.

The defendant, the State of West Virginia, above named, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are set forth and alleged, or in any way or manner, demurs thereto, and for the cause of demurrer shows:

First: The jurisdiction of this Court does not extend to the character of demands, alleged in the bill in this cause, being in substance simple demands for money, and this Court could not enforce a judgment for money against one of the sovereign states of the Union of the United States in any way or manner.

Second: The bill on its face shows that the said Commonwealth of Virginia has no suable interest in the demands for money set out therein which would entitle her to the relief prayed for therein, and that the said demands if recovered would be only for the benefit of certain individuals, who are the holders of the alleged evidences of debt mentioned in said bill.

Third: The bill on its face shows that so far as said Commonwealth of Virginia may have any ownership of any of such alleged evidences of debt, the acts of the Legislature of said Commonwealth, claimed by the said Attorney General thereof as authority to institute this cause, do not in fact authorize any suit therefor to be instituted, but only authorizes, if any authority at all is given, action on the part of the Commission in said bill mentioned and said Attorney General for the benefit and at the expense of the individuals in the bill and exhibits called "Certificate holders," which is in effect giving the use of the name of said Commonwealth

to such "Certificate holders" for the purpose of attempting to collect their alleged private money demands against said State of West Virginia.

Fourth: The said bill does not sufficiently and definitely set out therein the alleged demands for money claimed therein, so that a complete and proper answer can be made thereto.

Wherefore, and for divers other good causes of demurrer in the said bill, this defendant demurs thereto and humbly demands the judgment of this Court whether she shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with her costs and charges in the matter most wrongfully sustained.

Governor of West Virginia.

Attorney General of West Virginia.

State of West Virginia,
County of Kanawha, ss.

This day there personally appeared before me, the undersigned Clerk of the Supreme Court of Appeals of the State of West Virginia, William M. O. Dawson, Governor of said State, and Clarke W. May, Attorney General of said State, representing the said State of West Virginia, the defendant in the above entitled cause, and whose names as such are signed to the foregoing demurrer, and being by me duly sworn, say that they are respectively the officers of the defendant, the said State of West Virginia, as above set out, and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

Given under my hand as Clerk of said Court and the official seal thereof ——— day of October, 1906.

Clerk of the Supreme Court of Appeals of the State of West Virginia.

I, Clarke W. May, Attorney General of the State of West Virginia, hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

Attorney General of West Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

AMENDED DEMURRER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Original No. 7.

COMMONWEALTH OF VIRGINIA.

vs.

STATE OF WEST VIRGINIA.

AMENDED DEMURRER.

The defendant, The State of West Virginia, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General, of said State, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in manner and form as the same are set forth and alleged, or in any way or manner, presents this amended demurrer thereto, and for cause of demurrer shows:

First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who

are the alleged owners of certain certificates in the said bill set forth and described.

Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

Fifth. That it does not appear by said bill that the Attorney General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant.

Wherefore, and for divers other good causes of demurrer in the said bill, this defendant demurs thereto and humbly demands the judgment of this court whether she shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with her costs and charges in the matter most wrongfully sustained.

W. M. O. DAWSON,
Governor of West Virginia.
CLARKE W. MAY,
Attorney General of West Virginia.

State of West Virginia,
County of Kanawha, ss:

This day there personally appeared before me, the undersigned, clerk of the Supreme Court of Appeals of the State of West Virginia, William M. O. Dawson, Governor of said State, and Clarke W. May, Attorney General of said State, representing the said State of West Virginia, the defendant in the above entitled cause, and whose names as such are signed to the foregoing amended demurrer, and, being by me duly sworn, say that they are respectively the officers of the defendant, the said State of West Virginia, as above set out, and that the foregoing amended demurrer is not interposed for delay and that the same is true in point of fact.

Given under my hand as clerk of said court and the official seal thereof this 23rd day of February, 1907.

WM B. MATHEWS,
Clerk of the Supreme Court of Appeals of the State of West Virginia.

I, Clarke W. May, Attorney General of the State of West Virginia, hereby certify that in my opinion the foregoing amended demurrer is well founded in point of law.

CLARKE W. MAY,
Attorney General of West Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

BRIEF FOR DEFENDANT.

IN THE SUPREME COURT OF THE UNITED STATES.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF FOR THE DEFENDANT.

STATEMENT OF THE CASE UPON DEMURRER.

On January first, 1861, Virginia was indebted on account of the issuance of bonds at various times prior thereto in the aggregate amount of $31,800,712.90, upon which past due interest including the interest maturing on that date amounted to $1,045,183.01.

On July first, 1863, a date ten days subsequently to the admission of West Virginia as a State into the Union, the bill shows a public indebtedness of the plaintiff, including principal of said bonds and the interest accrued and unpaid thereon, amounting in the aggregate to $39,098,922.00. Of this sum, $5,954,716.08 is interest, and the residue, $33,141,212.92, is principal, representing the entire indebtedness against the State of Virginia at the time of the formation and admission into the Union of West Virginia. This indebtedness was held by private owners of bonds which Virginia had issued and sold upon her own account.

In 1871 the Legislature of Virginia passed an act providing for the funding and payment of her public debt, in which, among other things, there is recited that the people of Virginia being anxious for the prompt liquidation of her portion of the said debt, which was estimated by said act to be two-thirds of the entire indebtedness incurred by the State of Virginia, and also suggesting that the authorities of West Virginia might prefer to pay that State's portion of the said indebtedness to the holders thereof, and to enable the State of West Virginia to settle her portion of the said debt with the holders thereof, allotted to West Virginia by her own *ex parte* and *gratuitous* act the payment of the other third of said debt. The act provides for the surrender of the old and

the acceptance of the new bonds of Virginia for two-thirds of the amount of said aggregate indebtedness, and the issuance to the owners or holders of the other one-third of the amount due upon the old bonds, certificates bearing the same date as the new bonds representing the funded debt of Virginia, setting forth the form of the bond which is not funded, and the payment thereof to be provided for in accordance with such settlement as might thereafter be had between the States of Virginia and West Virginia.

In 1879 a further act was passed by the Legislature of Virginia regarding her said debt, which provides, among other things, for the issuance of certificates on West Virginia to the holders of the old bonds who had not already received such certificates, and that the State of Virginia would aid the holders of certificates issued by Virginia, in negotiating with the State of West Virginia for an amicable settlement of all the claims of such creditors holding the certificates issued by Virginia against the State of West Virginia, and that the acceptance of such certificates for West Virginia's one-third issued under the acts of the Legislature of Virginia, should be taken and held as a full and absolute release of Virginia from all liability on account of said certificates.

In 1882 another act was passed by the Legislature for the express purpose of ascertaining and declaring Virginia's equitable share of the debt created before and actually existing at the time the State of West Virginia was formed, the design of which act was to make a full settlement of said debt, and thus present a true state of the account between Virginia and her creditors, which embodies a recital to that effect, and which provides for the issuance of certain certificates by the Commonwealth of Virginia, covering the one-third of her indebtedness claimed to be payable by the State of West Virginia, and there is recited in the form of said certificate that the Commonwealth of Virginia has discharged her equitable share of her debt evidenced by such certificate, leaving a balance with interest to be accounted for by the State of West Virginia, without recourse upon the Commonwealth of Virginia. These certificates were accordingly issued by Virginia and received and accepted by the holders of that part of the original debt represented by said certificates, all of the old bonds surrendered to the Commonwealth of Virginia and cancelled, and Virginia thereby relieved from all liability on her own account to the holders of the West Virginia deferred certificates.

The only obligation left upon Virginia after the issuance of these deferred certificates purporting to represent West Virginia's portion of the debt of Virginia gratuitously fixed *ex parte* by the State of Virginia, and accepted by the holders of that part of the original debt of Virginia in settlement thereof, was to use her offices and endeavors to effect payment thereof, or its adjustment in some way, by the State of West Virginia. By this arrangement, effected alone by the State of Virginia with her creditors, she was relieved from all substantial liability—in fact from any pecuniary liability—as to the one-third of her indebtedness created by her

prior to the formation and admission into the Union of the State of West Virginia.

This suit was instituted in part for the recovery of that portion of the debt of Virginia created prior to and existing on June 20, 1863, the date of the admission of West Virginia into the Union and is the gravamen of the complainant's bill.

Another claim asserted by said bill is an alleged indebtedness evidenced by the bonds of Virginia and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of said State, as created under her laws, amounting, the former to $1,462,993.00, and the latter to $1,543,669.00, as of the date of January first, 1861.

This cannot be treated as a debt within the meaning of that term to be asserted against the State of West Virginia, because these Commissioners were simply agents for the management and control of a part of the internal fiscal affairs of the Commonwealth of Virginia, and the use of which was and is available only to the State of Virginia for the advancement of her own peculiar State interests.

Another and further claim made by the said bill is for the collection or payment for all property, real, personal and mixed, owned by or appertaining to the said State of Virginia, and being within the boundaries of the State of West Virginia, which passed to and became the property of the latter State, and was taken and appropriated to her own use by the State under the provisions of an act passed by the State of Virginia, in February, 1863, the bill alleging that the property passing to the State of West Virginia under and by virtue of the said act, consisted of a number of items alleged to amount in the aggregate to several millions of dollars, the exact amount of which complaint, it is alleged, is unable to definitely ascertain and state.

These three classes of claims made by the complainant in her bill constitute the sum total of the demand made by her against the defendant in this suit.

The first effort of Virginia to fund her said debt was the Act of the General Assembly approved March 30, 1871, in which she declared her portion thereof to be two-thirds, and provided a plan for its funding and payment, and as to the residue thereof this Act declares:

> "Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in

accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees; and provided further, that until such final settlement with West Virginia, there shall be paid upon what are known as sterling bonds, in the manner now prescribed by law, two-thirds of the interest accruing on the principal of said bonds, after July first, eighteen hundred and seventy-one, and for the interest accrued to said date certificates dated on that day shall be issued, drawing the same rate of interest as the bonds, two-thirds of which shall be paid as provided to be paid on the bonds. The remaining one-third of unpaid interest, both on the bonds and certificates, shall be payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia."

(Plaintiff's Bill, pp. 14, 15.)

Under the terms of this statute Virginia still remained liable for the payment of her entire debt including the one-third, unfunded, for which deferred payment certificates were to be issued, payable upon final settlement between Virginia and West Virginia.

The next effort of Virginia to adjust her bonded indebtedness created prior to the formation of West Virginia as a State, was the Act of her General Assembly, approved March 28, 1879, whereby she provided an abatement of the rate of interest and divided her then outstanding indebtedness into two classes, as follows:

"Class I, which shall be taken to include all tax-receivable coupon bonds, and all registered bonds and fractional certificates which are convertible under the act approved March thirtieth, eighteen hundred and seventy-one, into such tax-receivable coupon bonds.

"Class II, which shall be taken to include all bonds funded under the act approved March thirtieth, eighteen hundred and seventy-one, as amended by the act approved March seventh, eighteen hundred and seventy-two; and also two-thirds of the face value, with two-thirds of the unpaid accrued interest up to the first of July, eighteen hundred and seventy-one, on all unfunded bonds, including sterling bonds."

(Plaintiff's Bill, pp. 17, 18.)

This act also declares as to the liability of West Virginia touching the said indebtedness of the complainant, as follows:

"The owners of all classes of bonds mentioned in this act,

who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange, and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued, under this act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia from all liability on account of said certificates."

(Plaintiff's Bill, p. 19.)

Under these acts of the Legislature of Virginia, nearly if not quite all of her said indebtedness was funded on the basis prescribed by these enactments, thus relieving her of all liability upon the one-third part of her original ante-bellum obligations.

A third expression of Virginia touching her said debt, so far as the same relates to West Virginia, is that embraced in an Act of her Legislature approved February 14, 1882, which is entitled as follows:

"An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon."

(Plaintiff's Bill, p. 21.)

This act contains an extended preamble setting forth what purports to be an account between the state and her creditors, showing the aggregate of principal and interest in two distinct totals in separate columns, declaring the assumption of two-thirds thereof as her equitable portion, fixing the total amount of this equitable portion as of July 1st, 1882, at $21,035,377.15, and then provides for the funding of this debt by the issuance of bonds drawing interest at the rate of three per cent.

This act also further provides as follows:

"For all balances of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate, as follows:

"No. .....

"The Commonwealth of Virginia has this day discharged

her equitable share of the (registered or coupon, as the case may be) bond for ..... dollars, held by ....., dated the .... day of ....., and numbered ....., leaving a balance of ..... dollars, with interest from ....., to be accounted for by the State of West Virginia, without recourse upon this Commonwealth.

"Done at the capitol of the State of Virginia, this ..... day of ..... eighteen .....

"....., *Second Auditor.*

"....., *Treasurer.*"

(Plaintiff's Bill, pp. 28, 29.)

A further act of the General Assembly of Virginia was passed, approved February 20, 1892, which bears the following title:

"An act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of the interest thereon, approved February 14, 1882."

(Plaintiff's Bill, p. 31.)

This act provided for the issuance of nineteen millions of dollars in bonds in lieu of twenty-eight million dollars of outstanding obligations of Virginia, not funded under the act approved February 14, 1882, hereinbefore mentioned, and prescribed the form of the new bonds to be issued under this act and the coupons thereof.

This act also provides that in taking up these outstanding bonds before issuing new bonds in lieu thereof there shall be deducted "one third of the principal and interest of such obligations as were issued prior to the thirtieth day of March, eighteen hundred and seventy-one, and also deducting one-third of the principal and interest of such obligations as are issued under the act approved the thirtieth day of March, eighteen hundred and seventy-one, as do include West Virginia's portion."

This act further provides as follows:

"For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:

"No. ..... The Commonwealth of Virginia has this day discharged her equitable share of the (registered or

coupon, as the case may be) bond for .....dollars, dated ..... day of ....., and No....., leaving a balance of ..... dollars with interest from ..... to be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth.

"Done at the capitol of the State of Virginia, this ..... day of ....., eighteen hundred and ninety-two.

"....., *Second Auditor.*

"....., *Treasurer.*"

(Plaintiff's Bill, pp. 35, 36.)

By virtue of this act of legislation Virginia made a further considerable reduction of the principal of her debt and received a more favorable rate of interest and better terms as to its payment.

After the lapse of about two years from the approval of the act last named a joint resolution was adopted by the legislature of Virginia, entitled as follows:

"A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same."

(Plaintiff's Bill, p. 39.)

This resolution was approved March 6, 1894, and in its preamble refers to the acts by their titles, passed by the General Assembly of Virginia relating to her debt, concluding the preamble of this resolution as follows:

"Whereas the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original state."

(Plaintiff's Bill, p. 40.)

The resolution then creates a commission "authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original state of Virginia proper to be borne by West Virginia."

"But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the state through the agency of the board of education and sink-

ing fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof.

"All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the state to any expense on this account."

(Plaintiff's Bill, pp. 40, 41.)

A further act was passed by the Virginia legislature, approved March 6, 1900, reciting the previous acts of said legislature relating to the public debt of said state, and also reciting that,

"Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to wit: One-third of the amount of said obligations, of which certificates this state holds a large amount, through the agency of the commissioners of its sinking fund and literary fund, and * * *

"Whereas, it appears that while Virginia has satisfactorily settled the two-thirds of the original debt which she assumed, yet it is possible that complications will arise with respect to said certificates which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt * * * and take upon deposit the certificates aforesaid, or have the same otherwise held or placed on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the holders of said certificates so deposited will accept the amount realized on such settlement from West Virginia on said certificates as a full settlement of all their claims thereunder. If at least two-thirds in amount of said certificates issued under the act of eighteen

hundred and seventy-one, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney general of Virginia, to take such action and institute such proceedings on behalf of the state as may, in the judgment of said commission and attorney general, be needful and proper to protect the interest of the state and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate holders, as provided in the joint resolution aforesaid, and the state shall not be subject to any expense on that account."

(Plaintiff's Bill, pp. 41, 42.)

In accordance with the provisions and requirements of said act approved March 6, 1900, said commission entered into an arrangement with the duly authorized representatives of the holders of the deferred certificates issued by Virginia, without recourse upon her and received by her creditors in settlement of one-third of the original debt, whereby said commission reduced to its possession and control more than five-sixths of the entire amount of these certificates outstanding and the said commission now holds said certificates in trust for the present owners thereof, the amount of which certificates has, no doubt, largely increased since the institution of this suit, as indicated by a statement contained in the report of said commission submitted to the General Assembly of Virginia, thus placing in the possession of said commission nearly or quite all of said certificates.

The ownership of these certificates held by said commission is still in the original holders of the old debt of Virginia, and their possession by said commission is solely for the purpose of giving color to the institution of a suit in this court by the state to promote the collection of an alleged debt payable—not to the plaintiff —but to various private persons represented by the committee who assembled these certificates and turned them over to the said commission.

That this is the extent of the interest which the said commission created by the State of Virginia has in the said certificates, a demand for the payment of which constitutes the gravamen of the bill filed in this suit, is clearly apparent from the agreement entered into between the said commission and the committee representing the holders of said certificates, and the parts of said agreement relating to this feature of the case are here copied and are as follows:

"The said Virginia commission hereby stipulate and agree by and with the advice and approval of the attorney general of Virginia, that, in their judgment, it is needful and proper, in order to protect the interests of the state and bring about and carry into effect a settlement in the premises, that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States, asking for an adjudication and settlement by that court of the matters aforesaid unsettled and undetermined between the two states, arising and growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the act of the General Assembly of Virginia of March 6, 1900, referred to in the said contract of December 14, 1904; and the said Virginia commission acting by and with the advice and approval of the attorney general of that state, do hereby undertake and agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid, as soon as the pleadings, papers and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said act of the General Assembly of Virginia and the joint resolution of the General Assembly of March 6, 1894, also referred to in said contract of December 14, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia, as to the deferred certificates placed subject to the control of the commission as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said commission, notwithstanding the institution and pendency of such suit.

"And the Virginia commission do further undertake and agree that, in accordance with the terms and conditions of the said joint resolution and Act of the General Assembly of Virginia, they will account for, pay over and deliver such amount, either in cash or securities, as may be realized from West Virginia through any settlement made by the said commission with that State, either by means of an adjudication or a recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, to the said Depositing Committee in full settlement and satisfaction of all claims under said certificates; and the said Depositing Committee agree on behalf of the depositors of said deferred certificates so placed to the control of the said commission and on behalf of those entitled to the benefit of said certifi-

cates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates, and on account of the bonds represented by and mentioned in the said certificates respectively, in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

"It is further understood and agreed that if from any cause the said commission shall fail or be unable to bring about such adjustment or settlement, or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said commission to restore to the control of the said Depositing Committee all such deferred certificates as may have been placed subject to the control and disposal of the said commission as aforesaid."

(Plaintiff's Bill, pp. 84-86.)

We have thus given in brief outlines the material facts appearing upon the face of the record of the bill and its exhibits, and which declare the true and legal status of this suit at its very threshold.

The Propositions Raised by the Demurrer.

The case as made by the bill and its exhibits presents several vital points for consideration arising upon the demurrer interposed by the defendant, which may be thus particularized:

I. Is this a controversy between two states within the meaning of section 2, art. 3 of the Constitution?

II. Does the complainant have such an interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her standing in a court of equity?

III: Have not the real owners of these certificates such a substantial interest and right of ownership therein as to make them indispensable parties, and whose presence would oust the court of jurisdiction in respect to this feature of the bill?

IV. Does the fact that the commissioners of the Sinking Fund and Literary Fund of Virginia have in their possession certain small portions of these certificates thus issued by the plaintiff to herself give her any cause of action against the defendant in respect thereto?

V. Does the claim for property transferred by the plaintiff to the defendant contained within the boundaries of the territory out of which West Virginia was erected into an independent state, cre-

ate any right of action on the part of Virginia against her for the value of this property?

VI. If this does afford the plaintiff a cause of action must it not be asserted at law, and not in a court of equity?

VII. Does the bill disclose any authority from Virginia directing a suit for the recovery of the value of property transferred by her and used by the defendant?

Relation of Virginia to the Old Debt.

In determining whether the bill and its exhibits present a controversy between two states within the meaning of section 2, article 3, of the Constitution, the relation of Virginia to her old debt will not be overlooked. Before the formation of West Virginia it must be conceded that Virginia was morally and legally bound for the whole debt which she had created by the issuance and sale of her bonds. At that time her entire territory was intact and all her resources unimpaired, in so far as they were not affected by the ravages of war, for which, of course, her creditors were not responsible.

In 1862, of her own accord, she parted with a portion of her territory, and gave her free consent to the creation of a new and independent state out of the territory by her thus surrendered. This, however, did not impair her liability upon this debt, nor any part thereof, to her creditors holding the bonds which she had issued, or in any manner lessen her obligation for their payment.

This must be conceded upon the well recognized principles of international law.

Higginbotham *v.* The Commonwealth, 25 Gratt (Va.) 627.
Taylor, Int. Pub. Law, pp. 203, 204, Sec. 166.
Halleck, Int. Law Vol. 1, p. 76.
Hall, Int. Law, Sec. 27.

Mr. Taylor in his recent and very able and clear treatment of the effect of a dismemberment of a state upon its obligations, presents the subject in two aspects: First, when a portion of its territory and population have been taken by conquest to form an integral part of another state; second, when the severed territory is erected into a new and independent state. We are interested in the latter feature of the subject, upon which this distinguished author says:

> "A narrower and more technical rule prevails when the parent state is deprived of a portion of its territory which is erected into an entirely distinct political community. The cogent reason in such case is that as a man who loses an arm or leg in battle is not thereby relieved of any part of his obligations, so a state that is so dismembered as to suffer no loss of identity remains bound as before for its entire general indebtedness. 'Such a change,' says Halleck, 'no more

affects its rights and duties than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to as well as from the state, and to its rights of property and treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.' In other words, as the old state continues its corporate life without interruption, it retains all general state property, and all general benefits resulting from treaties, with full liability for all general obligations with which the new creation taken from its side may disavow all legal connection."

The high moral obligation and legal duty on her part to meet her indebtedness still remained, with the right to treat, upon terms fair and just, with her creditors, for its adjustment and settlement. Accordingly, therefore, Virginia proposed to treat with her creditors with reference to the debt she had contracted, and submitted to them through her legislative department a proposition for its adjustment and ultimate liquidation. The terms of settlement were those which she herself proposed, and were met by her creditors in a broad spirit of liberality and compromise.

As the basis of settlement Virginia offered to pay two-thirds of her old or original debt by the issuance of new bonds by her, resting this proposition upon the consideration that one-third of her territory had passed to the new state after the debt had been contracted, proposing to issue contemporaneously with such new bonds certificates payable by West Virginia, for the other third of the debt, which Virginia did not feel inclined to pay for the reason just stated, and these certificates were accepted by the creditors without recourse upon Virginia, in payment or settlement of this one-third of her debt, thereby releasing Virginia from the payment of the one-third of her old original debt.

Thus Virginia adjusted and settled her former indebtedness contracted prior to June 20, 1863, on the basis and upon the terms fixed by herself and by negotiations to which she and her creditors alone were parties.

As a part of the consideration of this settlement with her creditors, Virginia agreed to aid them in collecting these certificates from West Virginia, amicably if she could, but by an action if necessary.

By this composition with her creditors Virginia extinguished her old debt—the one for any part of which West Virginia was, or could have been made, liable to the owners or holders thereof—and created a new debt of her own, in the creation of which West Virginia had no part or agency.

This new debt Virginia herself recognizes as her own, for which she alone is liable, and does not by this suit, or in any other manner, seek to make West Virginia liable, or for any part thereof.

This new debt, founded upon the consideration of a liability attaching to the old one, constitutes a valid and subsisting obligation

of Virginia, and her promise to aid the holders of the certificates issued by her against West Virginia is a mere collateral agreement, and does not add to or detract from the validity of the new debt.

Thus it will be perceived that Virginia has discharged her obligation to her creditors arising from the debt which she contracted before the division of her territory, and in that debt she is no longer interested pecuniarily, and that the only persons who are so interested are the owners of the certificates representing the one-third of the original debt.

The only claim which the holders of these certificates have upon Virginia, so far as these certificates are concerned, rests upon her promise to aid in their collection, which is but collateral, and can only be construed to mean that she will exert her moral influence to constrain West Virginia to recognize so much of the old debt as may be represented by the aggregate of these certificates.

The Status of West Virginia with Reference to the Old Debt of Virginia.

Initiatory to the formation of the new state, on August 20th, 1861, Virginia, through the convention which had restored the government of the State of Virginia, promulgated an ordinance to provide for the formation of a new state out of a portion of that state, in which, among other things, is the following declaration as to the debt of Virginia:

"The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of the said debt was contracted and deducting therefrom all the moneys paid into the treasury of the commonwealth from the counties included within the said new state during said period."

This is Virginia's own declaration made as aforesaid as to how West Virginia's part or share of the old debt shall be ascertained and determined. And if the same were obligatory, the means of reaching a proper conclusion on this basis have always been within the possession and exclusive control of Virginia. They are to be found in her own archives of state, which have at all times been in the custody of her own officers.

The Constitution of the new state at the time of her admission into the Union contained with reference to said debt, the following provision:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient

to pay the accruing interest and redeem the principal within thirty-four years."

The constitution containing this clause was framed and adopted subsequently to the adoption of the ordinarce aforesaid by the State of Virginia.

The ordinance and legislation of Virginia looking to and providing for the erection of a new state out of a part of her own territory, were adopted and passed without the privity or consent of her creditors.

Then upon the division of the territory of Virginia, if the obligation of West Virginia, as claimed by some, to the creditors of Virginia became a joint liability as to which the two states were bound, and it appears to have been so regarded by Virginia, as the course she has pursued with reference thereto would seem to indicate, this suit as to said debt cannot be maintained.

Because, when the creditors of Virginia accepted new bonds in payment of the old bonds and surrendered the latter for cancellation and such cancellation was effected, all liability upon the part of West Virginia ceased and determined, and the issuance of certificates by the State of Virginia, mere *ex parte* memoranda, to be paid by West Virginia, was a mere gratuity which could not operate as a modus to give vitality to any part of the old debt which Virginia had fully discharged by her own composition with her creditors.

Here was an act of one claiming to be jointly liable with another whereby that one pays in new evidences of debt two-thirds of it, with an agreement of release as to the entire liability which must by the very act itself operate as a discharge of the other debtor. This must be the effect upon the well recognized principle of the law of contracts that the discharge of one joint obligor relieves the other from liability, in the absence of a valid stipulation to the contrary to which the parties in interest are privy.

It may be contended, however, that the principle here relied on does not apply to the transactions of sovereign states in matters of public concern. Nevertheless, when governments come into courts of justice for the determination of a controversy, they submit themselves to the ordinary rules of law which govern in such cases, and the same principles which would apply to private persons are also applicable to them. When they become suitors they no longer occupy the lofty attitude of sovereigns, so as to place themselves above and beyond the ordinary standards of right and wrong, but in the very nature and condition of things, these standards must be invoked or the courts themselves could not act as judicial tribunals.

If this were not so, the court's proceedings would necessarily be discretionary and capricious, without any established rules to govern their action. This is the principle which obtains and governs in cases of this character, even though the proceedings be by suit in equity.

United States *v.* Bank of the Metropolis, 15 Pet. 377; 10 L. ed. 774.
United States *v.* Flint, 4 Sawy., 42, Fed. Cas. No. 15,121.
United States *v.* Union Nat'l Bank, 10 Ben. 408, Fed. Cas. No. 16,597.
Rhode Island *v.* Massachusetts, 12 Pet. 657, 738, 743. 9 L. ed. 1233, 1266, 1267.

This is Not a Controversy Between Two States.

As already shown, Virginia has been released from the payment of one-third of her debt contracted before the formation of West Virginia, and has arranged for the payment of the two-thirds thereof by new bonds issued by her, and that she has no substantial interest in the third thereof for which she issued her own certificates without recourse upon herself, to be paid by West Virginia, the old bonds having been surrendered and canceled.

The record discloses that she has no interest in these certificates, as they impose no obligation upon her, and leave the creditors without any right of action or demand against her upon the failure or refusal of West Virginia to assume their payment. It also appears from the record of the bill and its exhibits that upon the failure of the commission into whose hands these certificates were placed to collect these certificates, that they are to be surrendered to the committee representing the owners thereof, and in the event that suit should be brought by Virginia against West Virginia, that the owners are to defray all expenses including the fees of counsel, and that no decree can be entered in this cause that will inure to the benefit of the plaintiff.

No one can examine the bill and its exhibits in this suit without being satisfied beyond all doubt that it is in legal effect commenced and now prosecuted, so far as said certificates representing the old debt are concerned, solely by the owners thereof and for their benefit and not for the State of Virginia. No decree as to these certificates can inure to the benefit of Virginia. Her only relation to them is her assurance to their holders that she will aid them by bringing suit in reference thereto at the expense of the owners. She is the merest nominal plaintiff carrying on the suit in her own name with an immunity from all costs of any character whatsoever.

This suit is governed, so far as the demand respecting the old debt of Virginia is concerned, by the well settled principles already laid down by this Honorable Court in the following cases:

New Hampshire *v.* Louisiana, and New York *v.* Louisiana, 108 U. S. 76, 27 Law. ed. 656.
See also in this connection *Re* Hartung, 98 Wis. 140, 73 N. W. 988; People *v.* General Electric Ry. Co., 172 Ill. 129, 50 N. E. 158.

To create a controversy between two states, it seems to us that there must be an assertion of a substantial right of one state as such which is denied or repudiated by the other, and which relates to the interests of each as states, and that the determination of the issue thus raised will promote or secure some substantial right of the one or the other of these states as states.

This may be illustrated by some of the decided cases, in each of which it was held that the contention involved a controversy between states.

New Jersey *v.* New York, 5 Pet. 285, 8 L. ed. 127; Rhode Island *v.* Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Florida *v.* Georgia, 11 Howard 293, 13 Law. ed. 702; Virginia *v.* West Virginia, 11 Wall. 39, 20 L. ed. 67 were cases in equity and all involved state boundaries; Pennsylvania *v.* Wheeling Bridge Company, 9 How., 657; 13 L. ed. 294; S. C. 11 How. 528, 13 Law. ed. 799; S. C. 13 How. 518, 14 Law. ed. 249; S. C. 18 How. 429, 15 Law. ed. 436, was a case in equity involving the free and unobstructed navigation of the Ohio river which caused a special damage to the plaintiff state for which there was no adequate remedy at law.

These cases just cited present an exercise of jurisdiction in cases directly affecting the property rights and interests of a state and that over lands and their inhabitants claimed by the states themselves.

Missouri *v.* Illinois, 180 U. S. 206, 45 L. ed. 497, involved a case in which the health and comfort of the inhabitants of a state were threatened.

South Dakota *v.* North Carolina, 192 U. S. 289, 48 L. ed. 488, was a suit in which the plaintiff sought the enforcement of the payment of a debt belonging exclusively to the plaintiff and no one else had any interest therein, and the jurisdiction was sustained by a majority of the court.

In the suit now before the court what interest can Virginia claim against West Virginia in certificates that do not belong to her and in which she can assert no interest? She cannot maintain a suit to vindicate her integrity in the matter of the issuance of these certificates. This is entirely too flimsy to constitute the basis of a controversy, and besides this, the act or its motives has not been assailed or questioned by West Virginia.

The conclusion is irresistible that Virginia has no interest in this suit so far as it is designed to enforce payment of the debt represented by said certificates, that it is being prosecuted for their owners and that as to such matters there is no controversy between the two states, and that the bill as to this matter must be dismissed.

II.

THE COMPLAINANT HAS NOT SHOWN SUCH INTEREST IN THE DEFERRED CERTIFICATES AS GIVES HER ANY STANDING IN A COURT OF EQUITY.

Does the Commonwealth of Virginia have such an interest in the subject matter of litigation or in the result thereof, so far as the deferred certificates are concerned, as to give her any standing in a court of equity in relation thereto?

As we have already seen, the former owners of the old debt are the present owners of these certificates; that they were placed in the hands of a committee whose members these owners had chosen, and this committee delivered the certificates to a commission selected under a joint resolution of the General Assembly of Virginia, who were empowered to collect these certificates for the owners at the sole expense of such owners.

The right of Virginia to maintain a suit as sole plaintiff therein, must be determined by the well settled rules of equity practice as recognized and enforced by the English Court of Chancery, and as understood and applied by this Court.

Virginia has no interest in these certificates, nor can her interests be in any manner affected by a decree in relation to these certificates.

She is not a guarantor because their issuance is based upon the condition of her non-liability in any event, and as a consideration of her release from all liability upon these certificates, and the portion of the debts represented by them, she issued new bonds for her old debt, and was acquitted from all obligation as to these certficates In what way can she be interested in this suit so far as it relates to these certificates? Does her interest at most exceed that of a mere committee representing the holders thereof? Has she any connection with them except by her agreement to aid their holders in an effort to enforce their collection? Has she not constituted herself a mere medium for the institution of this suit in her own name for the use and benefit of the holders and owners of these certificates?

If she has any connection with this part of the suit it is as its mere promoter, by virtue of her promise to the holders of the certificates—an agent for them—only an instrumentality for the institution of this suit.

This is not such interest as to support a suit in equity. The

plaintiff's interest must be as substantial and certain as that of the defendant.

A person having no interest, legal or equitable, in land, beyond a mere possession, cannot maintain a bill in respect thereto.

Smith *v.* Hollenbeck, 46 Ill. 252.

Smith *v.* Brittenham, 109 Ill. 540.

> "A complainant in chancery must have an interest in the subject matter of the controversy. Unless a complainant has some interest in the property in controversy his bill cannot be maintained."
>
> Smith *v.* Hollenbeck, *supra.*

In Smith *v.* Brittenham *supra*, the court in its opinion, discusing the insufficiency or want of interest in the plaintiff to maintain the suit, says:

> "It is a well recognized rule that in equity the party having the beneficial interest in the subject matter of suit must sue in his own name for any invasion of his rights in respect thereto, although the legal title thereto may be in another. (Frye *v.* Bank of Illinois, 5 Gilm. 332; Elder *v.* Jones, 85 Ill. 384; Moore *v.* School Trustees, 19 *id.* 83.) It is also settled that no one, in the absence of statute authorizing it, can maintain a suit in chancery with respect to real estate to which he has neither the legal nor equitable title. (Bowles *v.* McAllen, 17 Ill. 30; Horace *v.* Harris, 11 *id.* 24.) If such an interest in the plaintiff is indispensable to the commencement of this suit, as will be conceded, the conclusion would seem to follow that where a party having such interest commences a suit, and before any hearing or disposition of the cause upon the merits, voluntarily transfers his interests to another, and the same is made to appear of record, as is the case here, the whole proceeding will become so defective for want of proper parties, that no valid decree can be entered in the cause until the complainant's assignee, by supplemental bill or otherwise, makes himself a party complainant to the suit—and this, indeed, is the well recognized doctrine and practice in such cases. Mason *v.* York & Cumberland R. R. Co., 52 Me. 82."
>
> "Where the wrong complained of is one in which the State has no direct interest, any more than it has in an ordinary controversy between individuals, the State is not a proper party plaintiff, and the suit should be instituted by the particular individual who will be injured."
>
> 10 Enc. Pl. & Pr. 903, 904, and the very numerous cases cited in note 1.
>
> "The rule is fundamental that no person can maintain a

suit respecting a subject matter with reference to which he has no interest, right or duty, either personal or fiduciary."
Hogg's Equity Procedure, sec. 37, p. 40, citing Baxter *v.* Baxter, 43 N. J. Eq. 82, 10 Atl. Rep. 814; Ashby *v.* Ashby, 39 La. Ann 105, 1 So. Rep. 282.

In Ashby *v.* Ashby, *supra*, the syllabus of the case is as follows:

"An action can only be brought by one having a real and actual interest which he pursues. So, where one claiming to be a judgment creditor of another seeks to annul a mortgage executed by the latter in favor of his children on the ground of fraud, and the record shows that the judgment on which the suit is founded is not in favor of the plaintiff, but in favor of her minor children for whom she was tutrix, and who had attained their majority before the action of nullity was brought, and they did not join in the action, the suit must be dismissed."
"Where a bill is filed for relief, it must be prosecuted in the name of the real party in interest."
Oakley v. Bend, 13th Edw. Ch. (N. Y.) 482.

The doctrine here cited is supported by numerous authorities, among which are the following:
Field *v.* Maghee, 5 Paige (N. Y.) 539; Rogers *v.* Traders' Ins. Co., 6 *id.* 583; Sedgwick *v.* Cleveland, 7 *id.* 267.

It cannot be contended that because the State of Virginia has constituted herself an agent or representative of the holders of the certificates mentioned in the plaintiff's bill that this gives her any right to maintain the suit in her own name.

From the opinion delivered in Oakley *v.* Bend, *supra*, we take the following:

"A person who is a mere agent to sue for and collect money under a power of attorney, can not be a party to a bill for an accounting in his own name, nor be joined as a co-plaintiff with his principal. King of Spain *v.* Machado, 4 Russ. 225, 240, recognized in Clarkson *v.* Depyester, 3 Paige, 337, as good ground of demurrer. As a general rule, if an agent institutes a suit under an authority from his principal, he must do so in the name of his principal. Lee *v.* Thomas, 2 Ves. 313. And see Calvert, Parties, 229, 232, for the authorities on the subject."

The doctrine set forth in these authorities and cases is so firmly settled that further discussion or citation would seem superfluous,

and an annoyance to, and tax upon the time and patience of the court required for their notice or examination.

III.

THE REAL OWNERS OF THE DEFERRED CERTIFICATES HAVE SUCH A SUBSTANTIAL INTEREST AND RIGHT OF OWNERSHIP THEREIN AS TO MAKE THEM INDISPENSABLE PARTIES, WHOSE PRESENCE WOULD OUST THE COURT OF ITS JURISDICTION.

The practice in this court in cases in equity is regulated by the former practice of the courts of chancery in England. And in cases of original jurisdiction it will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and follows the general rules of that court in conducting a cause to a finality.

> California *v.* Southern Pacific Railroad, 157 U. S. 229, 249, 39 L. ed. 683, 690.

The only instance wherein the court will deviate from or refuse to follow this practice is when it impairs the case by unnecessary technicalities, or defeats the purpose of justice.

> California *v.* Southern Pacific Ry. Co., *supra;* citing Florida *v.* Georgia, 58 U. S., 17 How., 478, 15 L. ed. 181.

The general rule as to parties in equity as followed in English chancery practice, was well settled at the time the jurisdiction of the Supreme Court of the United States was created, and is thus laid down by Mr. Daniell:

> "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent further litigation. For this purpose all persons materially interested in the subject ought, generally, either as plaintiffs or defendants, to be made parties to the suit, or should have served upon them a copy of the bill, or notice of the decree, to have an opportunity afforded of making themselves active parties to the cause if they should think fit."
>
> I Daniell's Ch. Pl. & Pr. (4th Am. Ed.) 190.

This rule under some circumstances, not important to be considered here, may be dispensed with when its application becomes extremely difficult or inconvenient.

Equity Rule 48.

This court, in Caldwell v. Taggart, 4 Pet. 190, 7 L. ed. 828, says:

> "The general rule is that however numerous the persons interested in the subject of the suit, they must all be made parties plaintiff or defendant, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit; to make performance of the order perfectly safe to those who have to obey it, and to prevent future litigation."

In Barney v. Baltimore, 73 U. S., 6 Wall., 280, 18 L. ed. 825, speaking with reference to the subject of parties, the court decides as follows:

> "Courts of chancery will refuse to make a decree where, by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interests of the absent parties."

In Shields v. Barrow, 58 U. S., 17 How., 130, 15 L. ed., 159, the subject of parties to suits in equity received a very thorough consideration at the hands of the court, whose opinion was delivered by Mr. Justice Curtis, and in which he classifies parties to a bill in equity as follows: Formal parties; second, necessary parties; third, indispensable parties. Those under the second class include all persons having an interest in the controversy, and who ought to be made parties in order that the court may act upon that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. If the interests of this class of parties are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, then the latter are not indispensable parties.

Those coming under the third class are those persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affect-

ing the interest, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience.

This well considered opinion, which has been followed in many subsequent cases, contains several illustrative cases of the rule here announced as to the classification of parties to a bill in equity.

One of the points in the syllabus of the last case cited states the rule as follows.

> "Persons having rights which must be affected by the decree cannot be dispensed with."

In the case before the court the holders of the deferred certificates, who own both the legal and equitable title thereto are not made parties. The only plaintiff seeking relief is the State of Virginia, who has brought the suit in her own name without any title to this part of the subject matter of the suit, and without any direct or substantial interest in the result thereof. The purpose of this suit is to settle the liability of West Virginia on these deferred certificates to the owners and holders thereof, and any decree which is rendered in this case must relate solely to their rights. The court can not enter any decree with reference to these certificates which must not necessarily affect the interests of these outstanding owners and holders, who are not before the Court either as plaintiffs or defendants.

The purpose of the bill is not only to fix a liability on the State of West Virginia for the payment of these certificates, but also for an accounting to determine the extent of this liability. So it is clearly and at once perceivable that the holders of these certificates are vitally interested as to both of these purposes of the suit.

Therefore, as these persons have no opportunity to be heard, and as the decree can not bind them, the court cannot, for that very reason, afford any relief to the nominal plaintiff, the Commonwealth are vitally interested as to both of these purposes of the suit.

Suppose it be contended that these bonds are now held by the Commission created by the State of Virginia, apparently possessing powers to act as a corporate body, to negotiate with reference to these certificates, and that this commission holds the bonds in trust, as it evidently does, for the bond holders. Would not the Commission at least, acting in its fiduciary capacity, be an indispensable party to this suit? Could the State of Virginia, divested of all interest in these certificates, sue in her own name both for this com-

mission and the beneficiaries, who are the owners of these certificates? This Commission being a creature of the legislature of Virginia, endowed with corporate capacity to act in furtherance of the objects of its creation, is evidently interested in carrying into effect the steps which it has taken to secure the payment of these evidences of indebtedness.

But defect of parties may ordinarily be remedied by an amendment of the bill in such a manner as to cure this defect, and thus avoid the effect of a demurrer for want of parties. This is the general or ordinary rule—the one usually observed by the courts. Indeed, a court ought not to dismiss a bill and deny relief where the only obstacle to the granting of relief is the want of essential parties, when the bill may be relieved from this objection by amendment.

This case, however, constitutes an exception to this rule. It must be clearly apparent that the relationship of the owners or holders of the certificates, to the suit, if brought into the case, must be that of plaintiffs; and as they are numerous, a few could join, suing on behalf of themselves, and all others similarily situated, and thus avoid the inconvenience of large numbers appearing on the record as plaintiffs in the suit. They would be the real plaintiffs, with the State of Virginia as a mere nominal party, thus creating a suit by individuals against a state of the Union, which is prohibited by the Constitution.

If an amendment were thus permitted so as to bring the Commission as the Trustee into this case as a party plaintiff, or this Commission together with the owners as co-plaintiffs with the State of Virginia, there would be presented a case in which the real parties in interest as individuals are the plaintiffs, in which a state with no interest and as a mere nominal party would be joined, thus allowing an individual to do by indirection associated with the state as a nominal party what he would be prohibited from doing in his own name. An evasion of this sort will not be permitted by the court, and the bill in this regard is not amendable, and the court on this consideration alone has no jurisdiction of that part of the bill seeking to establish the liability of West Virginia on these deferred certficates, and the extent of such liability.

If, however, the State of Virginia should ask to amend her bill by making the Commission as Trustee and holder of these certificates a party defendant, in order to give these owners and holders representation in the suit, if this could be done in the absence of

the real parties in interest, then the court would have no jurisdiction under the principles laid down by this court in numerous cases which are cited and reviewed in the opinion announced in California *v.* Southern Pacific Co., 157 U. S. 229, 39 L. ed. 683. So, we perceive that as to this feature of the bill now under consideration, the court has no jurisdiction in any aspect of the case, nor can any amendment be made so as to give this court jurisdiction.

IV.

THE FACT THAT THE COMMISSIONERS OF THE SINKING FUND AND LITERARY FUND OF VIRGINIA HAVE IN THEIR POSSESSION COMPARATIVELY SMALL PORTIONS OF THE SAID CERTIFICATES ISSUED BY THE PLAINTIFF DOES NOT GIVE THE PLAINTIFF ANY CAUSE OF ACTION AGAINST THE DEFENDANT.

The commissioners of these two funds are mere state agencies or instrumentalities created by the Commonwealth of Virginia, to care for and preserve certain of her own financial resources, available for specific purposes, and which belong exclusively to Virginia. A few of the old bonds of Virginia issued prior to 1861 were by her converted into immediately available money by being deposited with these commissioners, and were therefore never sold and the title transferred from her so as to create a liability against the State herself, and hence at no time was there ever any right of action or liability on account of these old bonds so deposited with the said commissioners which could properly be asserted against the old state. In other words, these few old bonds deposited with these commissioners did not create any debt against the State of Virginia. At no time or under any circumstances could these bonds have been made or become a legitimate subject matter of controversy or suit against the Commonwealth of Virginia. To make them such, would present the grotesque spectacle of a sovereign state suing herself, for an accounting and payment to herself of her own funds, already under her absolute control.

Again there can be no liability in favor of the State of Virginia against the State of West Virginia on these bonds so held. The moneys in the sinking fund which purchased these bonds previous to the first day of January, 1861, were raised by the revenues of the entire State before the division, and they were therefore the property of

such entire State, and being in the ownership of the State itself, the debtor, they were a dead asset both as to that portion of the State which passed into the new State and the State of Virginia as she remained, and Virginia claiming to be such owner has no more right to institute and prosecute a suit thereon against West Virginia than would West Virginia if a similar bond had fallen into her possession. If there is any liability in respect to said bonds it is a liability of the State of Virginia to the State of West Virginia for a portion thereof.

Then if this were the status of Virginia as to the old bonds held by the commissioners of her Sinking Fund and Literary Fund, prior to 1861, and which remained unchanged at the time of the formation of the State of West Virginia, could their refunding and the issuance of the deferred certificates as to the one-third of them alter this status with reference to her right of suit thereon, or any part of them? The very propounding of the question must evoke a negative answer.

The idea of debt necessarily implies an obligation payable by the debtor to some third party—a creditor existing independently of the debtor, and over whom, as to the obligation asserted, the debtor can have no control, and in the use or disposition of which the debtor has no right or interest whatever.

How then—upon what principle—upon what ground or reason—can Virginia claim that the old bonds placed by her with her Commisioners of the Sinking and Literary Funds, were or are now any part of her *ante bellum debt?* We are wholly unable to perceive any. In fact, there is none.

If it be contended that the commissioners of the Sinking and Literary Funds are distinct entities from the State, persons clothed with an existence distinct and separate from the Commonwealth, with the right to assert a liability against Virginia on account of these old bonds acquired by them prior to the erection of the territory contained within the boundaries of West Virginia into a state, then and in that event this court cannot entertain jurisdiction of the suit, because these commissioners are necessary parties thereto, and the commission having been created and existing under and by virtue of the laws of Virginia, must be a citizen of Virginia, and if a distinct entity, it must necessarily be a corporation having its domicile in Virginia, where it was created.

Thus, we perceive that in any aspect of the case, the court has no jurisdiction of this suit so far as the certificates belonging to these

commissioners are concerned. In fact, this feature itself of this cause constitutes no ground of controversy between the parties to the bill.

V.

THE CLAIM FOR PROPERTY TRANSFERRED BY THE PLAINTIFF TO THE DEFENDANT CONTAINED WITHIN THE BOUNDARIES OF THE TERRITORY OUT OF WHICH WEST VIRGINIA WAS ERECTED INTO AN INDEPENDENT STATE CREATES NO RIGHT OF ACTION ON THE PART OF VIRGINIA FOR THE VALUE OF THIS PROPERTY.

In February, 1863, the General Assembly of the State of Virginia passed the following Act, declaring:

> "That all property, real, personal and mixed, owned by or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the President and Directors of the Literary Fund, or the Board of Public Works thereof, or any person or persons for the use of this state, to the extent of the interest and estate of this State therein and shall also include the interest of this state, or of the president and directors, or of the said board of public works, in any parent bank or branch doing business within the said boundaries and all stocks of any other company or corporation, the principal office and place of business whereof is located within the said boundaries, standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any other person or persons for the use of this state.
>
> "That if the apropriations and transfers of property, stocks and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state provided that no such property, stocks and credits shall have been obtained since the organization of the state government."

The bill of complaint relating to this property makes the following allegation:

> "Your Oratrix is informed, believes, and so charges that the property which was by the operation of this act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted, in the aggregate to several millions of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury, from the sale thereof, about six hundred thousand dollars, and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861."

It will be observed that all the property mentioned in this act was located within the territory comprised within the boundaries of West Virginia, and was designed for the use of the latter in the formation of a state government and in promoting the purposes of its establishment. The parent state parted with certain of her own territory and resources to create a new state within her own boundaries and to exercise over a part of her own people the powers of government, to be thereafter created by them, and to assume all the burdens and responsibilities incident to a state, and to erect for themselves all public institutions necessary to conduct the operations of the government of the new state, thus proposed to be created. Virginia in this act proposed new duties and obligations for a part of her own citizens, and at the same time declared in her own halls of legislation what should be done by the new state which then had no existence, but which she, by her own act and that of the general government, designed to bring into existence, by parting with the very property which she intended should be used by the new government and a part of the people of Virginia would share in the benefits and advantages thus afforded.

Now can Virginia by her own act create an obligation to be assumed by a state not then in existence and which she by her own acts aids in creating? Can she, in this act, declare that a creature not then in being, shall account to her for property which she herself really bestows upon a part of her own citizens, and who, in the true sense of the term, are the real owners thereof, and when she has thus freely bestowed her own bounty upon her own citizens,

make a demand thereafter upon the new government when it has been established, and that too when this new government is to extend to a large part of the citizens of Virginia full protection in the enjoyment of all their absolute and social rights? If so, upon what legal or moral principles can such a claim be predicated? The parent thus transfers all the burdens of her own government to a new state, created in her own boundaries, divesting herself of all responsibility for the conduct and safety of a large part of her former population and impose upon another sovereignty these very obligations which she herself had borne, and that, too, by her own act, and now seeks indemnity and compensation from this sovereignty for performing a duty which she herself has been relieved by her own act and concession.

By this act Virginia simply declared to a part of her own citizens that they could organize themselves into a government in a part of her own territory and thus become an independent state. These citizens of Virginia were the promotors and she co-operated with them to the end that a new state might be formed.

It will not be overloked that the territory of Virginia was divided in 1863 while she retained her own identity and institutions, and out of the territory which she surrendered, and within it, a new state arose.

This is not the case wherein one state is treating with another, whereby one state cedes a part of her territory to be added to the domain of the latter. In such case she could stipulate the terms of the cession, which would constitute a compact between the two states enforceable as a binding obligation. Their attitude towards each other would be that of two independent and competent contracting parties.

Here the attitude of Virginia is very different. She, on the one side, proposes that a new state may be organized if the National Government will assent to its admisison into the Union. She cannot propose conditions in advance of the creation of the new state, and enforce them against it as the price of property within its own territorial limits. This would constitute a mere *nudum pactum*. It would be without consideration because whatever is within the boundaries of a new state belongs to it, both upon reason and authority.

> "The new State on its part carries with it only local obligations, and whether contracted for local objects or secured by a lien on local revenues, and such local duties as arise out of

> agreements to maintain the channel of a river or to levy no more than certain tolls along its course. As a compensation for such burdens the new state is entitled to property within it of a local character, or to such, not within it, as belongs to state institutions localized there, and to the privileges arising from treaties specially contracted for the benefit of its territory, such for instance as contain demarcations of its boundaries, and such as secure to its inhabitants, or a part of them, the right to navigate streams running through other countries from its frontiers." Taylor, International Public Law, p. 204, citing Hall's Treaties on International Law (4th Ed., Oxford.) Sec. 27.

So if the new state is entitled to property within it of a local character, or to such not within it, as belongs to state institutions localized there, upon what principle can Virginia base a claim for the value of property within the territory of the new state of West Virginia? She cannot found it upon the doctrine of public international law. Neither can she found it upon an act of her own legislature, nor can she do so upon any act or agreement upon the part of West Virginia, for West Virginia did nothing, nor has she done anything to authorize it, as the new state was not a party to the agreement. Virginia has no claim and can have no claim for property, real or personal, localized or pertaining to or belonging to institutions localized in the territory out of which West Virginia was formed. She cannot base this claim upon treaty or compact, because at the time she declared by her own act of assembly that this property was to be taken by the new state when it came into being, there was no representative to act on behalf of the proposed new state so as to accept a cession of property upon terms proposed by the owner. This act of assembly could not be construed as a treaty between the state of Virginia and the proposed new state, as this was a mere *ex parte* act emanating from Virginia alone, and a treaty in its humblest and narrowest aspect, "is a mere agreement between states for the settlement of their current interests or controversies, made either with a tacit admision of the existence of the common law of nations, or with the express stipulation that some principle of that law shall be changed or modified in a particular case." Taylor, International Law, p. 93.

Hence the making of a treaty necessarily presupposes and assumes the presence and participation in its negotiations of two sovereign powers capable of acting. Another reason why it could not be referable to treaty is that one state cannot enter into a treaty

with another state without the consent of Congress. In February, 1863, when this act of assembly was passed, upon which Virginia rests her claim as presented by this feature of the bill, West Virginia had not been fully created and organized. Now, then, shall Virginia passing the title of property by her own act and imposing terms both unfair and unfounded upon the principles of public law, assert a claim to the value of this property when conditions have changed and the new sovereignty finds herself in possession of this property which is within her own territory, and actually necessary for the legitimate purposes of the new government? But it may be said or contended that if West Virginia is liable for her equitable portion of Virginia's public debt, is she not also liable for the public property of Virginia localized in the territory of the new state, or belonging to any of the public institutions localized there? This admits of plain and satisfactory answer in the negative.

West Virginia's attitude as to the public debt of Virginia was provided for by the ordinance of Virginia and the constitution of West Virginia, and in the absence of such provision, it can scarcely be contended that the State of Virginia could assert any liability against the State of West Virginia as to any part of said debt.

Furthermore, there is nothing in the record to show that Virginia, either by her Act of Assembly or by any act on the part of her governor, has authorized any demand upon the state of West Virginia for compensation for property situated in the territory now comprising the State of West Virginia.

The bill sets up a further claim for property predicated upon the Act of the General Assembly of Virginia passed on the 4th day of February, 1863, and which, according to the bill, is in the following language:

> "1. That the sum of One Hundred and Fifty Thousand Dollars be and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the United States.
>
> "2. That there shall be, and hereby is, appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated that may come into the treasury, up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United

> States, it shall be the duty of the auditor of the State to make a statement of all the moneys that up to that time have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the poperty of this state."

After reciting this act the bill avers:

> "And this last named sum of One Hundred and Fifty Thousand Dollars, together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid."

The same reasons and principles apply to this item demanded by Virginia from West Virginia, because of personal property located within the territory comprised within the State of West Virginia, that is applicable to the demand of a similar character made in the bill by reason of the Act already quoted passed by the General Assembly of Virginia on February 3, 1863.

It does seem to us that this claim of Virginia, which she rests upon the two acts passed by the General Assembly of February third and fourth respectively, in the year 1863, is not only without foundation upon any principles of law or equity, but is most unjust and unreasonable.

It is quite apparent that Virginia demands that West Virginia shall pay one-third of the old debt of Virginia upon the sole ground that she parted with one-third of her territory, and therefore, on that ground alone, West Virginia should be made to bear that portion of her *ante bellum* debt to the holders thereof, while Virginia should meet and discharge the other two-thirds of this obligation.

Has it occurred to the authorities of Virginia that when she parted voluntarily with one-third of her territory, she at the same time retained all of her institutions, or nearly so, intact, with the means in her own control of continuing the operations of her state government, while the territory she parted with had to be erected into a state government, all the institutions necessary to its operation to be constructed, and great expense incurred in order to bring the territory into the status of an independent state and put her machinery of government into operation? In this aspect of the case, Virginia cuts off about one-third of her domain, containing a large

percentage of her citizenship, sets them adrift without the means of government, and now demands not only that the new government erected out of this territory shall bear the burden of one-third of her public debt, but also pay to her compensation for "all lands, buildings, roads, and other internal improvements, or part thereof, situated within said boundaries, and vested in this State (Virginia), or in th president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this State (Virginia), to the extent of the interest and estate of this State (Virginia) therein," and all other property within the boundaries forming said new state, as well as all money properly belonging to the institutions of the state of Virginia localized in these boundaries.

On the other hand Virginia refuses to recognize any liability for the one-third of this debt on the very arbitrary basis assumed by her for its adjustment, still retains intact all property and institutions of every kind and character within her own domains, demanding compensation also for every article of property of any value with which she parted, and that too by her own act of legislation. She cannot in equity and good conscience make this two-fold demand. She must forego her claim upon West Virginia for the liquidation of any part of her public debt, or she must concede to West Virginia the absolute ownership in all the property localized within her boundaries. But she cannot now deal with the one-third of her old debt, because she is practically released from any liability thereon by reason of the acts and course pursued by her with the creditors themselves. The only parties that are now asserting any demand against West Virginia as to the one-third of the old debt of Virginia are the creditors themselves—the true and legal owners and holders thereof. The right to look to West Virginia for the payment of this one-third, if the right exists anywhere, necessarily resides in the creditors, and not in the State of Virginia. She, therefore, has left the demand as to one-third of the debt against West Virginia, so far as she herself is concerned, in the hands of the creditors, and no act of hers can now affect their substantial rights. She cannot, therefore, do anything at this time to release West Virginia from any part of the demand which the creditors are asserting against her through the medium of this suit nominally instituted by Virginia.

She is therefore referred to the only alternative in *fro conscientiae aut legis*, and that is, a relinquishment of her own demand for

compensation for property left by her within the boundaries of the territory out of which the state of West Virginia was created. She can only, therefore, stand upon that feature of her bill which relates to her old public debt, and as to this feature of the case, as we have already shown, she is without standing in a court of equity.

VI.

THE PLAINTIFF CANNOT ASSERT THE CLAIM WHICH SHE SETS FORTH IN HER BILL IN A COURT OF EQUITY.

In considering the proposition that the plaintiff cannot assert the demand contained in the bill in a court of equity, we must keep in mind the relation which Virginia bears to that portion of her *ante bellum* public debt which is sought to be made the subject of controversy in this suit. She disclaims at this time all liability to her creditors on account of the so-called equitable proportion thereof which she insists shall be borne by the state of West Virginia, at the same time averring that she has adjusted and settled two-thirds of the original debt by agreement and contract between herself and its owners.

It is patent upon the face of the bill and its exhibits, as hereinbefore stated, that the prosecution of this suit by Virginia is solely in the interests of the owners and holders of the deferred certificates issued by Virginia herself without recourse upon her, and set apart as a liability of West Virginia to the holders of the old obligations, which have been surrendered to the state of Virginia and by her cancelled in accordance with her own acts of legislation.

She therefore cannot come into a court of equity to assert a right of contribution against West Virginia. There are two clear and cogent reasons for this:

(*a*) First, the decree which she seeks to obtain cannot inure to her benefit, but only to that of the holders of the deferred certificates.

(*b*) Second, she must have paid everything for which she and the new state were jointly liable so as to relieve the new state from all liability before she can seek contribution from her joint obligor.

That this is the principle upon which rests the equitable right of contribution is the recognized and well settled doctrine of the courts.

Springer *v.* Foster, 21 Ind. App. 15, 60 N. E. 720.
Kirkpatrick *v.* Murphy, 3 N. J. Law 506.
Grove *v.* O'Brien, 1 Md. 438.
Rooker *v.* Benson, 83 Ind. 250, 256.
Zook *v.* Clemmer, 44 Ind. 15.
Pegram *v.* Riley, 88 Ala. 399, 6 South. 753.
Screven *v.* Joiner, 1 Hill Ch. 252, 26 Am. Dec. 199.

The rule is universal that the party seeking contribution must have paid more than his share in order to maintain a suit for contribution.

9 Cyc. 699; 3 Am. & Eng. Dec. in Eq. 163.

The demand made by Virginia which she claims arises out of the acts of her General Assembly, passed February 3rd and 4th, respectively, in the year 1863, whereby she transferred certain real and personal property belonging to her to be used by the new state when created and organized, if it has any validity, which is not conceded here, is purely a legal demand and one which cannot be asserted under any circumstances in a court of equity.

If it be an equitable demand, upon what principle or doctrine of equity does it rest? It is not secured by any lien; it is not in the nature of a trust; it rests upon no equities to be asserted in order to enter a decree or to make the claim available. It is simply a money demand for the value of property which the plaintiff claims was used and appropriated by the defendant for which payment should be made.

This court has declared in Scott *v.* Neely, 140 U. S. 106, 117, 35 L. ed. 358, that,

> "All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions and can be brought in the federal courts only on their law side."

This principle is based upon the seventh amendment to the Constitution of the United States, which declares that,

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In the federal courts this right cannot be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in a legal action may be preserved intact.

Scott *v.* Neely, *supra,* in the opinion of the court.

Pursuing this provision of the organic law of the United States, the sixteenth section of the judiciary act of 1789, enacted that such suits "shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law;" and this prohibition is carried into the revised statutes of the United States.

Section 723.

This provision of the revised statutes "is simply declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any rights violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity."

Scott *v.* Neely, *supra,* citing Hipp *v.* Babin, 60 U. S. 19 How., 271, 278, 15 L. ed. 633, 635; Lewis *v.* Cox, 90 U. S. 466, 470, 23 L. ed. 70, 71; Killian *v.* Ebinghaus, 110 U. S. 568, 573, 28 L. ed. 246, 248; Buzard *v.* Houston, 119 U. S. 347, 351, 30 L. ed. 451, 453.

As already stated, the demand asserted by Virginia for money and property localized within the boundaries of West Virginia is simply for a debt predicated upon the transfer of property by Virginia and appropriated by West Virginia after her creation and organization as a state.

The demand made by the bill in this respect is for the money mentioned in the Act of February 4th, 1863, and the value of the property designated in the Act of February 3rd of the same year.

On the common law side of the court this demand may be made the subject of an action of debt, or even of an action of assumpsit

on the implied promise, if any legal liability exists, which is not here conceded, on the part of West Virginia to repay Virginia the money which she used and to compensate her for the property appropriated and used, the amount of which would depend upon its value.

Therefore, the demand in the case now before the court is the alleged debt due the complainant for this property which in no respect differs from any debt upon contract; it is the subject of legal action only in which the defendant is entitled to a jury trial in this court.

But it may be contended that there is no precedent for the trial of an action at law in this court, in which a jury may be empaneled as in ordinary trials in actions at law instituted in the Federal Circuit Court. It may also be contended that this is an exceptional case to be tried in a court exercising exceptional original jurisdiction, and that therefore the ordinary distinction between law and equity ought not to be observed and followed. If there were no precedent for this, there is no assignable reason why such a precedent should not now be made.

But this court has already declared that it will not entertain a suit in equity brought by a state where an adequate remedy at law exists.

In Georgia *v.* Brailsford, the fourth case entered upon "the original docket" of the Supreme Court, a definition was first given of the original jurisdiction of this court. During the pendency in the circuit court OF the district FOR Georgia between Brailsford and others and Spradling, to which the State of Georgia was not allowed to be made a party, this state, in February, 1792, filed its bill in equity in this court seeking the aid of its original jurisdiction for an injunction, in behalf of the state, to stay the payment to others of a certain debt in controversy in the said circuit court, which the State of Georgia claimed had been vested in her by the Act of Confiscation passed May 4, 1782.

The judges of the Supreme Court were divided in their opinion on the question of granting an injunction upon the ground that Georgia had a complete and adequate remedy at law.

Therefore, in 1793, a motion was made to dissolve the injunction and dismiss the bill, and upon this motion the following order was indicated by the chief justice: "The bill, however, was founded in the highest equity; and the ground of equity for granting the injunction continues the same, that the money ought to be kept for

the party to whom it belongs. We shall therefore continue the injunction until the next term, when, however, if Georgia has not instituted her action at common law it will be dissolved."

Acting upon this statement of the court Georgia brought an action on the common law side of the original jurisdiction, perfecting her pleadings therein during February, 1794, a jury was empaneled for the trial of the case, and the court charged the jury in effect that the act of the state of Georgia did not vest the title to the debt in the state at the time of its passage, and that by the terms of the act the debt was not confiscated but only sequestered, and the right of the obligees to recover it revived on the treaty of peace.

The record then recites that "the jury retired for a few minutes, and, on their return to the bar, by their foreman, Reynold Keen, say they find a verdict for the defendant."

Taylor, Jurisdiction and Procedure of the United State Supreme Court, pp. 52, 53.

Mr. Taylor, in his very estimable work just cited, considering the matter now under discussion, says:

> "No more emphatic assertion could have been made of the immemorial distinction between law and equity, or of the fact that the equity side of the original jurisdiction cannot be invoked when there is a plain and adequate remedy at law."
> *Idem*, 53.

This same distinguished author, quoting from Carson's History of the Supreme Court, page 169, note 7, further says:

> "It has been asserted that this is the only instance of trial by jury in the Supreme Court. This is an error. The minutes of the court discloses that in the case of Oswald *v.* New York, a jury was sworn and witnesses called, and a verdict found for the plaintiff of $5,315.06. This was in February, 1795. Two years and a half later a writ of enquiry of damages in the case of Catlin *v.* South Carolina was executed at the bar of the Supreme Court, and a verdict was given for plaintiff for $55,002.84. Although judgments were entered there is no record of any steps to enforce them."

At the time of the formation of the Constitution of the United States the distinctions existing between law and equity were well defined, and these distinctions were familiar to the framers of this instrument, and they considered it a wise policy to carry them into

the federal tribunals, and they have ever since been observed and enforced.

Therefore, Virginia's claim for a judgment against West Virginia for money and property located within the boundaries of the latter must be asserted at law.

It may be contended, however, that equity does have jurisdiction of that part of the bill which relates to the public debt of Virginia created prior to the formation of West Virginia, and that the court having jurisdiction of this feature of the case on equitable ground, which however is not conceded by West Virginia for the reasons hereinbefore stated, and though the other part of the demand may be legal in its nature, the court will entertain jurisdiction of the entire bill and grant full relief if the bill can be sustained upon any equitable ground whatsoever.

Be this as it may in some of the state courts, no such rule is observed in the federal courts.

It has long been a settled doctrine of the federal courts that legal and equitable claims cannot be blended together in the same suit.

In Scott *v.* Armstrong, 146 U. S. 499, 36 L. ed. 1059, the court, speaking through Mr. Chief Justice Fuller, in the course of its opinion says:

> "Section 914 of the Revised Statutes, in providing that the practice, pleadings and forms, and modes of proceeding in civil causes in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity as, under the Constitution, matter of substance, as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted."

In support of this doctrine thus so clearly announced, the learned Chief Justice cites a number of decisions of this court, together with some of the decisions of the circuit courts.

The same principle is announced in Scott *v.* Neely, 140 U. S. 106, 35 L. ed. 358, and from this case we here quote points five and six of the syllabus as follows:

> "5. Remedies in federal courts at law or in equity, are not

according to the practice of State courts, but according to the principles of the common law and equity.

"6. A federal court has no jurisdiction of a suit in equity in which a claim, only cognizable at law, is united with a claim for equitable relief."

These principles have been fully adhered to in all of the federal courts, and are always applied in strict conformity to the well marked distinctions here laid down.

Now what is the status of the case at bar from any standpoint of its consideration? If it be conceded that the bill states a claim in equity relating to the *ante bellum* debt of Virginia, it cannot admit of argument that the claim for compensation for property used by West Virginia within the territory constituting her own boundaries formerly belonged to Virginia, is a pure legal demand, which has been united in the bill, and therefore the court will not entertain jurisdiction in this suit.

But we earnestly insist, upon reason and authority, that the plaintiff has no standing, even in a court of equity, with reference to that part of the bill relating to her public debt created prior to the formation of West Virginia; that as to this feature of the cause there is no ground for the assertion of any claim by the plaintiff against the defendant either at law or in equity; that this part of the bill is without merit, and that upon no consideration can this part of the plaintiff's claim be entertained by this court. This then leaves the naked legal claim of the plaintiff undisposed of, and the court being without jurisdiction in equity will not hear the cause as to this feature of the bill. The entire bill is without equity, and the demurrer interposed by the defendant ought to be sustained.

VII.

THIS COURT HAS NO JURISDICTION TO SETTLE OR DETERMINE THE PRINCIPLE UPON WHICH WEST VIRGINIA SHALL BE MADE LIABLE FOR ANY PORTION OF THE OLD DEBT OF VIRGINIA, BECAUSE THIS WAS MATTER OF CONTRACT BETWEEN VIRGINIA AND WEST VIRGINIA UPON THE ADMISSION OF THE LATTER INTO THE UNION.

The constitution of the new state, as prepared and formulated, looking to its admission into the union, contained the following provision as to the old debt of Virginia:

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

On May 13th, 1862, the Legislature of Virginia passed an act entitled "An Act giving the consent of the Legislature of Virginia to the formation and erection of a new state within the jurisdiction of this state."

The first clause of said act is as follows:

"*Be it enacted by the General Assembly*, That the consent of the Legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia to include the counties of Hancock, Brooke, * * * according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861."

The third clause of said Act is as follows:

"*Be it further enacted* that this Act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said Constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

It was thus provided by said Constitution that the Legislature should ascertain the same as soon as it was practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years; that is, it provided for the ascertainment of such equitable proportion by the Legislature of the State of West Virginia independently of the State of Virginia, and further made provision as to how the State of West Virginia should pay the same, and having provided that the Legislature of West Virginia itself should ascertain such equitable proportion, and Virginia having consented that it should ascertain such portion, it is respectfully submitted that

neither Virginia nor any court can intervene and perform this legislative duty.

When West Virginia framed her constitution and inserted in it the provision concerning the public debt of Virginia created prior to 1861, and the State of Virginia through her Legislature accepted the Constitution of West Virginia as the basis of her consent, this created a compact between the two States and was absolutely binding both upon Virginia and West Virginia.

It is matter of history that the vote on the adoption of the Constitution of the new State was held on the first Thursday in April, 1862; that this vote was taken and the Constitution ratified by the people; that the act of the Virginia Legislature was passed on the 13th of May, 1862, shortly after the vote on the adoption of the said Constitution was taken. This act was directed to be sent to the senators and representatives of Virginia in Congress, with instructions to obtain the consent of congress to the admission of the State of West Virginia into the Union. Accordingly on the 31st day of December, 1862, Congress acted on the matter, reciting the proceeding of the convention of West Virginia, and that of Virginia, and the act of the Legislature of the State of Virginia requesting that the new State should be admitted into the Union, and it then passed the act for the admission of said State.

These matters are fully recited in the opinion of this court delivered in the case of the Commonwealth of Virginia against the State of West Virginia, decided in 1870, and reported in 11 Wall. 39-65.

The action of the proposed new state in adopting her constitution by popular vote, the consent of Virginia through her Legislature given to the formation of the new State composed of the counties recited in the act giving her consent, and the deliberate consent of Congress, as required by the Constitution, consenting to the formation of the new State and admitting her into the Union, constitute a compact between Virginia and West Virginia, the terms of which, with reference to the said debt, form a part of this compact and are inviolable under the Constitution of the United States.

Biddle *v.* Green, 5 Wheat. [?] 5 Law. Ed. 547.

By this compact between Virginia and West Virginia, the former State referred to the Legislature of the latter the matter of ascertaining "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and therefore this "proportion" cannot be otherwise ascertained or de-

termined than by the consent of the State of West Virginia; nor can its liquidation be otherwise provided for than by a sinking fund sufficient in amount to pay the accruing interest and redeem the principal of whatever sum may thus be ascertained as the equitable proportion that West Virginia agreed to assume. Virginia referred this matter absolutely to the judgment of the Legislature of West Virginia and tacitly agreed to abide by the action of this legislative body.

This stipulation or compact between Virginia and West Virginia, with reference to the public debt of the former, is a valid and binding contract, and Virginia can do nothing, either by legislation or otherwise, to impair this obligation. West Virginia has the undoubted moral and legal right to stand upon its terms; and if in the exercise of its judgment exercised upon a basis just and equitable, it should be ascertained by the Legislature of West Virginia that the State owes nothing to the bondholders of the old debt of Virginia, then there is no obligation whatever subsisting which can be enforced by the holders of any part of the old debt of Virginia, and especially has Virginia herself no cause of action against this State.

VIII.

THE EFFECT OF THE COMPACT BETWEEN VIRGINIA AND WEST VIRGINIA ARISING FROM THE ADMISSION OF THE LATTER INTO THE UNION AS A STATE UPON THE CLAIM OF VIRGINIA TO PROPERTY LOCALIZED OR PERTAINING TO INSTITUTIONS LOCALIZED WITHIN THE BOUNDARIES OF WEST VIRGINIA.

We have already presented to the court our considerations relating to this feature of the case upon grounds independently of that which is here presented, and have shown that Virginia cannot sustain this part of her claim in this suit. It seems to us, however, that there is a further and conclusive reason why this part of her demand is without foundation.

In the initiatory convention held by Virginia on the 20th of August, 1861, having as one of its objects the consideration of the matter of the formation of a new State out of a part of the territory within her then existing boundaries, the representatives in that convention did not consider any condition touching the formation of a new State other than the one that the new state should

take upon itself the payment of "a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," and this was made the ultimate condition as expressed in the Constitution of West Virginia ratified by popular vote in April, 1862. This condition was, with some modification in the language employed to express it, inserted in the Constitution which West Virginia adopted. And Virginia, in May, 1862, signified her consent through her Legislature that the new state should be formed with the constitution which she had theretofore in April, 1862, adopted as her organic law, and with no other or additional burdens or liabilities touching the new state soon to be brought into existence, and needed only therefor the consent of Congress which was given in December, 1862.

When Virginia had given her consent properly expressed, as was done in this case, she could not revoke it, and the only other body whose action was essential to the creation of a new state that could impose other or further conditions touching her admission into the Union, was the Congress of the United States. Congress did give her consent in December, 1862, and it only remained for West Virginia to provide against slavery within her boundaries, and when this measure was adopted in the manner provided by the act of admission, West Virginia then became an independent and sovereign State of the Union.

After Virginia gave her consent to the formation of West Virginia in May, 1862, and the act of Congress was passed in December of the same year, providing for her admission as a state, all property localized in West Virginia, or belonging or appertaining to institutions localized there, passed to and became absolutely the property of West Virginia.

Therefore the acts of the Legislature of Virginia subsequently passed on the 3rd and 4th days of February, 1863, respectively, seeking to create a liability against West Virginia by an *ex parte* act, are without any force or effect to create any debt against West Virginia because of the matters in any of them to which the acts respectively relate. All of the property formerly belonging to Virginia located within the boundaries of West Virginia became and constituted a part of her public domain, and over which her territorial sovereignty extended as fully and efficiently as if no part of this property had ever belonged to the old state.

This necessarily results from the relation of the states to each other and to the general government. If it were otherwise and the

property and sovereign interests belonging to West Virginia, after her admission as a state into the Union, could be made the subject of disposal through a legislative act of Virginia efficient for the purpose for which such act was passed, then it would be within the sole power of Virginia to annihilate, by her own acts, all the instrumentalities and means necessary to uphold the integrity of West Virginia as a state. It would defeat her own avowed purpose as well as that of the national government.

Furthermore, if force and effect be given to these acts of legislation passed by the General Assembly of Virginia in February, 1863, it would necessarily impair the obligation of a contract existing between Virginia and West Virginia growing out of the terms of admission of the latter as a State into the Union. Because the only liability which she in any wise agreed to assume, and thereby did assume, was an "equitable proportion" of the public debt of Virginia.

It is now respectfully submitted that the State of Virginia has no claim against West Virginia with reference to her public debt, nor any valid demand against her for property localized within the boundaries of West Virginia; that it clearly appears upon the face of the bill that it is without equities to support it; and therefore the demurrer filed by the State of West Virginia ought to be sustained, and the plaintiff's bill dismissed.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

Brief for Defendant on Demurrer.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL, NO. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF ON DEMURRER.

The bill in this case sets up at least two separate and distinct causes of action, one in behalf of Virginia in her own right to have an accounting with the State of West Virginia for the value of certain property and money alleged to have been transferred to and received by the defendant State under two acts passed by the legislature of Virginia on the 3d of February, 1863, and the 4th of February,1863; and the other in the name of Virginia as trustee, suing for the use and benefit of the owners of certain certificates set out and described in the bill and exhibits.

The first act under which it is alleged property was transferred provided as follows:

> "That all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads,

and other internal improvements or parts thereof situated within said boundaries, and vested in this State, or in the president and directors of the Literary Fund, or the board of public works thereof, or in any person or persons for the use of this State, to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State."

And by the fifth section it was enacted:

"That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government."

It is then charged in the bill that the property which was transferred to the State of West Virginia under this act was received and enjoyed by that State, and consisted of a number of items the value of which amounted in the aggregate to "several millions of dollars," the bank stocks alone having realized to the State about "six hundred thousand dollars."

(R., pp. 4, 5.)

The second act is as follows:

"1. That the sum of one hundred and fifty thousand dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

"2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: *Provided, however,* That when the said State of West Virginia shall become one

of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State."

(R., pp. 5, 6.)

It is alleged that the sum of one hundred and fifty thousand dollars, "together with other sums belonging to the State of Virginia," were received or collected by the State of West Virginia after its formation.

Again it is alleged that:

"The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia."

(R., p. 10.)

It is alleged in the bill that on the 20th day of August, 1861, the Commonwealth of Virginia, in convention assembled, at the city of Wheeling, adopted an ordinance "to provide for the formation of a new State out of the portion of the territory of this State," and that the ninth section of the ordinance was as follows:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State Government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

(R., p. 4.)

It is then alleged that the new State was admitted into the Union on the 20th day of June, 1863, under a constitution which contained the folowing provisions:

> "5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."
>
> "7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank."
>
> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."
>
> (R., p. 6.)

It is shown by the bill that the State of Virginia has settled with the holders of the old public debt by issuing new bonds for two-thirds of the principal and interest, which was decided by the State herself to be her equitable proportion of the debt, and issuing certificates for the other one-third which was assumed by the State of Virginia and by her creditors to be the portion for which West Virginia was liable, and it is stated that—

> "By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, *in trust*, for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her."
>
> (R., p. 8.)

And it is also alleged that—

> "All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstand-

ing and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent. of the aggregate of those liabilities, have been taken up and are now actually held by your oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto."

(R., p. 9.)

It is averred in paragraph one of the bill that on the 1st day of January, 1861, the State was indebted "in about the sum of $33,000,000," and that in addition to this "there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the commissioners of the sinking fund and the literary fund of the State," the former amounting to $1,462,993.00 and the latter to $1,543,669.05, as of the same date.

(R., p. 1.)

The several acts of the legislature under which the debt was adjusted and the contracts under which the certificates issued by the State have been deposited with a commission, *in trust* for the purpose of bringing this suit, are exhibited with and made part of the bill, and it is alleged that "this suit has been instituted at the request and direction of the said commission and in strict conformity with the provisions of the said act of March 6, 1900," which act will be hereafter referred to in this brief.

In the preamble to the act of March 30, 1871, which was the first one passed by Virginia to provide for the funding and payment of two-thirds of the debt, it was recited, among other things, that—

"Whereas it has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof *and not to this State, as the constitution of this State provides;* now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due; therefore be it enacted," etc., etc.

(R., pp. 13, 14.)

The third section provided that—

"Upon the surrender of the old and the acceptance of

the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and that the State of Virginia holds said bonds, so far as unfunded, *in trust* for the holder or his assigns."

(R., p. 15.)

It appears from one of the exhibits attached to and made part of the bill that the certificates issued to the creditors under the provisions of this act were as follows:

"This is to certify that there is due unto ——— ——— —— heirs, executors, administrators or assigns $——, being one-third of bond surrendered under the provisions of an act approved March 30th, 1871, entitled, 'An act to provide for the funding and payment of the public debt,' namely, bond No. —, with interest, amounting to $—. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded *in trust* for the holder hereof or his assigns."

(R., pp. 47, 48.)

The fourth section provides, among other things, that—

"The treasurer shall, by proper endorsement, written or stamped, upon each bond, certificate of stock, or interest certificate so surrendered and delivered to him, *cancel the same*, and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law."

This act provided for funding two-thirds of the public debt and interest in bonds bearing interest at the rate of 6 per cent.; but subsequently, on March 28, 1879, another act, prescribing a plan of set-

tlement, was passed, which provided for the issue of twenty-year bonds bearing interest at the rate of 4 per cent. and ten-year bonds bearing interest at the rate of 5 per cent.

The sixth section of that act provided that—

> "The rules prescribed under the act approved March thirtieth, eighteen hundred and seventy-one, in respect to preparing, signing and issuing the new bonds and coupons, regulating the same, and in taking in, *cancelling* and registering the old bonds, shall be observed by the officers of the treasury in the execution of this act, except so far as the same be modified by the provisions of this act. * * * But in *cancelling* and registering the bonds as above directed, in every bond and coupon surrendered under this act holes shall be punched in one or more places, and in such a manner as to render a new funding of the same impossible, and every bond and coupon so *cancelled* shall be filed for reference."
>
> (R., pp. 18, 19.)

And in the seventh section of that act it is provided that—

> "The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy-one, when they make such exchange; and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued under this act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held *as a full and absolute release of the State of Virginia from all liability on account of said certificates.*"

February 14, 1882, another act was passed entitled "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory, resources," etc., etc. This act again provided for refunding only two-thirds of the old debt and interest at 3 per cent., and it was enacted that—

> "For all balances of such indebtedness, constituting West

> Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate, as follows:
>
> "No.—.
>
> "The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ——— dollars, held by ——— ———, dated the —— day of ———, and numbered ———, leaving a balance of ——— dollars, with interest from ——— ———, to be accounted for by the State of West Virginia, *without recourse upon this commonwealth.*"

In section 8 it was provided that—

> "All the bonds and certificates of debt and evidences of past-due and unpaid interest taken in under the provisions of this act, shall be *canceled* by the treasurer in the presence of the board of the commissioners of the sinking fund as the same are required (acquired), and by the treasurer the same shall be carefully preserved until such time as the General Assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so canceled, from time to time, shall be certified by said board and filed with the treasurer for preservation."
>
> (R., p. 29.)

This act also provided that after its passage "no bonds, certificates, or other evidences of indebtedness, shall be isued for any portion of the debt of this State, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided."

(R., p. 30.)

February 20, 1892, an act was passed to refund at least $23,000,000 of the outstanding debt which had not been presented in exchange for new bonds under the act of February 14, 1882. Like the others, this act provided for only two-thirds of the principal and interest of the debt, then outstanding, and by the sixth section it was enacted that—

> "For all balances of indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the Commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz:

"No. —.

"The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for ——— dollars, dated —— day of ———, and No. ——, leaving a balance of ——— dollars, with interest from ——— ——, to be accounted for to the holder of this certificate by the State of West Virginia, *without recourse upon this Commonwealth.*"

(R. p. 35.)

In the ninth section it was provided that—

"All the bonds and certificates of debt, and evidences of past due and unpaid interest, taken in under the provisions of this act, shall be *cancelled* by the treasurer in the presence of the commissioners of the sinking fund, or a majority thereof, as the same are acquired, and by him carefully preserved, subject to disposition by the General Assembly; a schedule of the bonds, certificates, and other evidences of debt so cancelled shall be certified by said commissioners and filed by the treasurer for preservation."

(R., p. 37.)

In the tenth section it is enacted, among other things, that—

"All bonds of the State issued under the provisions of the act aforesaid, approved February fourteenth, eighteen hundred and eighty-two, and now held by said commissioners of the sinking fund, shall, as soon as at least fifteen million of dollars of new bonds shall have been issued and delivered pursuant to the provisions of this act be *cancelled* by said commissioners and preserved in the office of the treasurer of the Commonwealth."

(R., p. 37.)

March 6, 1894, the legislature of Virginia passed a joint resolution, the preamble to which, after reciting the titles of the acts to which we have heretofore referred, declared:

"Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: one-third of the amount of said obligations, of which certificates this State holds a large amount, through the agency of the commissioners of its sinking and literary fund; and

"Whereas the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original State; now, therefore, be it resolved," etc.

(R., p. 40.)

This resolution provided for the appointment of a commission of seven members, which was—

"authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia.

"But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall have been received from the holders of a majority in amount of said certificates, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. *But said commission shall in no event enter into any negotiation thereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof.*

"All expenses incurred by said commission and said board of arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement, or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the State to any expense on this account. And their action shall be subject to the approval or disapproval of the General Assembly, and shall not be binding on the State until approved by the General Assembly. The governor is requested to communicate this joint resolution to the governor and legislature of West Virginia."

(R., pp. 40, 41.)

Commissioners were appointed under this resolution, but, no adjustment having been made, the act of March 6, 1900, was passed, entitled—

"An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the

due protection of the Commonwealth of Virginia in the premises."

The preamble to the act, after reciting the titles of acts previously passed, is as follows:

"Whereas in each of said acts provision is made for issuing to creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligation surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: one-third of the amount of said obligations, of which certificate this State holds a large amount, through the agency of the commissioners of its sinking fund; and

"Whereas the General Assembly is required by the constitution of Virginia to provide by law for adjusting with the State of West Virginia the proportion of the debt of the original State of Virginia proper to be borne by West Virginia, but no such adjustment has ever been had; and

"Whereas it appears that while Virginia has satisfactorily settled the two-thirds of the original debt *which she assumed*, yet it is possible that complications will arise with respect to said certificate which will render it desirable that she should endeavor to secure an adjustment thereof upon terms which will protect herself, but will work no injustice to West Virginia, and thus finally dispose of the only question remaining unsettled in connection with said debt; now therefore, be it enacted," etc.

The first section provided—

"That the commission created and appointed under a joint resolution of the General Assembly entitled a joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same, approved March sixth, eighteen hundred and ninety-four, be, and said commission hereby is, authorized to receive and take upon deposit the certificates aforesaid or have the same otherwise placed or held on deposit subject to their control upon an agreement and contract on the part of the holders of said certificates that if the said commission will secure a settlement with West Virginia with respect to said certificates the said holders of said certificates so deposited *will accept the amount realized on such settlement*

from West Virginia on said certificates as a full settlement of all their claims thereunder."
(R., p. 42.)

The second section provided that —

"If at least two-thirds in amount of the said certificates issued under the act of eighteen hundred and seventy-one, exclusive of those held by the State through the agency of the board of education and the sinking fund commissioners, and at least a majority in amount of all the other certificates aforesaid shall be so deposited or placed subject to the control of the said commission upon the agreement and contract aforesaid, then the said commission shall be authorized and empowered by and with the advice and approval of the attorney-general of Virginia to take such action and institute such proceedings, on behalf of the State, as may in the judgment of said commission and attorney-general be needful and proper to protect the interest of the State and bring about and carry into effect a settlement as aforesaid. All the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate holders, as provided in the joint resolution aforesaid, and the State shall not be subject to any expense on that account."
(R., p. 42.)

The holders of a large amount of certificates issued by Virginia for what she claimed was West Virginia's just proportion of the debt, had deposited their certificates with a committee for collection or adjustment, and on the 20th of July, 1898, the depositing committee through its chairman, made the following propositon to the Virginia commission:

"Whereas your commission was constituted as set forth in said joint resolution and act of assembly for the purpose of negotiating and bringing about a settlement with the State of West Virginia with respect to the proposition of the public debt of the original State of Virginia proper to be borne by West Virginia and in connection with which the present State of Virginia has issued certain certificates under four acts of its General Assembly, approved, respectively March 30th, 1871, March 28th, 1879, February 14th, 1882, and February 20th, 1892.

"And whereas your commission was, under the said act of March 6, 1900, further authorized to receive and take upon deposit the certificates aforesaid, or to have the same otherwise placed or held on deposit subject to your control, upon the agreement and contract on the part of the holders

of said certificates that if your commission would secure a settlement with West Virginia with respect to said certificates, the said holders of said certificates, so deposited, would accept the amount realized on such settlement from West Virginia as a full settlement of all their claims thereunder; and said act further provided that if at least two-thirds of the amount of the said certificates issued under said act of 1871, (exclusive of those held by the State through the agency of the board of education and the sinking fund commissioners) and at least a majority in amount of all the other certificates should be so deposited or placed subject to the control of your commission upon the agreement and contract aforesaid, then your commission should be authorized, by and with the approval of the attorney-general of Virginia, to take action in the premises as might be needful to protect the interests of the State and bring about and carry into effect a settlement as aforesaid.

"And whereas by a certain agreement of July 28th, 1898, a committee on behalf of the holders of the said certificates was constituted to bring about the deposit as far as practicable of said certificates in such depository as the committee should appoint with powers in the committee to act as agent of the certificate holders so depositing in bringing about a settlement of their claims upon such plan, as might be recommended by the advisory board named in said agreement and as should become effective thereunder it being further stated in said agreement that all the said certificates so deposited would be promptly surrendered in exchange for whatever amount West Virginia might agree to pay and the creditors of West Virginia might agree to accept as aforesaid.

"And whereas more than two-thirds in amount of all the said certificates of 1871, outstanding as aforesaid, to wit, $8,565,095.70 and a majority of all the other certificates aforesaid, to wit, $1,782,475.13, have been duly deposited with said committee and are in custody of Brown Brothers & Company, bankers of New York city, N. Y., the depository named by said committee, and are held subject to the control of the said committee under the said agreement, so that the same can be duly placed and held subject to the control of your commission in accordance with the said agreement and in pursuance of such plan of settlement as is now proposed or as may hereafter become effective.

"In view of the premises the undersigned, the committee aforesaid, do now hereby tender and place subject to the control of your commission all the aforesaid certificates, so held on deposit, upon the agreement and arrangement on the part of your commission, acting for the State of Virginia under the said joint resolution and act of assembly aforesaid, that your commission will enter into negotiations

with the State of West Virginia or the constituted authorities thereof for the purpose of effecting a settlement with West Virginia with respect—the said certificates in accordance with the said agreement of July 28th, 1898, and in accordance with such plan of settlement as is now proposed or as may hereafter become effective; and that your commission will by and with the advice and approval of the said attorney-general take such action as they may deem needful in the premises; and in event such a settlement is so made, then it is hereby agreed that the amount realized thereon *shall be accepted in full satisfaction of all the claims of the certificate holders thereunder* and the undersigned committee will surrender to your commission, in exchange for such amount the certificates aforesaid so deposited.

"If this proposal be accepted by your commission, the same shall constitute an arrangement and contract with the State of Virginia for obtaining a settlement with West Virginia and the same shall continue binding upon the undersigned committee and upon the holders of said certificates so deposited for the period of three years next ensuing from the date hereof for the purpose of allowing time for a settlement aforesaid; and the same shall be subject to renewal and extension for such further time as may be agreed upon and to such modification and amendment as may be agreed upon, and shall apply to and include any and all such certificates as aforesaid as may hereafter be deposited with and held by the said committee under said agreement of July 28th, 1898."

(R., pp. 54-56.)

This proposition was accepted by the Virginia commission, with the approval of the attorney-general, on the 18th of September, 1902.

On the 3d of December, 1902, the advisory board of the depositing committee promulgated the following plan of settlement, which was approved by the committee:

"Under an agreement of July, 1898, a committee was constituted for the purpose of assembling the Virginia deferred certificates, with certain powers and functions as in the agreement specified, and by the same agreement an advisory board was constituted whose functions were also specified in the agreement.

"In pursuance of this agreement, a certain plan of settlement was, on the 21st day of June, 1899, formulated and recommended by the committee and advisory board, which among other things, contained the following provision:

"'The committee may surrender to either State (Vir-

ginia or West Virginia) any of the deposited certificates and receive in full satisfaction therefor their *pro rata* of such an amount in State bonds, or cash as may be agreed upon between the committee and the representatives of Virginia or West Virginia, as the maximum amount which West Virginia will assume on account of her proportion of the debt of the original State.'

"Since the date last named the General Assembly of Virginia, on the 6th day of March, 1900, passed an act authorizing a commission which had been appointed and constituted on her behalf in the premises, by and with the advice and approval of her attorney-general, to take such action and institute such proceedings as might, in the judgment of the commission and attorney-general, be needful and proper to bring about and carry into effect a settlement of said certificates; but it was further provided in this act that such action should be taken only in the event that at least two-thirds of all the certificates of 1871 (exclusive of those held by the State) and a majority of all the other certificates, should be deposited with or placed subject to the control of the holders of such certificates that if the commission would secure a settlement with West Virginia with respect to said certificates, *they would accept the amount realized from West Virginia on such settlement in full of all their claims thereunder.*

"On the 18th of September, 1902, the committee held on deposit $8,565,095.70 of the certificates of 1871, being more than two-thirds thereof (*) as above stated, and $1,782,457.13 of all the other certificates, being a majority thereof; and the committee accordingly on that day entered into a contract with the Virginia commission, by which it was stipulated that the said certificates should, for the period of three years, be held subject to the control of the commission upon the agreement and arrangement on the part of the commission that they would enter into negotiations with the State of West Virginia for the purpose of effecting a settlement with respect to said certificates, and would by and with the advice and approval of said attorney-general, take such action as they might deem needful in the premises; *the amount realized on such settlement to be accepted in full of said certificates* as above stated, which contract was duly approved by the attorney-general of Virginia on September 29th, 1902.

"In view of this act of the Virginia assembly, and of the recent action taken thereunder, it is deemed desirable to make the plan of settlement heretofore recommended more definite with respect to the matters now involved; and to

(*) On March 2nd the figures were $9,231,602.13 of the certificates of 1871 and $2,239,451.62 of all the other certificates.

this end the following is hereby formulated, approved and recommended by the committee and the advisory board by way of supplement and addition to the original plan:

"I. The above named committee shall pledge or deposit the certificates now or hereafter received under the agreement of July 28, 1898, with the Virginia commission, in conformity with the act of March 6, 1900, *for the purpose of taking such action and instituting such proceedings, by and with the advice and approval of the attorney-general of Virginia as may be deemed needful to bring about and carry into effect a settlement as in said Act provided;* such pledge or deposit to be such length of time as may be agreed on; and the said agreement of September 18, 1902, shall continue in force for the period therein specified; and the committee may enter into such further agreements with the said commission as may be deemed needful to bring about a settlement in the premises.

"II. In the event that no settlement shall be effected by the Virginia commission either under the agreement of September 18, 1902, within the period therein specified, or under any other agreement which may be entered into between the committee and the said commission within such time as may be limited therein, the committee may, after any and all such agreements with the said commission shall have expired, take such other and further proceedings and make such other and further agreements and settlements in the premises as the committee may deem judicious.

"III. The committee shall be authorized to make such disposition by pledge, sale or otherwise, of the certificates, now or hereafter deposited, under the agreement of July 28, 1898, as may be necessary to carry into effect any proceedings taken and any agreements or settlements made by them as above stated, with or through the said commission or otherwise, or for the payment of expenses now or hereafter to be incurred, whether a settlement is effected or not, not to exceed, however, the limit fixed by said agreement, and may give such release and acquittance as may be necessary to that end.

"The amount realized on or the proceeds of any such settlement, after deducting proper charges under the agreement of July 28, 1898, shall be apportioned and distributed among the different certificate holders in such manner and according to such percentages as may be ascertained and established for the different classes of certificates by a tribunal to be constituted as follows: one member thereof to be appointed by the committee, one member by the advisory board, and the third by the two so appointed; and if it be impracticable in the judgment of such tribunal to distribute in kind any bonds or securities which may be received in any such settlement, then the same may be sold and con-

verted into money for the purpose of such distribution. If a vacancy occur in such tribunal the same shall be filled by the remaining members.

"New York, December 3d, 1902."

This agreement was signed by the members of the advisory board and the chairman of the committee.

On the 14th day of December, 1904, an additional agreement was made between the depositing committee and the Virginia commission, which extended indefinitely as to time by contracts made September 9, 1905 and November 24, 1905. The said contracts are as follows:

"Memorandum of agreement, made this 14th day of December, 1904, between the depositing committee of the securities known as the Virginia deferred certificates as constituted under the contract of July 28th, 1898, and of which John Crosby Brown is chairman, and Robert L. Harrison, secretary, acting under the plan of settlement approved on December 3rd, 1902, by the advisory board referred to in the said contract hereinafter referred to as the depositing committee, party of the first part, and the commission constituted on behalf of the State of Virginia for the purpose of bringing about a settlement with the State of West Virginia with respect to said certificates as constituted and acting under the joint resolution of the General Assembly of the State of Virginia, approved March 6, 1894, and the act of said General Assembly, approved March 6, 1900, and of which John B. Moon is chairman, and Joseph Button is secretary, hereinafter referred to as the Virginia commission, party of the second part:

"Whereas, by an agreement entered into between the above parties on the 18th day of September, 1902, certain of the certificates aforesaid amounting in the aggregate to $10,347,570.85 were tendered by the depositing committee aforesaid to the said Virginia commission, and were placed subject to the control of the said commission upon the agreement and arrangement on the part of the said commission acting for the State of Virginia under the said joint resolution and act of assembly aforesaid, that the said commission should enter into negotiations with the State of West Virginia or the constituted authorities thereof for the purpose of effecting with West Virginia a settlement with respect to the said certificates, *in accordance with the said contract of July, 28th, 1898*, and in accordance with such plan of settlement as was then proposed or might thereafter become effective, and that the said commission would, by and with the advice and approval of the attorney-general

of Virginia, take such action as they might deem needful in the premises; and that in the event such a settlement was so made, then it was *agreed that the amount realized thereon should be accepted in full satisfaction of all the claims of the certificate-holders thereunder*, and that the said committee would surrender to the said commission, in exchange for such amount, the certificates so placed subject to the control of said commission. And it was further specified in the said agreement of September 18, 1902, that the same should apply to and include all such certificates as might thereafter be deposited with and held by the said committee under the said contract of July 28, 1898, and that the said agreement should constitute an arrangement and contract between the said committee acting for the said certificate-holders with the State of Virginia for obtaining a settlement with West Virginia, and that the same should continue binding upon the parties and upon the holders of the certificates so deposited for the three years next ensuing from the date of the said agreement; that is to say, until the 18th day of September, 1905. And the said agreement further provided that the same should be subject to renewal and extension for such further time as might be agreed upon between the parties and to such modification and amendment as might thereafter be agreed upon; and

"Whereas, the said agreement of September 18, 1902, was approved by the Hon. William A. Anderson, attorney-general of Virginia, by his endorsement at the foot thereof on the 29th day of September, 1902; and

"Whereas, the provisions of the said agreement last named were fully approved and recommended on the 3rd day of December, 1902, by the advisory board referred to in the said contract of July 28, 1898, as appears by the plan of settlement made and approved by the said committee and the advisory board and bearing date December 3rd, 1902, of which plan of settlement publication was duly made as provided in the said contract of July 28, 1898, and no notification whatsoever was given to the said committee, either directly or through any depository, by any of the holders of the deposited certificates, of their unwillingness to accept the proposed settlement as set forth in the said plan so published and more than thirty days having elapsed after the said publication was completed, and the said plan of settlement having therefore become complete; and of this fact the declaration in writing of the committee having been duly made to the only depository under the said contract, to wit, Messrs. Brown Brothers & Company, of 29 Wall street, New York, the said plan of settlement thereupon became effective and final; and

"Whereas, it is now proposed under the terms of the said agreement of September 18, 1902, and by way of modifica-

tion thereof as therein provided, to place more fully and completely under the control of the said Virginia Commission all the certificates aforesaid which had up to that date been deposited, and also all thereafter deposited so that the said Virginia commission may be given full and complete control of all the said certificates in their proposed negotiations with the State of West Virginia, and also in any action and proceeding which may be taken or instituted by the said Virginia Commission by and with the advice and approval of the said attorney-general under the said act of the General Assembly of Virginia March 6, 1900:

"Now therefore this agreement witnesseth: that the aforesaid depositing committee does hereby authoriz and direct their said depository Messrs. Brown Brothers & Company to issue to the Virginia Debt Commission a certificate that all the aforesaid Virginia deferred certificates which have up to this time been deposited with the said Brown Brothers and Company under the said depositing agreement of July 28, 1898, and all which may hereafter and before the 18th day of September, 1905, be so deposited with the said depository are held by the said depository on deposit for and subject in all respects to the control and disposition of the said Virginia Commission *in pursuance of the said joint resolution and act of the General Assembly of Virginia;* and to this end the said Messrs. Brown Brothers & Company are authorized and instructed to issue such certificate to the said Virginia Commission in such form as to show that all of the certificates aforesaid have been received and are held by them on deposit for the said Virginia Commission and subject to the control and disposal of the said commission:

"But this agreement shall continue in force only until the said 18 day of September, 1905, when the said certificate issued by the said Brown Brothers and Company to the said Virginia commission for the purpose of making a settlement with West Virginia as aforesaid shall be returned to the said depositing committee, unless a settlement shall have been before that time negotiated with West Virginia in pursuance of said contract of September 18th, 1902, or unless negotiations be then pending with the properly constituted authorities of West Virginia for such settlement upon some equitable basis which has been agreed to by said commission and the authorities of West Virginia aforesaid. *Provided, however,* That it is fully understood and agreed that the time for continuing in force this agreement may be extended by the consent and agreement of the parties hereto indorsed hereon or at the foot hereof, for such length of time and upon such conditions as the parties may hereafter specify; and this agreement may be changed, modified and amended with respect to the action and proceedings to be

taken or instituted by the said commission in the premises, as may hereafter be agreed upon by the parties and then indorsed as aforesaid, or as may be specified in a further and supplemental agreement between the parties.

"In testimony whereof the signatures of the chairman of the said depositing committee and of the Virginia Commission, attested by the respective secretaries thereof, ar hereunto affixed on the day and year first above writter

"JOHN CROSBY BROWN, *Chairman.*

"ROBERT L. HARRISON, *Secretary.*

"JOHN B. MOON,

"*Chairman of Virginia Commission.*

"JOSEPH BUTTON, *Secretary.*"

"The foregoing agreement is hereby approved as having been entered into by my advice and approval.

"WILLIAM A. ANDERSON,

"*Attorney-General of Virginia.*

"Dated December 14, 1904."

"The foregoing agreement of December 14th, 1904, together with the contract of September 18th, 1902, therein referred to, are hereby extended in all their provisions until December 1st, 1905, and they shall remain in full force until that date just as if December 1st, 1905, instead of September 18th, 1905, had been the date originally named therein for their limitation, with the right of extension, enlargement and modification on or before December 1st, 1905, in all respects as therein specified.

"Given under our hands this 9th day of September, 1905.

"JOHN CROSBY BROWN,

"*Chairman Depositing Committee.*

"ROBT. L. HARRISON, *Secretary.*

"JOHN B. MOON,

"*Chairman Virginia Commission.*

"JOS. BUTTON, *Secretary.*"

"The above extension of the contracts above referred to is hereby approved this 9th day of September, 1905.

"WILLIAM A. ANDERSON,

"*Attorney General of Virginia.*"

"Upon the execution of the foregoing contract of December 14, 1904, hereto annexed, Messrs. Brown Bros. & Co., bankers of New York, N. Y., the depository referred to in said contract, issued to the Virginia Commission therein named the certificate provided for in said contract, which was also in the form of a receipt and showed that Virginia deferred certificates of 1871 to the amount of $10,639,776.42 and certificates of other dates to the amount of $2,270,779.47

were held by said Brown Bros. & Co. on deposit for and subject to the control and disposal of said commission; thus placing subject to the complete control and disposal of the commission considerably more than two-thirds of the total of $12,703,451.79 of the certificates of 1871 outstanding and in the hands of the public, and a large majority of the total of $2,778,239.80 of the other certificates so outstanding.

"Thereafter, in January and February, 1905, the Virginia Commission, through its properly constituted subcommittee acting with the attorney-general of Virginia, made to the governor and attorney-general of West Virginia, and to the finance committees of the legislature of that State, which was then in session, a full statement and presentation of the matters outstanding and unsettled between the two States in connection with the deferred certificates aforesaid, accompanied by an urgent plea on behalf of the State of Virginia that the legislature of West Virginia would, at least, appoint a committee or other public functionary with authority to take up the questions involved for the purposes of discussion and negotiation, but the commission was again met, as it had been in a previous attempt to open negotiations on the subject, by an absolute refusal on the part of the authorities of West Virginia to treat on the subject at all; thus leaving to the Virginia Commission and attorney-general of that State no possible means of bringing about the settlement, which they are charged with the responsibility of making, except by a resort to the court having jurisdiction of controversies between States.

"Now, therefore, it is hereby stipulated and agreed by and between the depositing committee, named as the party of the first part in the said foregoing contract of December 14th, 1904, and the Virginia Commission therein named as the party of the second part, the said commission acting in this behalf by and with the advice and approval of the attorney-general of Virginia, that in accordance with the provisions contained in the said foregoing contract and addendum thereto of September 9th, 1905, the same is hereby amended, modified and extended as follows, to wit:

"1st. Neither the said foregoing contract of December 14th, 1904, nor the contract therein referred to between the same parties, bearing date September 18th, 1902, shall expire on the 1st day of December, 1905, but the same shall continue in force in all respects just as if no time limit had been named in either of said contracts, and this agreement shall be taken as a continuation, modification and extension of said contracts.

"2nd. The certificate or certificates heretofore given by Brown Bros. & Co., the depository of the said committee, to the said Virginia Commission, covering the deferred certificates aforesaid, shall be retained by the said commission and

shall remain in full force and effect without regard to time limit; and the said Brown Bros. & Co. shall issue and give to the said commission such other and further certificates and receipts in the premises, by way of amendment or in lieu of those already given or otherwise, as may be deemed needful or desirable in order to place said deferred certificates more completely and finally under the control and at the disposal of the said commission for the purpose of carrying out this agreement; and especially shall they give such certificates or receipts to cover all such Virginia deferred certificates as have been or may be deposited with them and not covered by certificates or receipts previously given to the commission; and the said Virginia Commission are hereby given and *invested with the full and complete control and right to dispose of all deferred certificates now or hereafter covered by or embraced in the receipts and certificates of Brown Bros. & Co. as aforesaid.*

"3rd. The said Virginia Commission hereby stipulate and agree, by and with the advice and approval of the attorney-general of Virginia, that, in their judgment, it is needful and proper, in order to protect the interest of the State and bring about and carry into effect a settlement in the premises, *that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States asking for an adjudication and settlement by that court* of the matters aforesaid unsettled and undetermined between the two States, arising or growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the act of the General Assembly of Virginia, of March 6th, 1900, referred to in said contract of December 14th, 1904 and the said Virginia Commission acting by and with the advice and approval of the attorney-general of that State, do hereby undertake and *agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid,* as soon as the pleadings, papers and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said act of the General Assembly of Virginia and the joint resolution of the said General Assembly of March 6th, 1894, also referred to in said contract of December 14th, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia as to the deferred certificates placed subject to the control of the commission as aforesaid, as provided in the previous contracts aforesaid, shall remain vested in the said

commission, notwithstanding the institution and pendency of such suit.

"4th. And the Virginia Commission do further undertake and agree that, in accordance with the terms and conditions of the said joint resolution and act of the General Assembly of Virginia, *they will account for, pay over and deliver such amount, either in cash or securities*, as may be realized from West Virginia through any settlement made by the said commission with that State, either by means of an adjudication or recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, *to the said depositing committee in full settlement and satisfaction of all claims under said certificates;* and the said depositing committee agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in the said certificates respectively, *in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned*, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

"5th. It is further understood and agreed that if from any cause the said commission shall fail or be unable to bring about such adjustment or settlement or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said commission to restore to the control of the said depositing committee all such deferred certificates as may have been placed subject to the control and disposal of said commission as aforesaid.

"RICHMOND, VA., *November* 24th, 1905."

This contract was signed by all the members of the depositing committee and the Virginia Commission, and approved by the attorney-general on the day of its date.

It appears from one of the exhibits attached to and made a part of the bill that the total amount of certificates issued by Virginia on account of West Virginia's alleged proportion of the public debt was as follows:

Under the act of 1871	$15,281,970.47
Under the act of 1879	564,258.87
Under the act of 1882	1,775,603.48
Under the act of 1892	605,320.78
Total	$18,227,153.60

(R., p. 90.)

It appears that on January 4, 1906, certificates to the amount of $13,173,435.41 had been deposited by the committee with Brown Brothers and Company, and that they have been withdrawn by the Virginia Commission and are now in its custody or under its exclusive control.

For the owners of the whole amount of certificates issued, whether they have or have not been deposited with the committee or with the commission, Virginia sues as trustee in this case under the contracts and statutes to which we have referred.

The prayer of the bill is as follows:

> "Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her governor and attorney-general, with a copy of this bill, your oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right *and as trustee as aforesaid*; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises; and that

all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet."

The bill has been demurred to on the following grounds:

First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and aslo, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

Fifth. That it does not appear by said bill that the attorney-general has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain cer-

tificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant.

The first question to be considered in the case is whether this court has jurisdiction to hear and determine the causes of action, or any of the causes of action, alleged in the bill, for if no cause of action is alleged upon which the plaintiff is entitled to a judgment or decree in this court, it will not decide any of the other questions presented by the demurrer. Jurisdiction is the power to hear and determine a cause between the parties to the action who are before the court, and to render a final judgment or decree and enforce its execution by judicial process. Judicial tribunals cannot take cognizance of controversies merely for the purpose of ascertaining and declaring what the legal or equitable rights of the parties are. They must render judgments or decrees which remedy the wrongs complained of, or enforce the rights ascertained in the case; in other words, their powers are remedial, not merely declaratory.

Jurisdiction is defined by Bouvier as "the authority by which judicial officers take cognizance of to decide causes. Power to hear and determine a cause (3 Ohio, 494; 6 Pet., 591). The right of a judge to pronounce a sentence of the law on a cause or issue before him acquired through due process of law. It includes power to enforce the execution of what is decreed. (8 Johns., 239; 3 Met., Mass., Thach., 202). (2 Bouvier Law Dic., 26).

In defining jurisdiction, Black says:

> "The power and authority constitutionally conferred upon or constitutionally recognized as existing in a court or judge to pronounce the sentence of the law or to award the remedies provided by law upon the set of facts proved or admitted,

referred to the tribunal for decision and authorized by law to be the subject of investigation or action by that tribunal, and in favor or against persons (or a *res*) who present themselves, or who are brought before the court in some manner sanctioned by law as proper and sufficient. Jurisdiction is a power constitutionally conferred upon the judge or magistrate to take cognizance of and determine a cause according to law and to carry a sentence into execution (6 Pet., 591; 9 Johns., 239; 2 Neb., 135)."

Black's Law Dictionary, page 63. See also Anderson's Words and Phrases, page 3877-813; also Am. & Eng. Ency., vol. 17, page 1041; *Daniels v. Tearney*, 102 U. S., 418; *Applegate v. Lexington, etc.*, 117 U. S. 267; *Simmons v. Saul*, 138 U. S. 454; *Holmes v. Oregon*, 5th Fed., 534; 9th Fed., 32; 6 Sawyer, 385; *Grignon v. Aston*, 2 How. 385; *U. S. v. Arredondo*, 6 Pet., 691; *Decatur v. Paul*, 14 Pet., 599; *In re Bogart*, 2 Sawyer, 491; 3 Fed. Cases, No. 596; 1 *Le Roy v. Clayton*, 2 Sawyer, 499; 15 Fed. Cases, No. 8258; *Riggs v. Johnson County*, 6 Wall., 187; *McNitt v. Turner*, 6 Wall., 366; *Cornett v. Williams*, 20 Wall. 240.

The bill, so far as it relates to the old debt of Virginia, although it sets up all the provisions of the compact, seems to be framed upon the theory that West Virginia is liable for one-third of the debt as it existed prior to the first day of January, 1861, upon the alleged ground that the formation of the new State diminished the territory and population of the original or parent State to that extent. It is evident, however, that no such rule can be applied here, for this is not a case in which West Virginia's "just proportion" of the debt is to be determined upon such rules or principles as a court may decide to be fair and equitable, but is to be ascertained and paid according to a method agreed upon by the parties; and that method must be observed, whether the action is prosecuted at law or in equity. The liability of the defendant State, if any exists, is founded entirely upon a compact entered into between the two States with the consent of Congress, and the adjustment must therefore be made according to its terms. No rule, or supposed rule, of international law can be applied in such a case.

By the ordinance of the Wheeling convention, which represented the State of Virginia, consent was given to the formation of a new State out of a part of her territory, and it was provided, as we have already seen, that it should take upon itself a just proportion of the public debt of Virginia existing prior to the first of January, 1861, which, according to the ordinance, was to be ascertained by charging

to the new State all the State expenditures within the limits thereof and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted, and deducting therefrom the moneys paid into the treasury of the State of Virginia during that period from the counties included within the new State.

It was also provided that al private rights and interests in lands within the proposed new State derived from the laws of Virginia prior to the separation should remain valid and secure under the laws of the proposed State and should be determined by the laws then existing in the State of Virginia. At the time of the passage of this ordinance there was, of course, no State of West Virginia, and therefore no second party to the proposed compact or agreement. Subsequently the people inhabiting the counties proposed to be included in the new State held a sovereignty convention and adopted a constitution preparatory to admission into the Union. This was the first time the new State, or proposed new State, had the capacity to assent to, or dissent from, the proposition submitted by Virginia, and it assented to it with the qualification, or addition, that its equitable proportion of the debt should be ascertained by its own legislature as soon as practicable, and that the legislature should provide for its liquidation by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years. But this did not complete the compact, for Congress had not yet given its consent, which was necessary under the Constitution of the United States.

Afterwards application was made by the proposed new State for admission to the Union under the Constitution containing the provisions above recited; and, on the 31st day of December, 1862, an act was passed by Congress providing for its admission upon certain conditions, none of which had any reference to the indebtedness of the old State (12 Stat., 633). This act of Congress recited that the "Legislature of Virginia, by an act passed on the 13th of May, 1862, did give its consent to a formation of a new State within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia," etc., etc. The Virginia act of May 13, 1862, was passed while the application of West Virginia for admission into the Union was pending, and its first section provided that the consent of the legislature of Virginia is given to the formation and erection of the State of West Virginia within the jurisdiction of that State, to include certain counties which are mentioned in the act, "according to the boundaries *and under the provisions set forth in the Consti-*

tution for the said State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

It was further provided that—

> "This act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."
>
> *See Constitution and Statutes of Virginia and West Virginia, 1861-66, page 3, Acts of Extra Session, May, 1862.*

The schedule attached to the constitution of West Virginia and referred to in the act declared that "when the General Assembly of the State of Virginia and the Congress of the United Stats shall severally give their consent to the formation and erection of the State of West Virginia as proposed, the commissioners hereby appointed shall forthwith issue their proclamation," etc., etc.

Finally, on the 20th day of June, 1863, the State of West Virginia was admitted into the Union under the constitution framed by its convention, approved by the State of Virginia and the Congress of the United States. And thus the consent of that body was given to all the provisions of the agreement and it became a legal and constitutional compact between the two States.

Virginia v. West Virginia, 11 Wall., 39.
Green v. Biddle, 8 Wheat., 1-86.
Virginia v. Tennessee, 148 U. S., 503.

West Virginia having agreed to the proposed compact, upon the conditions that her own legislature should ascertain the amount of the debt and provide for its liquidation in a certain manner and the reconstructed State of Virginia having been authorized by Congress to elect delegates to frame a constitution, proceeded to do so, and in 1867 adopted a constitution, the 19th section of article 10 of which contained the following provision:

> "The General Assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia, and shall provide that such sum

> *as shall be received from West Virginia* shall be applied to the payment of the public debt of the State."

In 1902, after Virginia had settled with her creditors, a new constitution was adopted, which omitted this section and contained no provisions upon the subject of a settlement with West Virginia.

It appears plainly from the foregoing that essential parts of the compact as agreed to by West Virginia were that the legislature of that State should ascertain what was her just proportion of the debt; that it should provide for its liquidation by the establishment of a sinking fund; that the State of Virginia assented to this condition by consenting to the admission of the new State "under the provisions set forth in the constitution of the said State of West Virginia and the schedule thereto annexed," and that Congress admitted the State under that Constitution, thereby consenting to the compact with the conditions constituting part of it.

The two States have therefore, by compact between themselves, and with the consent of Congress, as required by the Constitution, designated a tribunal to ascertain and settle West Virginia's share of the debt. This tribunal still exists and is unquestionably competent to discharge the duties imposed upon it. And, moreover, but most important of all, it is the only tribunal existing or that can be established, possessing the power to provide for the payment of West Virginia's share of the debt when the same has been ascertained in accordance with the terms of the compact. It cannot be coerced by any judicial or other civil process known to the Constitution or laws of this country. No court can compel it either to adjust the debt or to provide a sinking fund, or impose taxes, issue bonds, or appropriate money.

Conceding, for the sake of the argument, that Virginia might maintain a suit in this court as trustee, the question must be considered whether the bill states a good cause, or good causes, of action in favor of the plaintiff, either in her own right or as trustee for the parties. Clearly there is no cause of action shown against West Virginia under the provisions of the act of February 4, 1863, which is embodied in the bill (R., p. 4). The first section of that act appropriates $150,000 to the State of West Virginia when it shall be organized and admitted into the Union; but it does not provide that the new State shall account for it in any way. Whether the whole of the sum appropriated, or, if not the whole, what part of it, had been paid into the treasury by the counties located within the boundaries of the proposed new State does not appear from the act, and is not

alleged in the bill. As there was no provision that it should be accounted for or repaid to Virginia, the presumption is, especially in the absence of an allegation upon that subject, that it was in fact collected from the West Virginia counties, or that it was intended as a gratuity to the new State. The bill being silent upon the subject and every presumption being against the pleader in such a case, the court cannot infer a cause of action in favor of the plaintiff. The second section of the act shows plainly on its face that it appropriated no money except what had been actually collected from the counties within the proposed boundaries of the new State, and as it was not required to account, and never agreed to account, no cause of action, legal or equitable, can be based on that part of the statute.

The other act under which a claim is made in this action was passed February 3, 1863 (R., p. 4). In brief, the first section of that act transfers to West Virginia certain public property "within the boundaries of the proposed new State of West Virginia when she becomes one of the United States," and declares that the title shall pass without any other assignment, conveyance, transfer or delivery than is therein contained. The second section provides that if the appropriation of the property, stocks, and securities made by the act shall take effect, the State of West Virginia "shall duly account for the same in the settlement hereafter to be made with this State." The bill alleges that the plaintiff "is informed, believes, and so charges" that the property transferred under this act consisted of a number of items, and that its value amounted to "several millions of dollars," but that the plaintiff is "unable to state at this time the exact amount." It is then alleged that the State of West Virginia realized from the bank stocks alone "about six hundred thousand dollars;" but there is no allegation as to their value at the time of the transfer.

It is evident that the "settlement hereafter to be made with this State" means a settlement of West Virginia's just proportion of the old public debt which had been provided for by the ordinance of the Wheeling convention and by the constitution of West Virginia, which was then before Congress on her application for admission into the Union. In the adjustment provided for in the compact West Virginia was to be charged with "all the State expenditures within the limits thereof," since any part of the debt was contracted, and consequently the State of Virginia, in order that it might not thereafter be claimed that the expenditures on account of the

public property transferred by the act of February 3, 1863, were not to be included in the settlement under the compact, expressly provided that they should be. The bill therefore shows an attempt to make two causes of action out of one—a separate cause of action based upon the compact for the recovery of the amount of money originally expended by the State of Virginia in paying for the property so transferred, and another cause of action founded on the statute. The State of Virginia of course retained all the public property situated within her own boundaries after the separation, and it was the intention of Virginia that West Virginia should become the owner of all within her limits and should, in the settlement made under the compact, account to the old State for the expenditures made by that State in procuring it.

We think enough will be said, and suggested, in other parts of this argument to establish the proposition that the State of Virginia has not alleged, and cannot allege, either in her own right, or as trustee, a good cause of action against the defendant State on the compact. Before she could possibly sue the defendant State, either at law or in equity, to recover for contribution, she must have paid the whole debt, or at least she must have paid more that her own legal or equitable share of it. As the case is now presented, neither Virginia nor her creditors have been injured in the slightest degree by the fact that West Virginia has not paid her proportion of the debt. Virginia has not been injured, because she has herself paid, or extended, only that part of the debt which, according to her own judgment, she would have been justly required to pay if West Virginia had fully complied with her alleged obligations, and she has been released from all the remainder; and the creditors have not been injured by any alleged default on the part of West Virginia, because they never had any claim, legal or equitable, against her and have voluntarily discharged their only debtor from liability. It is elementary law that if one owes a debt and another agrees with him—not with the creditor—that he will furnish a part of the money to pay it, or that he will reimburse the debtor as to a part of it, the original debtor cannot sue for contribution until he has paid the debt, and certainly not until he has paid his own share and some part of what the other agreed to furnish or reimburse; and in the latter case he could sue only for what he had paid in excess of his own share. The applicability of this legal and equitable rule is the same whether the liability to contribute is founded on an express

contract between the parties or is implied, as in the case of cosureties.

It is not alleged in the bill that the State of Virginia has ever made an account or statement of her claim under the compact and presented it for payment or adjustment. On the contrary, it is shown by the bill and exhibits that as early as 1871, if not before that date, Virginia repudiated the compact and arbitrarily decided that West Virginia was liable for one-third of the debt, and has always, at least up to the time of the institution of this suit, insisted upon an adjustment on that basis only. This is shown by the preambles and provisions of every act passed providing for an adjustment with her creditors; and in the joint resolution of March 6, 1894, creating a commission to settle with West Virginia, it was declared:

> "But such commission shall in no event enter into negotiations hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State which she has already provided for as her equitable proportion thereof."
>
> (R., p. 40.)

This restriction upon the power of the commission has never been repealed, and that body has now no power to negotiate with the defendant State upon any other basis. It is a mockery, however, to characterize such a proceeding as a "negotiation." An ultimatum was presented at the very beginning, and West Virginia was distinctly informed that she must recognize her liability to pay one-third of the debt, or have no adjustment. Under this proposition no accounts were to be presented or examined, no vouchers or other documents were to be considered, except such as would show the amount of the debt prior to January 1, 1861; the terms of the compact were to be wholly ignored and nothing was to be done except to divide the amount of the debt by three. West Virginia was perfectly justifiable in declining to "negotiate" upon such a basis as this.

If the allegations contained in paragraphs fifteen and sixteen of the bill (R., p. 9) are to be regarded by the court as setting up a cause of action for West Virginia's equitable proportion of the debt, the plaintiff is claiming in this case a double liabilty upon the part of that State—a lability for her equitable proportion, or for one-third, of $33,000,000, the alleged amount of the whole public debt on the 1st of January, 1861, and also a liability for her equitable proportion, or one-third, of the $25,000,000 alleged to have been paid

by Virginia, which is a part of the $33,000,000. We do not think, however, that the court can regard the general and indefinite allegations in the paragraphs to which we have referred as even a serious attempt to state a cause of action; but if it is, then the bill contains three separate claims instead of two.

But it is clear that Virginia could not under the ordinance, or upon any principle of law or equity, have a cause of action against West Virginia for contribution to the payment of her (Virginia's) own equitable share of the debt, either before or after she had paid it; nor can that State recover against West Virginia any part of the old debt from which she has been released and discharged by her creditors.

We have endeavored to show that if Virginia, either in her own right or as trustee, ever had a cause of action against West Virginia on account of the old debt, it was founded on the compact, and the sum she had a right to demand was to be ascertained and paid in the manner prescribed in the compact; but that State and her creditors have, without consulting West Virginia, created a situation which renders it impossible for this court, or any other tribunal, now to adjust the liability of the latter State in the manner therein prescribed without doing great injustice to her. An examination of the Wheeling ordinance shows that the amount of the Virginia debt as it existed prior to January 1, 1861, is not a factor to be taken into consideration in ascertaining West Virginia's just proportion. It is alleged in the bill that the debt at the time of the separation amounted to "about $33,000,000." When Virginia passed the ordinance, and when West Virginia accepted it with the modifications as to the manner of ascertaining and paying the debt, both parties knew what the amount of the indebtedness was; and it was agreed between them that if West Virginia was charged "with all the State expenditures within her limits and a just proportion of the ordinary expenses of the State since any part of the debt was contracted, and credited with the moneys paid into the treasury of the Commonwealth from the counties included within the proposed new State durring the same period," the result would show what was her just portion of the debt; that is, her just proportion of $33,000,000. If Virginia had repudiated the entire debt, or had admitted her liability for only $5,000,000, or for any other sum less than the $33,000,000, and her creditors had settled upon such a basis, it could scarcely be seriously contended that West Virginia would still be liable to her for exactly the same amount as if she had paid, or adjusted, the

whole $33,000,000; and yet that will necessarily be the result if the mode of settlement provided for in the compact is applied to a situation which Virginia and her creditors have now created. The State of Virginia has not paid the debt, but has extended two-thirds of it, which she decided for herself was her equitable share, and has been released from all the remainder; but she now asks that West Virginia may be compelled to pay to her in her own right, or as trustee, the same amount precisely as if the whole debt had been paid or settled by the issue of new bonds.

It is important to bear in mind throughout the consideration of this case that West Virginia's obligation to pay a just proportion of the debt was to Virginia alone, not to the bondholders. As to the bondholders, Virginia was legally the sole obligor and has always remained so. Neither changes in her constitution of government nor in her territorial area could affect in any degree her liability under her previous obligations. Notwithstanding such changes in either of these respects, the State continued to be the same political entity which incurred the obligation, and the compact by which West Virginia agreed to pay her just proportion of the obligations was made between the two States alone, not between them and the bondholders, and the settlement was to be made between the two States. We doubt whether, in the absence of a compact on the subject, the State of West Virginia would have been legally liable to pay any part of it to Virginia, or to reimburse the parent State on account of any part of it; but as there was a compact, the discussion of these propositions would be purely academic in this case.

If the court has any power to render and enforce a judgment or decree in this cause which would afford to the plaintiffs effective and final relief, it must be a judgment or decree for a definite sum of money found to be due to the State of Virginia on a settlement made in the mode provided by the compact, or else the solemn compact entered into with the consent of Congress, thereby becoming, as this court said in *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How., 185, "a law of the Union," must be wholly disregarded and the amount of the judgment or decree must be ascertained according to some other rule or principle, adopted by the court, to which the parties refused to assent when the compact was made. The adoption of the latter method is not even supposable, for the compact is either valid or invalid; and if it is valid, it cannot be disregarded by the court, while if it is invalid the consequence would

be that West Vrginia was unconstitutionally admitted and is not now a State of the Union, and therefore cannot be sued as such.

In *Green v. Biddle,* 8 Wheat., 1-85, 86, this court said:

> "Now, it is perfectly clear that although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State without the assent of Virginia *or upon terms Variant from those which Virginia* had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed by a solemn act the consent of that body to the separation. The terms and conditions, then on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of Congress, without which Kentucky could not have become an independent State; and then it would follow that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true."

In *State of Penna. v. The Wheeling Bridge Co.,* 13 How., 518, 566, the court, speaking of this same compact, declared (p. 566):

> "This compact, by the sanction of Congress, has become a law of the Union," citing *Green v. Biddle, supra.*

In the case of *Poole v. Fleger,* 11 Pet., 185, 209, the court construed the compact between Kentucky and Tennessee, consented to by Congress, determining a matter of boundary, and it held that—

> "The compact, then has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."

If the court is to found its judgment or decree upon the compact, it must take the place of the legislature of West Virginia in the determination of the amount due, and then it must also disregard the terms of payment provided for in the constitution of that State, which is a part of the compact, or it must in some way establish a sinking fund sufficient to discharge the interest and principal of the

debt at the end of a series of years. It may be observed here that the sinking fund contemplated by the constitution of West Virginia was not intended to be, and in fact could not be, established until the amount of that State's proportion of the debt had been ascertained by the legislature, for until that had been done it was not possible to know what sum would be required to produce the necessary accumulation.

Leaving out of consideration the untenable proposition that the compact is to be disregarded and the adjustment made according to some rule or principle not recognized in it, the demand of the plaintiffs is, in substance and effect, that the court shall decree and enforce a specific performance of the compact, for if that is not the object of the suit, it presents only a moot question which the court will not decide. A mere declaration of the principles upon which an accounting shall be had and the taking of the account accordingly, to be followed by no enforceable judgment or decree, affords no relief and would therefore be an idle and useless proceeding. Besides, it is wholly unnecessary for the court to declare the principles upon which the adjustment shall be made; that is plainly done in the compact.

We have said that this court could not compel the legislature of West Virginia to levy a tax or appropriate money or issue bonds to provide for the payment of any judgment or decree which might be rendered in this case; and we may add that it could not even appoint a receiver or commissioner to collect a tax or to issue bonds for that purpose even if the tax had been imposed by the proper legislative authority, or the issue of bonds had been duly authorized.

The authorities upon this and analogous questions are numerous and conclusive. In *Rees v. City of Watertown* (19 Wall., 107), which was a suit in equity to enforce the collection of certain judgments upon the bonds of the city of Watertown, the court said:

> "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest tribute of sovereignty, and is exercised, first, to raise money for public purposes only; second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

And after referring to the statute, the court said:

> "But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally this jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says: 'There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate,' of which he cites many instances. Lord Talbot says: 'There are cases, indeed, in which a court of equity gives a remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows.' "

Again the court said:

> "A court of equity cannot, by avowing that there is a wrong and no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens."

Again the court said, in the course of its opinion:

> "The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceedings."

In *Heine v. The Levee Commissioners* (19 Wall., 655) the court said, speaking of the right to give a party the relief demanded:

"If sustained at all it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which in the imperfection of human nature often admits of no redress. The holder of a corporation bond must in common with other men submit to this calamity, and the law affords no relief.

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an evasion by the judiciary of the federal govermnet of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

In *The State Railroad Tax Cases* (92 U. S., 575), speaking of the want of authority in judicial tribunals to interfere with the process of collecting taxes, the court said:

"It is a wise policy. It is founded in the simple policy derived from experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of enforcing it are necessary than those which belong to courts of justice. See *Cheatham v. Norvell*, decided at this term; *Nickoll v. United States* (7 Wall., 122); *Dow v. Chicago* (11 Ill. 108)."

In *Merriweather v. Garrett* (102 U. S., 472), the court said on page 501:

"The power of taxation is legislative and cannot be exer-

> cised otherwise than by the authority of the legislature. * * * Taxes can only be collected under authority of the legislature. If no such authority exists the remedy is by appeal to the legislature which alone can grant relief."

And Mr. Justice Field, for himself and Mr. Justice Miller and Mr. Justice Bradley, in a concurring opinion, said, on page 515:

> "The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. Levying taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In a distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare and to provide the revenues for the support and due administration of the government throughout the State in all its subdivisions. Having the sole power to authorize the taxation, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced.
>
> "It is the province of the courts to decide cases between parties and in so doing to construe the constitution and statutes of the United States and of the sovereign States and to declare the law, and when their judgments are rendered, to enforce them by such remedies as legislation has prescribed or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain and encroach upon the other departments of the government, and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of the government, and is essential to its successful administration."

In *Heine v. The Levee Commissioners* (1 Wood, 247), in the United States circuit court, the opinion was delivered by Mr. Justice Bradley, and, speaking of taxation, he said:

> "The judicial department has no power over the subject. If the officers who are charged with the duty of laying or collecting taxes refuse to perform their functions, the court, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative of the writ of mandamus, compel them to perform acts which are ministerial as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject

unless the legislation has expressly conferred upon it further powers."

Louisiana v. Jumel (107 U. S., 711) was a bondholders' bill against the State board of liquidation, alleging that the State had impaired the obligation of an express contract, and there was also a petition for a mandamus against the board and the State auditor and trueasurer. The object of the proceedings was to compel the State officers to pay from the general funds of the State the repudiated bonds and coupons held by the complainants. The court said:

"In neither of the suits was any inquiry to be instituted in respect to the particular bonds and coupons held by the plaintiffs, or any special relief afforded as to them. All that is asked will inure as much to the benefit of the other holders of similar obligations as to the particular parties to these suits. So that the remedy sought implies power in the judiciary to compel the State to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view.

* * * * * * * * * *

"In *United States v. Lee*, 106 U. S., 196, it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner even though the United States were not a party to the judgment under which the eviction was to be had. Here, however, the money in question is lawfully the property of the State. It is in the manual possession of an officer of the State. The bondholders never owned it. The most they can claim is that the State ought to use it to pay their coupons, but until so used it is in no sense theirs.

"Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the auditor of State, the treasurer of State, and the board of

liquidation may be required to enforce the act of 1874, and 'carry out, perform, and discharge each and every one of the ministerial acts, things, and duties respectively required of them, * * * according to the full and true intent and purport of that act.' Certainly no suit begun in the circuit court for such relief would be entertained, for that court can ordinarily grant a writ of mandamus only in aid of some existing jurisdiction. *Bath County v. Amy*, 13 Wall., 244; *Davenport v. County of Dodge*, 105 U. S., 237. Our attention has been called to no case in the courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the circuit court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed,—a question we do not deem it necessary to now decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot thus be ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

And in the case of *Thompson v. Allen County*, etc. (115 U. S., 550), the whole subject was again reviewed by this court, upon a certificate of division from the circuit court. Two of the questions certified were:

1. Whether taxes levied under judicial direction can be collected through a receiver appointed by the court of chancery, if there is no public officer with authority from the legislature to perform the duty.

2. Whether taxes levied by State officers under judicial direction can be colected through a receiver appointed by the United States court where the legislature has provided an officer to collect, but there is a vacancy in office and no one can be found willing to accept the office.

This court answered these questions in the negative. (See also the same case reported in 13 Fed. Rep., 97, Mr. Justice Matthews delivering the opinion.)

It is evident that a judgment or decree in this case must be for money only and must be enforced, if enforced at all, either by a sale of the State's property or by taking control of its legislative and executive authorities and compelling them, by some process not heretofore known to our jurisprudence, to appropriate money from the State treasury for the satisfaction of the debt, or to levy taxes or issue and sell bonds for that purpose. The question whether any of these remedies can be afforded must, it seems, be directly met and finally settled in the present case if there is any good cause of action shown; for, as before said, there is no allegation that there is a lien or trust or any other element involved in either of the alleged causes of action to require the application of any remedy except a judgment or decree for money.

The jurisdiction of this court in an action brought by one State against another to settle a question of boundary, or to secure redress for wrongs and injuries perpetrated by another State upon the territorial rights of the complaining State, or upon the rights of large communities of its people, has been definitely settled by a long series of cases, beginning with *Rhode Island v. Massachusetts* (12 Peters, 657) in one class, and ending with the other class in the two cases of *Kansas v. Colorado* (185 U. S., 125) and *Missouri v. Illinois* (180 U. S., 208, and 200 U. S., 496). But when this court decides a question of boundary between two States, or the boundary between a State and a Territory of the United States, no judicial process is necessary to carry its judgment or decree into effect. When the facts as to the true location of the line of separation has been found by the court, the political departments of the Government, as well as the courts of the States concerned, are bound to recognize its adjudication as conclusive of the question, and the territory formerly in dispute must be thereafter treated as part of the State to which it has been awarded. It will be included by the legislative department of the United States in the congressional and judicial districts of the State, and its people will be recognized as qualified electors in the choice of members of the

House of Representatives, and their representatives in the State legislature will be recognized as qualified electors in the choice of members of the United States Senate for that State. The executive department of the United States, in the exercise of its authority under the Constitution, in the execution of its powers concerning the constitutional and legal relations between the State and the general government, will also treat the territory as part of the State to which it has been adjudged to belong. No State which has lost part of its territory by such adjudication could, therefore, prevent the practical execution of the judgment or decree by legislation or otherwise; for every attempt to continue the exercise of its own jurisdiction over it would be defeated, not only by the political departments, but by the courts as well. So far as we have been able to ascertain, no judicial process has ever been issued or applied for to carry such judgments or decrees into effect, except an order directing the established line to be surveyed and properly marked.

In the other class of cases, where trespasses or nuisances are complained of, and where the acts complained of are done by or under the authority of the defendant State, a decree of this court enjoining the continuance of the wrongs would be binding upon all the officers and agencies of the State, and upon all other persons who might thereafter knowingly participate in the violation of the decree, and they would all be punished for contempt. A power to make and enforce a decree in such a case is very different from the power to make and enforce a decree requiring the legislative or executive authorities of the State to take affirmative action in regard to matters which their own constitution and laws, and the plan and theory of our dual system of government, have committed to their own exclusive judgment and discretion.

There is no fact alleged that would authorize a court of equity to take jurisdiction for the enforcement of such claims as are set up in this case. But, waiving that subject for the present, we propose to confine ourselves in this part of the argument to the question whether this court, under that provision of the constitution which confers upon it jurisdiction over cases in which a State shall be a party, has the power, either in equity or at law, to hear and determine a case in which the final relief demanded is the rendition and enforcement of a simple judgment for money against a State. In *United States v. North Carolina*, 136 U.S., 127, which is one of the cases relied upon to show the jurisdiction of this court in an action against a State for the recovery of money, not only was there no objection made to the jurisdiction at any stage of the proceedings,

but the whole case, which involved no question of fact and only a single question of law, was, by the written consent of the parties, submitted to the court for its decision. It has been decided by this court that a State may waive its privilege and submit itself to the jurisdiction of any court at the suit of another State, or at the suit of an individual.

Beers v. Arkansas, 20 How., 527.
Clark v. Bernhard, 108 U. S., 115.

In the case last cited the court said:

> "The immunity from suit belonging to a State which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that a suit otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction while of course those courts are always open to it as a suitor in controversies between it and citizens of other States."

We do not think, therefore, that the case relied upon can be properly considered as a conclusive adjudication that this court has jurisdiction of an action against a State for the recovery of a money judgment when the State has not consented to be sued but is protesting. Besides, the court, after considering the question submitted by consent of the parties, found that nothing was due from the State and therefore was not required to render a judgment against it. What it would have done if it had found against the State, whether it would have decided that it had power to render and enforce a judgment for the payment of the money, cannot, of course, be known; but from what was subsequently said and done in the case of *South Dakota v. North Carolina,* 193 U. S., 286, we are at liberty to say that the question of power in the court to render and enforce such a judgment is at least still open.

In the case last referred to the court said:

> "But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the constitution, there is an implied exception of actions brought to recover money. The public properly held by any municipality, city, county or State, is

exempt from seizure upon execution because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes *Meriwether v. Garrett*, 102 U. S., 472, 513. As a rule no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature."

The court then refers to the cases of *Rees v. City of Watertown* (19 Wall., 107) and *Heine v. The Levee Commissioners* (19 Wall., 655) and says:

"In this connection reference may be made to *United States v. Guthrie*, 17 How. 284, in which an application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary, and in which we said (p. 303):

" 'The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the federal government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the united States? This is a question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests.'

"Further, in this conection may be noticed *Gordon v. United States*, 117 U. S., 697, in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress pow-

er to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704):

"'The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggreived party without a remedy. * * Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.'"

The court also cited *In re Sanborn*, 148 U. S., 222, and *La Abra Silver Mining Company v. United States*, 175 U. S., 423, 456, and proceeded to say:

"We have, then, on the one hand the general language of the constitution vesting jurisdiction in this court over 'controversies between two or more States,' the history of that jurisdictional clause in the convention, the cases of *Chisolm v. Georgia, United States v. North Carolina,* and *United States v. Michigan* (in which this court sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expressions of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question, it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties."

The decision of the question never became necessary, for the reason that the parties afterwards settled the matter between themselves, so that all the court actually did in that case was to enforce a lien.

In *United States v. Michigan*, 190 U. S., 379, the opinion of the court was delivered upon a demurrer which, of course, admitted all

the material allegations of the bill, and the court decided that the State of Michigan held certain funds and certain tools and machinery appertaining to the Saint Mary's River canal in trust for the United States, and that on the face of the bill the United States had a right to demand an accounting and a payment of the sum found due.

In the opinion it was said:

> "In the consideration of this case, the controlling thought must of course be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but in view of the character of the subject, the language should have its ordinary and usual meaning.
>
> "Whether, under these circumstances, technical words were used to express the thought that the State was to be trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. *Winona &c. R. R. Co. v. Barney,* 113 U. S., 618, 625."

And after an examination of the question the court held that the State was a trustee for the United States as to the money and propery in its possession, and it overruled the demurrer and gave the defendant leave to answer.

In *Kentucky v. Dennison,* 24 Howard, 66, where a law had been constitutionally enacted by Congress making it the duty of the governor of a State to surrender fugitives from the justice of other States, the court held that the suit was against the State, although the governor was the only party made defendant on the record, and in the course of the opinion it said:

> "But the language of the act of 1793 is very different. It does not purport to give authority to the State executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the governor, it evidently points to the duty imposed by the constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State executive to the compact entered into with the other States when it adopted the Constitution of the United States and became a member of

the Union. It was so left by the constitution, and necessarily so left by the act of 1793.

"And it would seem that when the constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

"But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department of any other department, to use any coercive means to compel him" (pp. 109, 110).

In *Missouri v. Illinois*, 200 U. S., 496, in which no judgment or decree for money was demanded, the court said:

"In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that State's conduct can be called in question is one which must be implied from the words of the constitution. The constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizen of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law, and, if so, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principle it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line and in so doing must be governed by rules explicitly or implicitly recognized (*Rhode Island v. Massachusetts*, 12 Pet., 657-733). It must follow and apply those rules even if legislation of one or both of the States seem to stand in the way. But the words of the constitution would be a narrow ground upon which to construct and apply to the relations between States the same system and municipal law in all its details which would apply between individuals. If we suppose a case which did not fall in the power of Congress to regulate, the result of a denial of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the con-

stitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

"The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new."

In every case since the adoption of the eleventh amendment to the Constitution where the court has found that the effect of granting the relief sought by the plaintiff would be to enforce the claim of an individual, whatever may be its nature, against a State, it has denied its power, or the power of any other court of the United States, to do so. It can make no difference what means or devices the parties may have resorted to for the purpose of getting the case into the court, if it appears that the real object of the action and the effect of the judgment or decree would be to conclude the State itself, and not merely its ministerial officers or agents, the court has refused to exercise jurisdiction for that purpose.

See *Hollingsworth v. Virginia*, 3 Dall., 378; *Osborn v. Bank*, 9 Wheat., 738; *Briscoe v. Bank*, 11 Pet., 257; *Jumel v. Louisiana*, 107 U. S., 710; *N. H. v. Louisiana*, 108 U. S., 726; *Poindexter v. Greenhow*, 114 U. S., 270; *Marye v. Parsons*, 114 U. S., 325; *Hagood v. Southern*, 117 U. S., 52; *In re Ayres*, 123 U. S., 443; *Christian v. Atlantic & N. C. R. R. Co.*, 133 U. S., 233; *Louisiana*, etc., *v. Steele*, 134 U. S., 230; *Penoyer v. McConnaughy*, 140 U. S., 1; *In re Tyler*, 149 U. S., 164, *Reagan v. Farmers' Loan and Trust Co.*, 144 U. S., 362; *Scott v. Donald*, 165 U. S., 58; *Tindel v. Wesley*, 167 U. S., 204; *Smith v. Ames*, 169, U. S., 466; *Fitz v. McGhee*, 172 U. S., 516.

This being the law, it is not possible to see how the State of Virginia can maintain an original action as trustee in this court for the avowed use and benefit of individuals on claims in which she as a State has no interest. To sustain such a proceeding would be a palpable evasion of the eleventh amendment, and would establish a precedent which would practically nullify that provision of the organic law by conferring original jurisdiction upon the court in every case where an individual might choose to thansfer his real property or his goods and chattels, or choses in action, to a State as trustee, even if it were done, as in this case, for the sole purpose of conferring jurisdiction on this court. Certainly it cannot be held that a controversy between two States, justicible in this court, can

be created by the transfer of a claim on behalf of an individual to one of the States as a mere trustee to sue and collect it, whatever may be the law in a case where the complaining State is itself the real and beneficial owner of the claim sued on. But this precise question was presented in the case of *Kansas v. United States*, decided February 25, 1907, and not yet reported, and the court disposed of it in a single sentence. After finding that the State was suing as trustee for the Missouri, Kansas and Texas Railway Company, the court said:

"In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of a claim of the railroad, and our original jurisdiction can not be maintained;" and the court held that as the United States has not consented to be sued the bill must be dismissed.

We cannot see how the provision of the Constitution which confers upon this court jurisdiction in cases in which a State shall be a party can be properly so construed and applied as to destroy, or disarrange, the distribution of powers between the federal government and the States, which that instrument establishes. To hold that the judicial tribunals of the United States, whether the case be in equity or at law, can seize and sell the property of a State or direct money to be paid out of its treasury, or assume control over its legislative and executive departments and decree when and how, and for what purpose, they shall exercise their constitutional authority, would be destructive of the independence of the several States in the management and control of their own internal affairs. Yet it is indisputable that if such tribunals possess the power to render valid judgments and decrees in such cases, they must be enforced by some one of the means we have stated.

Some other interpretation must therefore be given to the constitutional provision, some interpretation which will be consistent with the character of our political institutions and at the same time invest this court with original jurisdiction to hear and determine all controversies between States which affect their rights as States—that is, as political organizations clothed with the authority and charged with the duties of government. It is the duty of a State as such to preserve and protect its territorial area against the encroachments of another State; to see that the lives, health, and safety of its citizens are not impaired or endangered by the action of another State or by its authority; and when controversies arise concerning these matters, or others of like character, this court has original jurisdiction to hear and determine them. There is, in fact,

no other way to settle them except by negotiations or war, and the latter is prohibited by the constitution. To confine the jurisdiction to controversies of the character indicated and decline its exercise in cases where the enforcement of a judgment or decree would destroy or impair the sovereign authority of the States, would establish a reasonable construction of the constitution and accomplish all its real beneficial purposes.

There are many controversies between individuals which no judicial tribunal can take cognizance of, notwithstanding the comprehensive terms in which their jurisdiction is conferred, many rights which cannot be enforced, and many wrongs which cannot be redressed by the courts. Although they were established for the purpose of administering justice, it often happens that they are incapable of doing so by reason of the character of the questions involved or the character of the remedies required.

It is safe to say that if the framers of the constitution had expressly provided that this, or any other tribunal of the United States, should have power to seize and sell the property of a State or control the legislative and executive authorities of a State in any matter concerning its financial or other internal affairs, their work would have been rejected, and we do not think such an extraordinary power should be now applied from the general grant of original jurisdiction to this court in cases where a State is a party.

While it appears from the quotations made from the opinion of *South Dakota v. North Carolina* that in the judgment of this court the question as to its jurisdiction to render and enforce a judgment or decree against a State in a suit on a contract for the payment of money, where no lien or trust exist, is still an open one, yet, in view of the facts that it has been elaborately discussed at the bar and much considered by the court in previous cases, we do not propose in this brief to repeat the arguments or cite further authorities. Some questions have been, we think, definitely settled by former adjudications. They are:

1. That the public property of a State cannot be seized and sold to satisfy a judgment or decree.

2. That a court has power in a case properly made to compel the municipal authorities or ministerial officers of a State to comply with the laws of the State in the matter of imposing and collecting taxes.

3. That no court can appoint a receiver, commissioner, or other official with power to collect taxes and apply the proceeds to the satisfaction of a judgment or decree, even after they have been imposed by the proper authorities of the State.

4. That no court can by its judgment or decree order the payment of money out of the State or national treasury when it has not been appropriated by the proper legislative authority.

5. That no court can compel the legislature or executive authorities of a State to impose a tax or issue bonds or appropriate money for any purpose, or to exercise any other authority vested in them by the constitution of the State. Unless the numerous cases establishing these propositions shall be overruled in whole or in part, or unless the present case can be in some way distinguished from them, it is plain that no enforceable judgment or decree can be rendered by the court on any one of the alleged causes of action; and if that is so, it has, according to all the authorities on the subject, no jurisdiction to hear and determine the controversy.

We confidently submit that the outline of the bill heretofore given and the exhibits made part of it shows conclusively that it is multifarious, and that the demurrer ought to be sustained on that ground, if any good cause of action is shown over which this court has jurisdiction.

Virginia suing in her own right upon a separate and independent cause of action alleged to belong exclusively to her is not the same party as Virginia suing as trustee upon a different cause of action for the use and benefit of others who have no interest in her claim. Moreover, the State could not sue in equity in her own right, in one bill, upon two causes of action so entirely separate and distinct from each other as the claim for money and property alleged to have been delivered to the defendant under the acts of the legislature, and the claim founded upon the compact for the defendant's just proportion of the old public debt, even if she had paid that debt and was entitled to contribution. The foundations of the two causes of action are wholly different, and they are of a wholly different nature and require different judgments or decrees. They involve different questions of law and fact, and a defense which would be good against one would be wholly inapplicable to the other.

"Multifariousness," says Foster, "consists in the joinder of two or more distinct and unconnected grounds for equitable relief each

of which might be the foundation for a separate bill. This may occur in three ways—by misjoinder of plaintiffs, by misjoinder of defendants, and by misjoinder of grounds for equitable relief held by and against the same parties."

Foster, Fed. Prac., sec. 71; *Calvert on Parties, Book I*, ch. VII.

Story says:

> "By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several of a distinct and independent nature against several defendants in the same bill."
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> *Story's Equity Pl.*, sec. 271.

Again it is stated by Story:

> "The result of the principles to be extracted from the cases on this subject seems to be that where there is a common liability and a common interest, a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit" (sec. 533).

In Daniel's Chancery Practice, page 335, it is said:

> "It may be that the plaintiffs and defendants are parties to the whole of the transactions which forms the subject of the suit and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records."

In *Brown v. Guarantee Trust Co.* (128 U. S., 404) this court said:

> "To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must occur: First, the ground of suit must be different; second, each ground must be sufficient as stated to sustian a bill. *Bedsole v. Monroe* (5 Iredell Eq., 313); *Larkins v. Biddle*, (21 Ala., 252); *Nail v. Mobley* (9 Ga., 278); *Robinson v. Cross* (22 Conn., 171)."
>
> See also *Shields v. Thomas*, 59 U. S., 253 (18 How.).

In *Walker v. Powers* (104 U. S., 245), a case analogous to the present, there was a misjoinder of plaintiffs and a misjoinder of causes of action. The opinion was delivered by Mr. Justice Miller, and the cases of *Emals v. Emals* (14 McArthur [N. J. Eq.] 114) and *Sawyer v. Noble* (55 Me., 273) were cited and approved.

See also *Dial v. Reynolds* (96 U. S., 340).

Doggett, etc., v. Florida R. R. Co. (99 U. S., 72).

In Salvidge v. Hyde (Jac., 151; Mad., 158) the Vice-Chancellor said:

> "In order to determine whether a suit is multifarious, or, in other words, contains distinct matter, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the case, but whether the plaintiff's bill seeks relief in respect of matters which are, in their nature, separate and distinct."

In *Church v. Citizens' Street Railway Company*, 78 Fed., 529, the court said:

> "Multifariousness consists in stating against the same party two or more independent causes of action in the same bill; or it may consist in stating one or more causes of action against a portion of the defendants and another cause of action against another portion of the defendants."

In that action the plaintiffs, who had purchased stock in a corporation, attempted to secure relief for themselves in their own right on one cause of action, and also to secure relief against the same defendants for themselves and all other stockholders on another cause of action. The court held the bill multifarious.

C. Zeigler v. Lake City Elevated Railroad Company, 76 Fed., 662; the *First National Bank v. Sioux City*, 75 Fed., 154; *Price, receiver, etc., v. Coleman*, 21 Fed., 557; opinion by J. Grey; *Central Bank v. Fitzgerald et al.*, 94 Fed., 16; *Lewarne v. Mexican Internal Improvement Co.*, 38 Fed., 629; *Aetna Insurance Co. v. Smith*, 73 Fed., 318.

In *Metropolitan Trust Co. v. Columbus & Hocking Ry. Co.*, 93 Fed., 689, Judge Taft said:

> "It is also true that a cause of action in favor of one in his own right is as distinct from a cause of action in favor of the same person as trustee as it is from that of a different

> person. And therefore that a defendant against whom a trustee attempted to unite in the same bill with a cause of action asserted by him as trustee a wholly distinct cause of action in his individual right might object on the ground of multifariousness. In the case before us the defendant railway company might therefore be heard to urge this defect in the bill, because it asks for an enforcement of two different liens held in different rights."

But the court held that the objection to the bill for multifariousness could not be taken by Zohorst and the Second National Bank, "for," said the court, "as to that issue made by the complainant as trustee the right is the same." And again the court said:

> "Upon that issue the complainant as trustee and in its own right has precisely the same interest. And the union of the two causes of action does not embarrass Zohorst or the bank in the slightest; for as to them, the causes of action raised but one narrow question" (page 691).

The difference between that case and the case at bar is obvious at a glance. In the case at bar the bill alleges two entirely separate and distinct causes of action arising out of two unconnected transactions, in one of which it alleges an interest in the plaintiff State, and in the other an interest as trustee, and thus presents two distinct series of issues to be investigated and decided. And, besides, it is perfectly clear that the State of Virginia has not the same interest in the cause of action alleged in her own right and in the one asserted as trustee; nor can the State of West Virginia make the same defense to both.

In *Moss v. Cohen*, 158 N. Y., 240, the plaintiff entitled the action as by himself individually and as executor, but there was only one cause of action alleged, and that was wholly for the benefit of the estate he represented. The court said:

> "There is no pretense or allegation that the plaintiff claimed more than a single right of recovery and that he brought to enforce as executor and for the benefit of the estate he represents";

and it held that there was consequently no improper joinder of parties.

In *Hall v. Fisher*, 20 Bard. (N. Y.), the plaintiff sued in its own name and also as administrator, alleging that he and his intestate during the lifetime of the latter tenants in common, the intestate

owning three-fourths and the plaintiff owning one-fourth of a lot of land; and his claim was that the defendants should account to him individually and to him as administrator for their shares of rents and profits. The court held that the cause of action should have been separately stated. It said:

> "How else can the defendant, if he has a defense of a different character as to each cotenant, avail himself of such defense? He might in this case have one defense against the plaintiff as to his personal claim and another defense as to the interest whose rights he claims to represent as administrator. It cannot be regular for a plaintiff to include in the same action claims in his individual right and as administrator of another. It was never allowed at common law and is not sanctioned or allowed by any statute, not even the Code."

It is evident that the State of Virginia, having been by contract with her creditors discharged from all liability for the one-third of the old debt represented by the certificates, has no pecuniary interest whatever in the alleged claim against West Virginia for which she sues as trustee; and it will be contended, we presume, that the owners of the unfunded one-third of the ante-war debt, whether it is represented by the canceled bonds held in trust by the State or by the certificates, have any interest whatever in the claim of Virginia for money and property alleged to have been transferred to West Virginia under the acts of 1863. The unfunded one-third of the old bonds formerly held by the Virginia Commissioners of the Sinking Fund and the Literary Fund is in the same position as that belonging to the other creditors. Virginia has solemnly and repeatedly declared that she was not liable for the one-third, has refused to pay it or any part of it, and has canceled the bonds and issued to the Sinking Fund and Literary Fund precisely the same kind of certificates issued to other creditors. The fact, if it be a fact, that the Commissioners of the Sinking Fund and the Literary Fund are agencies of the State, would simply show that the State owed that part of the debt to herself. But the State has released herself from the obligation for one-third of the bonds originally held by these funds and has thereby withdrawn from them that proportion of the sum which she originally intended they should have. Unless, therefore, the two funds, as agencies of the State, now have a valid claim against West Virginia, their demands have been fully satisfied and extinguished.. In any aspect, the claim is asserted by

Virginia to recover from West Virginia for contribution on account of money which she (Virginia) has never paid.

The claim against West Virginia under the compact cannot be divided into separate parts, so that Virginia can sue in her own right or for the Commissioners of the Sinking Fund and the Literary Fund for the part represented by the certificates held by those two funds, and also sue as trustee for another part held by different parties. The claim is an entirety and the amount is to be ascertained *in solido*, in the manner provided by compact, and is to be paid in the manner provided by the compact. Whatever the amount might be, it was all payable to Virginia herself, and not to the bondholders, who never had a cause of action against West Virginia, even if the State had been suable; and they cannot create a cause of action for their own benefit, in the name of the State, by the process of having Virginia transfer the indebtedness, or part of it, to them by the enactment of statutes or the issue of certificates or otherwise, and then transferring it back to the State as trustee. But whether the State is, or could be, legally a trustee, or whether, if she be legally a trustee, she could maintain an action in this cause in that capacity, makes no difference in the decision of the question of multifariousness, for the bill and exhibits show that for nearly, if not all, of the unfunded one-third of the debt she actually sues as trustee in this action and not otherwise; and that is sufficient to sustain the contention that there is a misjoinder of parties and a misjoinder of causes of action. Even, therefore, if it should be held that the State is suing in her own right for a judgment and recovery of the amount represented by the certificates held by the two funds, and as trustee for the holders of the other certificates, it would furnish another substantial reason for holding the bill to be multifarious. Besides, it would show that there is a conflict between the personal interests of the trustee and the interests of the *cestuis que trust*, for whatever the trustee might receive in her own right in the distribution of the sum recovered would, to that extent, diminish the portions of the other beneficiaries; and it is a well established rule that plaintiffs whose interests are conflicting cannot unite in the same action—a rule which ought to be rigidly enforced, especially when one of the plaintiffs sues as trustee for the others, and consequently controls the entire proceeding.

Walker v. Powers, 104 U. S., 245.

In view of her own statutes and the agreement she has exacted

from the other holders of certificates, it is difficult to see how Virginia can consistently claim in this action to be suing in her own right to recover any part of the alleged indebtedness of West Virginia on account of the ante-war debt, or, for that matter, on account of any other claim. By statutes she has required her creditors to enter into contracts to defray all the expenses of this proceeding, to release her absolutely, and to accept whatever may be received from West Virginia—whether it be much or little or nothing at all—in full satisfaction and discharge of their claims, and this suit, as alleged in the bill, is being prosecuted under those statutes and agreements.

The bill wholly fails to show a case which entitles the plaintiff to an accounting against the defendant. There are no mutual accounts between the parties, no trust or lien alleged, no fraud, mistake, or concealment, no discovery asked or shown to be necessary, no multiplicity of suits to be avoided, no question as to the application of payments, and no question of apportionment or contribution except upon a basis which is expressly and plainly stated in the compact between the States, and which, therefore, calls for no exercise of the powers of a court of equity. In all its branches, the action is founded on contracts evidenced by the ordinance, and by statutes and constitutional provisions, easily interpreted and involving no question not cognizable in a court of law; and the only possible remedy is a simple judgment for money which a court of law is fully competent to award, if it can be awarded at all in such a case.

In a case where there are no mutual accounts, and no discovery is necessary, the court will not decree an accounting. Story says:

> "One of the most difficult questions arising under this head (and which has been incidentally discussed in another place) is to ascertain whether there are any, and if any, what are the true boundaries of equity jurisdiction in such matters of account as are cognizable at law; we may say cognizable at law, for wherever the account stands upon equitable claims or has equitable trusts attached to it, there is no doubt that the jurisdiction is absolutely universal without exception, since the party is remediless at law" (Sec. 454.)

And again he says:

> "But in cases where there is a remedy at law, there is no small confusion and difficulty in the authorities. The jurisdiction in matters of this sort has been asserted to be maintainable upon two grounds, distinct in their own nature and yet often running into each other. In the first place, it has

> been asserted that where in a matter of account the party seeks a discovery of facts, and these appear upon his bill to be material to his right of recovery, there, if the answer does in fact make a discovery of such material facts (for it would be no ground of jurisdiction if the discovery failed), the courts have at once a rightful jurisdiction of the cause and may proceed to give relief in order to avoid multiplicity of suits" (Sec. 455).

The authorities in suppore of the propositions we have stated are substantially uniform.

In *Russell v. Clark* (7 Cranch, 89), this court said:

> "It is true that if certain facts essential to the merits of a claim, purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes properly from a court of law into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law."
>
> See *Fowle v. Lawson*, 6 Pet., 495; *Dowell v. Mitchell* and *Mitchell v. Dowell*, 105 U. S., 430 (and the authorities therein cited); *Consolidated Safety Valve Co. v. Ashlan*, 26 Fed., 369; *Lord v. Whitehead*, 24 Fed., 421; *Gunn v. Brinkley*, etc., 66 Fed., 382.

French v. Hay, 22 Fed., 231-237, was a bill for an accounting, and the court said:

> "And where it conceded that by the instrument through which he claims, French became the owner of the judgment, as between himself and Hay, we do not perceive how the concession could aid him in this case. If, as the bill avers, Hay collected the judgment and now holds the money for the use of the complainant, there is a complete remedy at law. This is not a bill for discovery and the aid of the court of equity is not needed."

It is shown by the bill in this case that the State of Virginia has in her own possession all the accounts, vouchers, and documents relating to the amount of the old indebtedness, and all the charges and

credits that should be made against and in favor of West Virginia on the settlement provided for in the compact, and she offers to produce them before the master. The prayer of the bill asks that the defendant State "may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth," etc., etc.; but it is not alleged anywhere in the bill that the State of West Virginia has in her possession, or under her control, any such entries, documents, reports, or proceedings.

There is no semblance of a ground for the intervention of a court of equity in this case unless it be the fact that the jurisdiction of such a court can be invoked merely because the accounts necessary to be examined in deciding the controversy between the parties are voluminous or tedious; but in the case of *Brown v. Chase*, 94 U. S., 81, the court said:

> "If the evidence is merely voluminous or tedious, that circumstance is not sufficient cause for transferring a case from a court of law to a court of equity" (p. 824).

But it is unnecessary to discuss this question at length, for the distinction between the common law and equity jurisdiction of the courts of the United States under the constitution has been so often stated and explained in the decisions of this court that it would be tedious to repeat them here.

For cases in which this distinction is stated, see—

Fenn v. Holmes, 21 How., 491;
Robinson v. Campbell, 8 Wheat., 221;
Strather v. Lucas, 6 Pet., 768;
Parish v. Elkins, 16 Pet., 453;
Bennett v. Butterworth, 11 How., 669;
Galt v. Galloway, 4 Pet., 432.
Young v. Porter, 3 Woods, 342;
Scott v. Seely, 140 U. S., 106;
Hipp v. Robbins, 19 How., 271.
Parker v. Winnipiseogee et al., 2 Black, 545;
Grand Chute v. Winniver, 15 Wall., 373;
Lemon v. Coches, 23 Wall., 461;
Killian v. Ebbinghaus, 110 U. S., 468.

There is no allegation in the bill that any authority has been given for the prosecution of this action on behalf of the State of Virginia, except for the single purpose of securing an adjustment of the proportion of the old debt proper to be borne by the State of West Virginia. The plaintiff State has already determined for herself what her just proportion of the debt is, and neither asks nor is willing to have that question reopened. The only authority for the institution of the suit is found in the act of March 6, 1900, which relates exclusively to the ascertainment of West Virginia's proportion of the debt represented by the certificates deposited with the commission, and provides that "the said commission shall be authorized and empowered by and with the advice and approval of the Attorney-General of Virginia to take such action and institute such proceedings in behalf of the State as may, in the judgment of said commission and Attorney-General, be needful and proper to protect the interests of the State and bring about and carry into effect a settlement as aforesaid." This is the whole extent of the authority given for the use of the name of the State in this action, and it is expressly limited to an action or proceeding on her behalf as trustee for the certificate-holders; and, as we have already shown, this court cannot entertain that part of the bill.

It was held by the court in *Texas v. White* (7 Wall., 700) that the governor of a State had the power to authorize the institution of an action by the State in a case where the interests of the State itself were involved; but no such rule can be applied where the suit is not for the assertion of a claim or the protection of a right belonging to the State, but for the sole benefit of individuals, and she sues as their trustee. In such a case the legislature possesses the sole authority to direct its institution. But, whether this is the general rule or not, the fact in this case is that the legislature, the supreme authority of the State, did assume and exercise control over the subject, and by an act which was approved by the governor, specifically defined the purpose for which the name of the State might be used.

Ordinarily the objection that the suit was brought without authority from the party named as plaintiff should be taken by a plea in abatement, but where the lack of authority appears on the face of the bill of complaint, the question can be raised by demurrer. For instance, in a case where diverse citizenship is necessary to confer jurisdiction, and it appears on the face of the bill or complaint that the plaintiff and defendant are citizens of the same State, or even where it does not appear that they are citizens of different States,

no plea in abatement is necessary, and a demurrer to the jurisdiction will be sustained.

The demurrer in this case calls the attention of the court to the fact that the bill contains no prayer for a judgment or decree or any other final relief. (*See Equity Rule* 21.) It merely asks that the principles upon which an accounting shall be had "may be ascertained and declared;" that an accounting may be had, and that the plaintiff may be granted such other and further general relief as the nature of the case may require or to equity may seem meet. We do not suppose a decree or judgment for the recovery of money or property can be rendered upon a mere prayer for general relief; but this is not a matter of great importance, because the bill might me amended in this particular.

We respectfully submit that the demurrer should be sustained and the bill dismissed.

J. G. CARLISLE,
For West Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Brief for Plaintiff

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Original, No. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF OF COUNSEL FOR VIRGINIA UPON THE QUESTIONS RAISED BY THE DEMURRERS.

Statement of Facts as Shown by the Bill.

I.

On the 20th of June, 1863, West Virginia became a State of the American Union pursuant to an act of the United States Congress approved December 31, 1862, and in accordance with a proclamation of President Lincoln made April 20, 1863, under the act of Congress, upon the terms and conditions prescribed by the Commonwealth of Virginia in an ordinance adopted in convention and in the acts passed by the General Assembly of the restored government of the Commonwealth giving her consent to the formation of the new State out of her territory, with the constitution adopted for the new State by the people thereof, and which was sanctioned by Congress.

II.

Prior to the formation of the new State, the Commonwealth of

Vrginia had contracted an indebtedness approximating, as of the first day of January, 1861, the sum of $33,000,000, evidenced by the contracts and obligations of the undivided State.

This large indebtedness had been created in constructing a system of public highways, turnpikes, canals, railways, and other public internal improvements, begun in the first quarter of the nineteenth century and designed to fairly develop every part of her territory, and to afford means of communication between the different sections of the Commonwealth and the seashore, and to give to the people in all the various portions of the State access to the best available markets.

The "vast potentalities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known for years prior to the date named (1861), and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation." Accordingly the costly system of highways, canals, and railways thus projected were designed, begun, and in very great measure constructed, *for the purpose of developing the resources of the region afterwards embraced in the State of West Virginia,* and of giving to its people adequate facilities of communication with other portions of the Commonwealth and access to the seashore and to the markets of the country.

This system of internal improvement and the large indebtedness contracted in carrying it into execution received the sanction of the people of the counties subsequently constituting West Virginia, through their representatives in the General Assembly of the undivided State, and a very large portion of that indebtedness would not have been created but for the votes of the members of the General Assembly representing those counties; and little or none of that indebtedness would have been contracted had the represntatives from the counties subsequently forming the State of West Virginia voted against its creation. Several millions of dollars of said indebtedness were contracted on account of the works of internal improvement constructed in the territory now constituting West Virginia.

III.

The 9th section of the ordinance adopted by the people of the restored State of Virginia, in convention assembled in the city of Wheeling, Virginia, on the 20th day of August, 1861, entitled "An

ordinance to provide for the formation of a new State out of the portion of the territory of this State," provided as follows:

> "9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

Upon this stipulation and condition, afterwards accepted and acted upon by the people of West Virginia, the consent of the Commonwealth of Virginia was given to the formation of the new State.

IV.

Before the creation of the State of West Virginia, and while the territory and the people afterwards constituting the State still formed a part of the Commonwealth of Virginia and were subject to its jurisdiction and laws, the General Assembly of the restored State of Virginia, on the 3d day of February, 1863, enacted the following law:

> "That all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this State, or in the president and directors of the literary fund, or the board of public works thereof, or in any persons or persons for the use of the State, to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said board of public works, in any parent bank or branch

doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State.

5. That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government."

And by another act of the General Assembly of the restored State of Virginia, passed February 4, 1863, it was enacted as follows:

"1. That the sum of one hundred and fifty thousand dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United Statets.

2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State."

These two statutes of the restored government of Virginia validly prescribed the terms and conditions upon which the property and money therein mentioned should be transferred to the new State, when it should be formed; and, pursuant to their provisions, money and property amounting to and of the value of several millions of dollars were, after the formation of the new State, paid over and transferred to and accepted by West Virginia.

The constitution of the State of West Virginia, which became effective when she was admitted into the Union pursuant to the said

act of Congress and proclamation of President Lincoln, contained the following provisions:

By section 5 of article VIII of said Constitution it was provided:

> "5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

And by section 7 of article VIII it was provided:

> "7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank."

And by section 8 of article VIII it was provided:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

At the time the constitution containing these provisions was adopted by West Virginia that State did not owe, and could not have owed, any "public debt" or "previous liability," except for her just contributive portion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the acts of the General Assembly of the restored State of Virginia as above set forth, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia.

The provisions of sections 7 and 8 of article VII of said constitution were embodied therein by the people of West Virginia, or their representatives, for the purpose of complying with and carrying out in good faith the stipulations and conditions upon which the consent of Virginia was given to the formation of the State of West Virginia, and to the transfer of the money and property aforesaid to said new State.

VI.

After the formation of the State of West Virginia and after the restored government of Virginia had become the only government of the Commonwealth and its authority recognized and established throughout her limits, at intervals after the years 1865 down to and including the year 1905, various efforts were made by the Commonwealth of Virginia, through its constituted authorities, to bring about and effect an adjustment and settlement with West Virginia of the equitable proportion of the public debt of the undivided State proper to be borne and paid by the State of West Virginia. All of these efforts proved unavailing and abortive; and for years West Virginia has refused or failed to take any action or do anything for the purpose of bringing about any adjustment or settlement with this State.

Only after exhausting every means of amicable negotiation and having her overtures to that end repeatedly refused, and as a last resort, has Virginia been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to her and to all of her people.

VII.

Without waiting for a settlement with West Virginia, the Commonwealth proceeded, fully recognizing her liability for an indebtedness, all of which stood in her name, soon after the establishment of its restored government at Richmond, to make provision for the settlement and payment of the portion of the common debt of the undivided State which she could be fairly expected to assume and pay, under the circumstances then existing and the conditions which confronted her.

Several efforts were made to effect such an adjustment and settlement, the most important of which was that embodied in the act of March 30, 1871, mentioned at page 7 and copied at pages 13 to 16 of the bill.

By reason of the then impoverished condition of her people, occasioned by disasters which had destroyed their resources and paralyzed their productive energies, it was soon apparent that Virginia, in assuming and capitalizing, and again recapitalizing, the accrued interest upon the debt of the original State, and undertaking to pay, with 6 per cent. interest, two-thirds of the aggregate sum thus

ascertained, had assumed a heavier burden than she was able to bear. Accordingly other plans for the settlement of the State debt were adopted, and a final adjustment made under the act of February 20, 1892, set forth in the bill.

As a result of this, it will be seen that Virginia has assumed and already actually paid off and retired, exclusive of the large amounts she has paid on account of interest, *a principal sum* aggregating as much as, or more than, the entire principal sum of the debt of the undivided State as of January 1, 1861.

The facts in regard to these various transactions and the adjustment made by Virginia with the common creditors of the old State are recited in the bill merely for the purpose of showing the present status of the public debt of the original State and the precise relation of this Commonwealth at the present time in respect thereto.

Of course, the rights of West Virginia cannot be affected by any of these transactions between Virginia and the common creditors, of the undivided State, except to the extent that Virginia's rights and action therein may entitle her to contribution from West Virginia.

VIII.

As indicating the character of the efforts and sacrifices which Virginia, notwithstanding the disasters and losses which her people have endured, has made, in order to bear and to discharge her just obligations on account of the common debt of the undivided State, and as showing something of the strength of her equitable claim against West Virginia, it must be remembered that she has actually paid off, retired, and discharged and satisfied, so far as West Virginia is concerned, as of the date of the institution of this suit, over $71,000,000, including principal and interest, on account of said common indebtedness.

While Virginia has made this large contribution towards the settlement of the common debt, West Virginia has not paid one dollar thereof.

IX.

Since January 1, 1861, the arbitrary date fixed by the Wheeling ordinance as of which the adjustment and settlement between the two States shall be made, Virginia has actually paid off and retired, and now holds in her own hands and for her own benefit, exclusive of the sums represented by the certificates issued under the funding acts aforesaid, obligations of the undivided State amounting in the

aggregate, including the interest to be fairly computed thereon to date, to a sum in excess of $25,000,000. For all of the obligations and indebtedness of the original State, so taken up and retired or paid off by her, Virginia has a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

X.

As a part of the adjustment which Virginia from time to time has made with the holders of the bonds and obligations of the undivided State and as a proper stipulation in connection with the partial settlements thereof made by her, it was agreed between them and Virginia that upon giving to them respectively her obligations for the respective portions of each of the old bonds of the undivided State agreed to be assumed and paid by Virginia, these old original bonds should be deposited with Virginia, and so far as not thus funded by her in her own obligations should be held by her as trustee for the holder or his assigns; and to each of these parties thus entitled she has given her certificate to this effect.

By the terms of the settlements authorized by the acts of 1879, 1882, and 1892, set forth in the bill, no liability rests upon Virginia on account of the certificates given by her pursuant to the terms of those acts, for the bonds deposited with her, and to be held by her, to await a settlement with West Virginia, as to the portion thereof not assumed or paid by Virginia. But it has been suggested that, although there is no liability assumed by Virginia by reason of issuing said certificates or upon said certificates, that there may still be a liability upon her *as to the unfunded portion of the bonds deposited with her under the acts of 1879, 1882, and 1892.* This, however, is a matter of minor importance, because a comparatively small portion of the old debt of the State was funded under the acts of 1879, 1882, and 1892, as will appear from the circumstance that there are in all only $1,609,600.15 of the certificates issued under the last-mentioned three acts outstanding in the hands of the public, as shown by the exhibit at page 73 of the bill.

The great bulk of the debt of the old State was funded under the act of 1871, and the unfunded portion of the bonds deposited with Virginia by the public creditors under the terms of that act, amounted to $12,703,451.79, upon the principal interest-bearing sum of which there is interest due from July 1, 1871. (See Exhibit No. 1, page 13 of the bill, and statement of Second Auditor of Virginia,

embodied in the address of Mr. Randolph Harrison, found at page 73 of the bill.)

The arrangement under the funding act of 1871 was very different from that provided for by the subsequent acts of 1879, 1882, and 1892.

By the acts of 1871 Virginia undertook to be the custodian of the bonds of the undivided State deposited with her, so far as they were unfunded; and that payment should "be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment."

Whatever may have been the purpose of the General Assembly of Virginia in the enactment of this law and in authorizing such contracts to be made, it would seem that Virginia's legal liability on account of said unfunded portion of said bonds is not released or affected by the transaction, but still exists.

However, under all the circumstances of the case and in view of the underlying equities suggested by the facts stated in the bill, it would seem that Virginia has already unquestionably done as much as she could be fairly expected to do towards paying off the common public debt of the old State. The great mass of the holders of the certificates issued by her under the act of 1871, and under the other acts above recited, who are the persons entitled to the said unfunded bonds deposited with her and now held by her, recognizing the justice of this view, have, through their authorized representatives, entered into the agreement printed at pages 83 to 86 of the bill.

XI.

By joint resolution of the General Assembly of Virginia, printed as Exhibit No. 5, beginning at page 39 of the bill, entitled—

> "A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same,"

approved March 6, 1894, a commission was created for the purposes set forth in the title to the resolution.

The Virginia Debt Commission mentioned in the bill was created pursuant to that resolution, and made earnest efforts to bring

about a settlement with West Virginia, without any satisfactory result.

Accordingly the General Assembly of Virginia afterwards passed the act approved March 6, 1900, printed as Exhibit No. 6 of the bill, beginning at page 41 thereof, the object of which is stated in its title as follows:

> "An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises."

By this act, as plainly appears from its terms, additional powers and authority were conferred upon this commission, and it was made its duty, and power was conferred upon it, by and with the advice and approval of the Attorney-General of the State, to take such action and institute such proceedings on behalf of the State as may, in the judgment of said commission and Attorney-General, be needful and proper to protect the interest of the State and bring about and carry into effect a settlement as aforesaid.

After again making an earnest effort to bring about an amicable settlement with West Virginia, by which the proportion of the debt of the original State of Virginia proper to be borne by West Virginia should be ascertained, and after having had their overtures to that end rejected by West Virginia, the said commission deemed it to be its duty, with the advice and approval of the Attorney-General of Virginia, to cause this suit to be brought in strict conformity with the powers conferred upon them by the acts aforesaid, the commission and the Attorney-General considering such action to be needful and proper to protect the interest of the State and bring about and carry into effect such a settlement.

Accordingly, and in strict conformity with the authority conferred by the act of March 6, 1900, this suit was instituted.

BRIEF OF ARGUMENT UPON THE QUESTIONS OF LAW PRESENTED BY THE DEMURRERS.

(1.)

As to the first ground alleged in the amended demurrer, namely, that there is a misjoinder of parties plaintiff and a misjoinder of causes of action, we cannot see that this objection is well taken.

The definitions of misjoinder under English chancery practice, as well as the practice in this country, show that there is no such vice in the bill.

(*a*) As to the misjoinder of parties: This does not arise unless—

> "Complainants actually have or may have conflicting interests in regard to the object of the suit, or if any or either of them have no interest in the subject-matter of the suit."
> Mitf. Pl., p. 399, note.

The rule as to misjoinder of plaintiffs, as laid down by Mr. Daniell, is that—

> "persons who have no interest in the litigation cannot be joined as coplaintiffs in a suit with those who have."
> 1st Daniell Chy. (5th Am. ed.), m. p. 301.

Example given by Mr. Daniell of what is not misjoinder; Auctioneer can be joined as coplaintiff with the vender in a bill against the purchaser.

Id., m. p. 302.

Again: Want of interest by a coplaintiff in the subject matter is ground for demurrer.

Story's Eq. Pl., sections 231, 232, 508, and 509.
Mitf. Pl., 160, 161.

Again: Plaintiffs who have no common interest, but assert distinct and several claims against one and the same defendant, cannot be joined.

Story's Eq. Pl., section 279.

On the other hand, where there is a community of interests among coplaintiffs desiring the same relief against a common defendant, they may be joined.

It was held in Ware *vs.* Duke of Northumberland. 2 Anstruther's Rep., p. 469, that:

> "Unconnected parties might be joined in one suit *where there was a common interest among them all, centering in the point in issue in the cause.*"

This doctrine is strongly approved by Chancellor Kent in Brickenhoff *et als. vs.* Browns, where different judgment creditors united in one bill for discovery and account to set aside impediments to their remedies at law caused by the fraudulent acts of their common debtor.

6 Johnson Chy., 139, 151, 152.

Chancellor Kent says at page 151:

> "It is an ordinary case in this court, for creditors to unite or for one or more, on behalf of themselves and the rest to sue the representative of their debtor in possession of the assets, and to seek an account of the estate.
>
> "This is done to prevent a multiplicity of suits, a very favorite object with this court; and this principle so far controls the other rule, which preserves, in some degree, an analogy between pleadings in chancery, and the simplicity of declarations at common law. *There is no sound reason for requiring the judgment creditors to separate their suits, when they have one common object in view, which, in fact, governs the whole case.*" (Italics here and elsewhere ours.)

Story's Eq. Pl., section 286; see also 2d Story's Eq. Jur., sections 853, 854.

(*b*) Nor is there any foundation whatever for the objection that there is a misjoinder of causes of action.

Considering together the two grounds of objection which are jointly presented in the first assignment of grounds of demurrer made in the amended demurrer in the light of the established doctrines and definitions, we beg leave to say that they are both founded upon an utter misapprehension of the meaning, scope, and purpose of the bill.

It is impossible that there can be any misjoinder of parties plaintiff, because there is only one party plaintiff. Virginia, in her corporate capacity, is the only plaintiff in the suit. She does not sue in any representative capacity, though the bill discloses the fact that, by reason of the arrangements which she has made with the great mass of the holders of the bonds of the old State, she does

hold in her possession nearly all of those bonds as a depository, and *quoad* the custody thereof that she holds them in a fiduciary capacity; but she does not sue as trustee, but sues in her own name, for the purpose of obtaining the equitable relief to which the bill shows that she is fairly entitled.

In so far as said bonds have been funded in her own obligations and discharged by her, she holds those bonds as vouchers and evidence of her satisfaction of the same against the State of West Virginia, who is, as a proposition of public law and of equity, bound jointly with her to the public creditors to pay the same, and, as between her and West Virginia, is bound by contract to pay West Virginia's equitable proportion thereof.

If Virginia had no personal interest in respect to the bonds so deposited and held by her in a fiduciary capacity, we would cheerfully concede that she would have no standing to maintain this suit in respect *to these bonds;* but Virginia not only has an interest, but a very great interest, in respect to the unfunded and unsatisfied bonds of the old State, which, confiding in her fair dealing, the public creditors have entrusted to her custody, and in the settlement by West Virginia of her fair equitable proportion of the indebtedness of the undivided State represented by these bonds; *and that interest is that she shall be exonerated, at least to the extent of West Virginia's liability therefor, from any obligation to pay the same.*

To obtain such just exoneration she has invoked the equitable jurisdiction of this court.

Not only is she entitled to maintain and prosecute this suit, in order to obtain the exoneration which, according to the general principles of equity she is entitled to be decreed, but, by the special contract between her and the parties entitled to these bonds, she has, without any prejudice to the rights of West Virginia or any violation of any duty she owes to West Virginia, and without doing anything of which West Virginia has any ground whatever for complaint, acquired a still greater interest and right, namely, to be entirely exonerated from any liability on account of the unfunded portion of the common debt represented by the bonds so deposited with her and by the certificates which she has issued therefor.

This interest is given to her by the express terms of the contract which she has made with these certificate-holders, who are the owners of the bonds of which she is the custodian, and who, recogniging the enormous contributions which she has made from her limited

means to the satisfaction of the common debt, have cheerfully agreed to accept whatever amount this court shall ascertain to be the just and equitable proportion of the common debt of the old State to be borne by West Virginia, in full discharge and satisfaction of any claim they may have against Virginia and in full acquittance of all demands against her. (See 4th clause of contract, p. 85 of bill.)

It will be observed that, as has been already suggested, this stipulation, though it inures to the protection and to the interest of Virginia, in no sense and by no possibility is or can be prejudicial to any right of West Virginia; for under no circumstances could or will this agreement operate to add one cent to the liability of West Virginia.

We respectfully submit that her equitable right to exoneration from liability as to these unsatisfied and unfunded bonds, of which she is the custodian, alone gives her a standing to maintain this suit to have West Virginia's liability, not only for the whole indebtedness of the undivided State, but for the bonds so deposited with her, ascertained, determined, and adjudicated; and that her contractual right to exoneration under her agreement with the parties equitably entitled to those bonds increases her interest and confirms her right to have such exoneration decreed.

An authority of respectability and of proven merit has said:

> "It was not necessary to wait till some one was damnified by having paid, or having claim made against him for the whole; a bill might be filed to settle the amount due from each individual of a body liable to a common burden, and to compel the payment by each, of his share."
>
> 2 Spence Equitable Juris., marginal p. 662.

This suit is brought, as appears plainly from the bill, for the purpose of obtaining a *complete settlement* with West Virginia and an adjustment of a controversy which has vexed both States for a generation past; and as a part of this settlement and as a necessary incident to it, and in accordance with the manifest equitable rights of Virginia to have that settlement decreed—

First, in respect to some $25,000,000, including principal and interest, of the obligations of the original State, which have been paid off or retired by the Commonwealth of Virginia since her dismemberment and the vouchers for which transaction she now holds in her treasury; and as to this she invokes the equitable jurisdiction of this court for *contribution* from West Virginia to the extent of

West Virginia's liability on account of the common obligations which Virginia has thus paid off and retired; and,

Second, to obtain the *exoneration* to which she is entitled in respect to the unsettled and unfunded one-third of the debt of the undivided State, the obligations evidencing which have been deposited with her.

There is no possible conflict between or inconsistency in the two kindred and associated rights of contribution and of exoneration thus possessed by Virginia, or in the assertion of the same in one common suit. Indeed, it is proper and right that they should be asserted and united in one suit, and it would be ground of objection not to include them in one suit.

This would be true, even if there were more than one party, who had such rights, plaintiff to the bill; but, in the nature of things, there is and can be but one party plaintiff here, because there is only one Commonwealth of Virginia; and, as to her, "there is a common interest centering in the point of issue in the cause," and, in every phase and aspect of the cause, a common right in her capacity as a creditor of West Virginia in respect to so much of the common debt as Virginia has settled and paid off in full, and in her capacity of co-obligor of West Virginia as to so much of the common debt as remains unsatisfied, to have a settlement and ascertainment and adjudication of the equitable proportion of the debt of the undivided States which West Virginia should pay.

The effect and logical consequence of such an ascertainment and adjudication will necessarily be to obtain contribution to Virginia by West Virginia to the extent of West Virginia's equitable liability to make such contribution, and to obtain exoneration of Virginia from any farther liability on account of the common debt of the old State; and this is the ultimate relief to which Virginia is justly and equitably entitled, upon the showing made by her bill..

Again, the two causes of complaint united in this bill, and on which relief is prayed, are:

1. The liability of West Virginia to Virginia for her reasonable and just contributive share of the public debt of Virginia as of the 1st of January, 1861.

This liability rests upon several distinct and evident grounds:

(*a*) On the principle of public law, that "where a State is divided into two or more States, in the adjustment of liabilities between

each other the debts of the parent State should be ratably apportioned among them" (Hartman *vs.* Greenhow, 102 U. S., 877.

(*b*) On the ordinance of the convention of Virginia of August 20, 1861, "to provide for the formation of a new State out of the portion of the territory of this State," by section 9 of which ordinance it was provided that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," &c.

(*c*) On the constitution formed by the State of West Virginia and submitted to Congress, and on which West Virginia was admitted into the Union (Virginia *vs.* West Virginia, 11 Wall, 43).

By section 8 of article 8 of said constitution it was provided that—

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

2. Under and by virtue of the act of the General Assembly of the restored government of Virginia, passed February 3, 1863, property of the Commonwealth of Virginia, to the amount in value of several millions of dollars, was transferred from Virginia, and was delivered to and received by West Virginia, on the express condition that "the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the organization of the State government."

And by act of the same General Assembly, passed February 4, 1863, the sum of one hundred and fifty thousand dollars ($150,000) was appropriated and subsequently paid over to West Virginia, and by the same act all moneys and balances in the treasury of Virginia not otherwise appropriated were approiated to the said State of West Virginia.

It is too plain and obvious to be questioned, that both of the two above-recited grounds of complaint grew out of and formed material parts of the same transaction, viz, the generation of the new State of West Virginia and its necessary sustenance and support while in

her infancy. By her very birth, West Virginia incurred the liability for her just proportion of the public debt of Virginia. It was in fact and in law her debt as much as it was the debt of Virginia. She inherited it. It was congenital. Then, at her birth, West Virginia was wholly without resources or means for maintaining herself and continuing her political existence twenty-four hours save by the money and property of Virginia which fell into her hands. The appropriation of this money and property to the uses of West Virginia created a debt of so high an obligation that, even without the express condition on which it was given and received, she would be compelled to account for it.

Can there be doubt, then, for one moment that these two grounds of complaint are so intimately and essentially connected as that, had this complainant brought her separate bill on each ground, this court would, to avoid so useless multiplicity of actions, have consolidated or caused them to be heard together? The people who appeared as the citizens of the restored governmnt of Virginia and who formd the conventions and General Assemblys by which ordinances were framed for the creation of the new State of West Virginia—and consent was given in the name of Virginia for the creation of such new State—and who appropriated millions of dollars in value of the property of Virginia for the use of West Virginia were, it may be, in legal contemplation, citizens of Virginia up to the 20th day of June, 1863; but on that day these same people became citizens of West Virginia and thenceforth sat in conventions of her people and in her halls of legislation. But before this transformation took place, and in contemplation of its assured coming, they, as citizens of Virginia, appropriated all her property within their reach and gave it to the embryo State.

So it appears by the allegations of this bill, which must be taken here to be true, that West Virginia is justly liable on many grounds for a just proportion of the public debt of her parent State, Virginia; that West Virginia has not only repudiated and openly disavowed all such liability, but that she has appropriated to her own use a large amount in value of the public property of Virginia, which Virginia might properly have applied, as part of her public assets, to the payment of her public debt; and now, when by this bill in equity Virginia calls on West Virginia to account for the property which she has appropriated and applied to her own uses, and to come in before this court and have her propertion of the public debt ascertained, West Virginia, by her demurrer, protests that the part

of the public debt which she owes and the part of the public assets which she has appropriated to her own use are two subjects of complaint so distinct and unconnected as should relieve her from making answer to the bill.

Counsel for the defendant rely upon the decision of this court in the cases of New York *vs.* Louisiana and New Hampshire *vs.* Louisiana, 108 U. S., 78; but, as has already been made apparent, this case is entirely different in fact and in principle from those cases; indeed, there is no analogy between them.

Neither the State of New York or New Hampshire had any direct or personal interest in the bonds of Louisiana or in the subject-matters of controversy in those suits, but were mere volunteers, self-constituted trustees, without sustaining any relation, or interest, or obligation, or liability in regard to the bonds, or to any question presented in those causes.

While it may be true that, as to the custody of some of these unsatisfied bonds, Virginia sustains the relation of trustee, she has an enormous interest as to those bonds—an interest as substantial and as real, if not in fact as great, as if she had actually paid these bonds in full.

(2.)

The next ground of demurrer assigned by the defendants is:

> "That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree therein."

This ground of objection is based upon two postulates, each of which, we respectfully submit, is fallacious as applied to this case.

The first is, as we understand the position of defendant's counsel, that the judicial power of the United States and the jurisdiction conferred by section 2 of article III of the Constitution of the United States upon the Supreme Court over "controversies between two or more States" does not embrace a controversy such as is presented here, or any other controversy which, like the one here, is based upon any pecuniary obligation or liability of a State; that while it does

not confer jurisdiction upon the Supreme Court of the United States over certain controversies between States, the word "controversy" as used in that section of the Constitution, does not embrace any controversy in regard to any pecuniary matter.

This second postulate which defendant's counsel must maintain to support the above objection is necessarily that the language of the Constitution referred to does not confer jurisdiction in any case in which the court has no power to render or enforce and make effective its final judgment thereon, and that this court cannot render or enforce its final judgment or decree making effective the relief sought by the plaintiff.

We will now consider this two fold ground of objection:

(*a*) Can it be true that the word "controversy" as thus used in section 2 of article III of the Constitution can be fairly given any such narrow construction and confined by any such forced and restricted limitations?

It will be observed that precisely the same word defines the jurisdiction of this court as to "controversies between citizens of different States."

Judge St. George Tucker, in discussing the judiciary clauses of the United States Constitution, says, in his appendix to Tucker's Blackstone, vol 1, p. 120, edition of 1892:

> "The word 'controversies,' as here used, must be understood as relating to such as are of civil nature. It is probably unknown in any other sense, as I do not recollect ever to have heard the expression 'criminal controversy.' As here applied, it seems particularly appropriate to such disputes as might arise between the United States and any one or more States, respecting territorial *or fiscal matters;* or between the United States and their debtors, contractors and agents. This construction is confirmed by the application of the word in the ensuing clauses, where it evidently refers to disputes of a civil nature only, such, for example, as may arise between two or more States, or between citizens of different States, or between a State and the citizen of another State, none of which could possibly be supposed to relate to such as are of a criminal nature."

It is to be presumed that the framers of the Constitution did not design by the use of the same identical expression to confer one jurisdiction upon the federal courts as to matters of dispute between States and another jurisdiction as to matters of dispute between cit-

izens of different States. In other words, if the words "controversies between two or more States" do not embrace, under any circumstances, in the one case controversies growing out of contracts or liabilities for the payment of money, the words "controversies between citizens of different States" cannot be fairly construed to embrace any controversies of a pecuniary character; and yet we are surely within the limits when we say that a large majority of the "controversies between citizens of different States" of which the federal courts have from their foundation taken jurisdiction have been controversies arising out of contracts for the payment of money.

But it is urged that it is derogatory to the dignity of a State to have it impleaded in any court upon any contract, or obligation or promise which a State may have made.

Whether this be true or not is immaterial, if it be true (and as to this there can be no question) that the States, by coming into the Union and accepting the Constitution of the United States as their supreme law, have agreed to submit their controversies to the supreme tribunal created by that Constitution and clothed by it with jurisdiction of just such controversies.

And is it any more derogatory to the dignity of a State for it to be impleaded in this impartial tribunal in a controversy involving such important and far-reaching questions of public obligation and of public right as are presented in this cause than it would be to be impleaded in this court upon the question as to whether one State had encroached upon the territorial limits of another State; or as to whether it was improperly allowing its citizens to pollute the waters flowing through its territory and by the territory of another State, or that it was in violation of the rights of a neighboring State, diverting, dissipating, and absorbing streams of water rising in one State and preventing their natural flow in the territory of another State; or that it was doing any one of the things for which States have been impleaded under jurisdiction recognized and approved by this Court?

We are unable to see that there is any surrender of the dignity of a State in that it submits, or, if recalcitrant, is compelled to submit, its controversies to the adjudication of a tribunal of its own creation and selection for the settlement of any question of controversy involving property rights, or any other direct interests of a State in its corporate capacity, or of the people of a State represented by the government of the State.

It is urged that a State cannot be sued without her consent; but, as has been repeatedly decided by this court, all of the States have, in most solemn form, given their consent to the jurisdiction of this court over all civil controversies which may arise between them.

A careful review of all the decisions of this court which throw light upon this subject, we think, justifies us in the view that this is no longer a debatable question.

The word "controversy" as used in this section of the Constitution has been repeatedly passed upon and intrepreted by this court. Not only has its meaning been fixed by this court in approving the jurisdiction taken by the circuit courts of the United States of hundreds of controversies of a pecuniary character "between citizens of different States," but it has been repeatedly given a similar significance and interpretation, and the jurisdiction of this court sustained in respect to controversies to which States were parties and in respect to controversies to which the United States has been a party, as to which the definition and limitation of the jurisdiction conferred by the Constitution is defined by precisely the same word, "*controversies.*" And so we say that, if this court has jurisdiction of any controversies arising out of demands for money, or obligations for the payment of money, between States, then neither this court nor any other federal court could have jurisdiction of any such pecuniary "controversy between citizens of different States," or of controversies to which a State is a party, or of a controversy to which the United States is a party, for in each case the jurisdiction is conferred by precisely the same language.

And such we understand to be the doctrine established by the decisions of this court.

The first case in which this question arose was that of Chisholm, ex'r, *vs.* Georgia, 2 Dal., p. 419, in which this court held that the judicial power of the United States and the original jurisdiction of the Supreme Court, as conferred by section 2, article III of the Constitution, embraced a demand for money asserted against a State by a citizen of another State in an ordinary action of assumpsit, and that such a case presented a "controversy" within the meaning of that section of the Constitution.

Mr. Justice Iredell alone dissented, not as to the construction given by the majority of the court to the word "controversy," but as to the decision of the majority of the court in construing section 2 of article III so as to extend the jurisdiction of the federal courts to a pecuniary demand asserted by a citizen of one State *against*

another State. He held and argued that the language used in the Constitution, taken as a whole and construed in the light of the historical facts which he mentioned, was not designed to give the federal courts jurisdiction of a suit by any *individual* against a sovereign State upon any merely pecuniary demand; but it is an exceedingly significant circumstance that Mr. Justice Iredell was constrained to hold, and he did declare, that—

> "The Supreme Court hath, therefore, first, *exclusive jurisdiction in every controversy of a civil nature; 1st. Between two or more States.* 2nd. Between a State and a foreign State. 3rd. Where a suit or proceeding is depending against ambassadors, other public ministers, or their domestics, or domestic servants. Second. Original, but not exclusive jurisdiction, 1st, between a State and citizens of other States. 2d. Between a State and foreign citizens or subjects. 3d. Where a suit is brought by ambassadors, or other public ministers. 4th. Where a consul or vice-consul, is a party."
> *Id.*, p. 431.

Had that suit, like this, been a suit between two States; had that been a suit by South Carolina *vs.* Georgia, upon a demand for money, there cannot be a doubt but that this court, as then constituted, would have unanimously maintained its jurisdiction. And such is the meaning and effect of the decision of all the Judges.

It may be fairly claimed that the ruling of the majority of the court in Chisholm, ex'r, *vs.* Georgia has been questioned, if not overruled, as to the suability of a State by any private citizen independently of the eleventh amendment, and the opinion of Mr. Justice Iredell in that case affirmed by the opinion of this court, as formulated by Mr. Justice Bradley in Hans *vs.* Louisiana, 134 U. S., p. 1; but it will be seen that Mr. Justice Bradley, in the interesting opinion referred to, affirms and approves the opinion and the views of Mr. Justice Iredell in the Chisholm case; and Mr. Justice Iredell, in his opinion so unqualifiedly affirmed, as we have seen, held that this court had jurisdiction "*in every controversy of a civil nature between two or more States,*" though he held that jurisdiction was not conferred upon it of a controversy between an individual plaintiff suing a State upon a pecuniary demand.

There can be no doubt that the decision and reasoning of all the judges in the case of Chisholm, ex'r, *vs.* Gerogia confirms every contention made for the plaintiff in this case as to the rightful and necessary jurisdiction of this court over a controversy of the kind

presented here between the Commonwealth of Virginia and the State of West Virginia.

The question of the nature and extent of the jurisdiction conferred upon this court by article III of the Constitution in respect to controversies to which a State is a party, and also as to controversies between two or more States, was exhaustively discussed by Chief Justice Marshall in Cohens *vs.* Virginia, 6 Wheat., pp. 364, 375-440.

In considering the effect of the adoption of the 11th amendment upon that jurisdiction the Chief Justice, at pages 405-6, says:

> "This leads to a consideration of the 11th amendment.
>
> "It is in these words: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commneced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State.'
>
> "It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. *There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases*, because it might be essential to the preservation of peace. *The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.*"

And at page 378, in defining the jurisdiction of this court in this

class of cases in which its jurisdiction by the terms of the Constitution is determined by the character of the parties, the Chief Justice uses this language, which would seem to be conclusive as applied to this case:

> "In the second class, the jurisdiction depends *entirely* on the character of the *parties.* In this are comprehended 'controversies *between two or more States,* between a State and citizens of another State, and between a State and foreign States, citizens or subjects.' *If these be the parties, it is entirely unimportant what may be the subject of controversy.* Be it what it may, these parties have a constitutional right to come into the courts of the Union."

It has been argued that these rulings of the Chief Justice were *obiter dicta.* They were entirely pertinent to the great question which he was considering and had a direct bearing upon it. The question which the court had to review was what was the character of the controversies over which it had jurisdiction under article III of the Constitution, after the adoption of the 11th amendment; and it was necessary in that connection for the court to construe the word "controversy" as used in that article.

The opinion was one of the most lucid and ablest which ever came from the mind of the great Chief Justice. It was evidently well and carefully considered.

Under such circumstances a conclusion which he so deliberately reached and so clearly expressed ought to have the greatest weight.

It may also be justly claimed that the expressions in opinions in two or three later cases. which are claimed to be inconsistent with the views of Chief Justice Marshall, are all of them far more emphatically *obiter* than were his conclusions as above quoted.

It is to be presumed, of course, that the controversies to which the Chief Justice referred were controversies in a judical sense; that is to say, justiciable controversies; but where has it ever been held by any court anywhere that a controversy arising out of a contract for the payment of money was not *justiciable?*

Since money supplanted barter in the dealings and contracts of mankind, and since courts for the adjudication of civil controversies have been established, a great part of the disputes which have grown out of the contracts of mankind have been controversies about the payment of money. They have not been "solvable" by the courts but they are generally more really "solvable," for principles of justice and right and more edequate relief can usually be admin-

istered in respect to them than in respect to some other descriptions of controversy which have been held to be justiciable by this court. For instance, the prevention of the flow of polluted water from the State under whose authority it has been contaminated, along the borders of another State, the health of whose inhabitants is prejudiced by the flow of such polluted water by their shores, as in Missouri *vs.* Illinois, 180 U. S., p. 208; or the prevention of the undue retarding and diminution of the natural flow of rivers by the State in which they have their source into the State through which they have their natural exit, as in Kansas *vs.* Colorado, 185 U. S., p. 125; or, indeed, the establishment of a disputed boundary line between co-terminous States, as in Rhode Island *vs.* Massachusetts, and a number of later cases where this court has taken jurisdiction of such controversies.

In Missouri *vs.* Illinois, 180 U. S., 240, Mr. Justice Shiras, after reviewing at great length the cases decided under the constitutional provision giving this court original jurisdiction in controversies between two States, says:

> "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases *directly affecting the property, rights and interests of a State.* But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court."

This question has been directly passed upon by this court and its jurisdiction over controversies arising upon pecuniary demands has been sustained in—

Georgia *vs.* Brailsford, 2 Del., p. 402;
Texas *vs.* White, 7 Wal., p. 700;
Florida *vs.* Anderson, 91 U. S., p. 667;
Alabama *vs.* Burr *et als.*, 115 U. S., p. 413;

and even more emphatically and conclusively in—

United States *vs.* North Carolina, 136 U. S., p. 211;
United States *vs.* Texas, 143 U. S., p. 621; and
United States *vs.* Michigan, 190 U. S., pp. 379, 396, 406.

The three last cases would seem to be entirely decisive of the question.

The very language under which this court took jurisdiction of these cases, all involving pecuniary demands of the United States against the several defendant States, is used in the Constitution to confer jurisdiction upon this court of controversies between States; and if that language in the one case gave this court jurisdiction of a controversy arising out of, or asserted upon, a pecuniary demand, by a logical and inevitable consequence it gives this court jurisdiction of a similar controversy between States.

It may possibly be contended that the question of jurisdiction was not raised in United States vs. North Carolina, 136 U. S., p. 211, but such contention would be idle, because this court, and no other federal court, according to the uniform decisions of this court, can, even by consent of parties, exercise jurisdiction in any case in which such jurisdiction has not been conferred upon it by the Constitution or by valid act of Congress.

This question arose in United States *vs.* Texas, 143 U. S., p. 621, *supra*, where, at page 642, this court, through Mr. Justice Harlan delivering its opinion, said:

> "The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination *of all cases in law and equity between two or more States*, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by United States *v.* North Carolina, 136 U. S., 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. *It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this Court has original jurisdiction of a suit by the United States against a State.*"

And it unquestionably arose and was passed upon in United *vs.* Michigan, 190 U. S., pp. 379, 396, 406, which was a suit for the recovery of money, in which this court, Mr. Justice Peckham delivering its unanimous opinion, at page 396, held:

"By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although it is not literally between two States, the United States being a a party on the one side and a State on the other. This was decided in United States *v.* Texas, 143 U. S., 621, 642; 36 L. Ed., 285, 292; 12 Sup. Ct. Rep., 488."

Such was also the effect of the decision of the majority of the court in South Dakota *vs.* North Carolina, 192 U. S., p. 268; and there is nothing in the dissenting opinion of the minority of the court in that case inconsistent with the views for which we contend.

Again, we say that it seems to us the question is no longer a debatable one in this court.

(*b*) Is there anything in the contention that this court cannot hear and determine the questions presented in this case because it has, as is alleged, no power to render or enforce any final judgment or decree therein?

Let us see, first, what is the precise character of this suit and what is the relief sought, a total misconception of which must have occasioned the assignment of the ground of demurrer now being considered.

The main and real object of the suit is a settlement with West Virginia, and to this end a determination and adjudication by this court of the amount due by that State to Virginia, upon the state of facts set forth in the bill.

West Virginia having refused to have any accounting, or even to negotiate with Virginia upon the subject, it became necessary to invoke the equitable jurisdiction of this court in order that it might ascertain, determine, and adjudge the proportion of the debt of the original State which it would be equitable for West Virginia to pay.

The Commonwealth of Virginia would be loth to believe that any State of the American Union would disregard or disobey any decree of this, the tribunal selected and empowered by all of the States as the final arbiter of all civil controversies which may arise between them, and did not consider it necessary in any such case, or proper under the circumstances of this case, to insert in her bill a special prayer asking this court to summarily enforce its decree against West Virginia.

She cherishes the hope that there would never be any occasion to

ask the court to award any execution or take any action for the purpose of enforcing such judgment as it shall render.

If such occasion should ever arise, it will be for the court to then decide by what process or further action it would proceed to execute its decree.

It will be time enough when the proper accounts have been taken, and the balance ascertained, and the sovereign State against whom such balance may be found has repudiated the liability and refused to pay such balance, to consider and decide whether the power resides in this court and the means are at its hand to enforce the payment of the amount so found to be due.

It is enough for present purposes to know that all the States in the Union have, by the Constitution of their general Government, covenanted and agreed in the most solemn form that "the judicial power shall extend to controversies between two or more States," and that "in all those cases in which a State shall be a party the Supreme Court shall have original jurisdiction."

> "The Constitution of the United States, with all the powers conferred by it on the General Government and surrendered by the States, was the voluntary act of the people of the several States deliberately done, for their own protection and safety against injustice from one another."
>
> Ableman *vs.* Booth, 21 How., p. 521.

> "Some tribunal exercising such authority, is essential to prevent an appeal to the sword and a dissolution of the Government."
>
> 2 Story on Constitution, sec. 1681.

The Supreme Court hath exclusive jurisdiction in every controversy of a civil nature between two or more States.

Chisholm *vs.* Georgia, 2 Dall., 2d ed., p. 430.

These cases hold that questions of boundary, territorial right, and property rights of all kinds are proper for this jurisdiction.

2 Tucker's Constitution, p. 784.

Indeed it may be needless to consider at all the question of whether, when a decree shal ble made ascertaining the amount due by West Virginia, on a full adjustment and accounting between the two States, how such an amount can be obtained from the debtor State. We may accept as sound and true the statement made by Mr. Webster in his letter to Baring Brothers (Webster's Works, vol. 6, p.

539), that "the security for State loans is the plighted faith of the State as a political community, resting on the same basis as other contracts with established governments; that is to say, the good faith of the government making the loan, and its ability to fulfill engagements." We may admit that this is the only sanction and security on which an individual who is a public creditor may rely; that this arises on the creation of the debt and continues so long as the debt exists. We recognize that no sovereign State, of whatever form of goverment, can clothe an individual or another State with power to seize by force upon its treasury and appropriate its resources without regard to the needs, policies, or will of the debtor State.

Every day judgments are rendered by this court against the United States for money demands on appeals from the Court of Claims; but nowhere is power given to this court to award execution of *fiere facias* against the United States. Awards are made by high tribunals and commissioners to whose arbitrament claims for money against empires, kingdoms, and republics have been submitted, but never has power been given to these courts to enforce by judicial process or physical force the payment or satisfaction of the amounts which they may ascertain to be due.

Only by appropriation, regularly made by the legislative branch of the Government, is provision ever made for the payment of claims, whether ascertained by judgment, award, or other legal form. To that branch of the Government alone may we look for the fulfillment of "the good faith of the Government."

We here invoke the exercise of a long established ground of equitable jurisdiction when, on the case stated in the bill, we ask that an accounting be had, and that such other and further relief be granted as the nature of the case may require and in equity may be meet.

It is true that in the case of Gordon *vs.* United States the Supreme Court declined to take jurisdiction of the case on appeal from the final action of the Court of Claims, on the ground that no power had been conferred upon the court to enforce its judgment, Chief Justice Taney in the opinion saying:

> "nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised and where its judgment would not be final and conclusive on the rights of the parties, and process of execution awarded to carry it into effect.
>
> "The award of execution is a part, and an essential part,

> of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy," &c.
>
> Gordon *vs.* United States (Appendix), 117 U. S., p. 697.

(Although a grave doubt exists as to the authenticity and accuracy of this alleged opinion.)

This language was used in considering and deciding a question of jurisdiction of the Court of Claims where the judicial power of the United States had not been conferred on it by Congress. It is not applicable to the question presented here, which is not as to the jurisdiction of the court, but as to its power to enforce its writ of execution against a State. The question here is not as to the power of the arm to strike, but as to the immunity of the object from wounds.

Whether property or funds of West Virginia within the jurisdiction of this court, other than property used distinctly for governmental purposes, would be liable to seizure, levy, garnishment, or sale in execution of or for the purpose of coercing compliance with any such decree in a question which we trust will never arise; for we are persuaded that any decree which this court shall render will be accepted by both parties as final and binding and will be respected and obeyed. But if a decree shall be rendered against West Virginia, and that State shall fail or refuse to respect it and to comply with its terms, it will be time enough then for this court to decide what farther action shall be taken in the enforcement of its decree.

The supreme court of Louisiana, in the case of *Carter vs. State*, 42 La. Annual, 930, in an opinion delivered by Judge Fenner, has shown why, from the character of the party, a writ of *fieri facias* should not be awarded, and cannot be enforced against a State.

> "Legislative acts authorizing individuals to sue the State upon claims which the Legislature, for any cause, does not see fit to recognize and pay, have been of common occurrence in this and in other States. Their purpose and effect, as commonly understood, are undoubtedly nothing more than to refer to the judiciary the settlement of the question of law and fact involved in the claims, and the determination, in the form of a judgment, of the rights of the parties. It is implied, as a matter of course, that the legislative power,

after making such a reference, will accept and abide by the judicial determination, will recognize the judgment rendered as final and conclusive, and will, in due and ordinary course, make provision for the satisfaction thereof.

"That such was the interpretation of his remedy, adopted by the plaintiff himself, is evinced by his applications to successive General Assemblies for an appropriation to satisfy his judgment.

"But to assume that, by consenting to be sued, the Legislature intended to abdicate its constitutional function of controlling and administering the public funds and property and of appropriating them to such lawful purposes as it may deem best, and to delegate to the judicial department the power of seizing such property and applying it to the payment of a particular debt, would be, beyond measure, rash and unjustifiable. No such intention is expressed in the act or can be fairly implied from its terms; and we consider it beyond question that no such ever entered into the mind of any member of the legislative body. The incidents and appurtenances of ordinary jurisdiction have no application to a case like this. Undoubtedly jurisdiction granted to render judgments between parties subject to judicial power and control implies power to execute such judgments. But the sovereign is not subject to judicial power and control except just so far as it has consented thereto; the moment the limit of that consent is reached the judiciary must instantly halt. Satisfied as we are that the Legislature has not consented and did not intend to consent to the execution of this judgment by writ of *fieri facias*, we are bound to deny such remedy.

"Counsel asks, of what use is the power to render judgment against the State, if the court is powerless to execute the judgment? That question was anticipated by Mr. Hamilton in the discussion of the Constitution of the United States before its final adoption. 'To what purpose,' he asked, 'would it be to authorize suits against sovereign States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State.' Federalist, No. 81. He never dreamed that authorizing suit against a State would imply the right to issue *fieri facias* on the judgment.

"Puffendorff says: 'And if the prince gives the subject leave to enter an action against him in his own courts, the action itself proceeds rather upon natural equity than on municipal laws. For the end of the action is not to *compel* the prince to observe the contract, but to *persuade* him.'

"In England claims against the Crown might be prosecuted before certain courts, in the form of petitions of right, with the consent of the King, but it was held by Lord Mans-

> field that 'if there were a recovery against the Crown, application must be made to Parliament, and it would come under the head of supplies for the year.' "
>
> Macbeth *vs. Haldimand*, 1 Durn. & East., 172.

We have examined all the authorities quoted by counsel, and find none of them to support his contention. We are quite certain that no precedent exists sustaining the issuance of a *fieri facias* on a judgment against a sovereign State in her own courts, though rendered with her own consent.

The only recourse for satisfaction is by application to the Legislature, with whom the judgment should surely have great *persuasive force*, but none *compulsive*.

In United States *vs. North Carolina*, 136 U. S., p. 211, *supra*, this court took jurisdiction of a suit brought by the United States against that State for money due upon bonds held by the United States.

In United States *vs.* Michigan, 190 U. S., pp. 377-406, already referred to, this court again took jurisdiction of a suit against Michigan for the recovery of money. At he conclusion of its opinion, at page 406, this court unanimously decided that—

> "There must be a judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. *In case it refuses to plead further, the judgment will be in favor of the United States for an accounting, and for the payment of the sum found due thereon.*"

Every writ, process and remedy which would be available for the enforcement of such a judgment, or for the decree prayed for by the plaintiff in Unitel States *vs.* North Carolina, 136 U. S., p. 211, *supra*, would be available for the enforcement of a decree in this case adjudicating the amount of West Virginia's equitable contributive share of the ante-bellum debt of Virginia.

If such decree in United States *vs.* North Carolina, or the judgment directed in United States *vs.* Michigan, could not be summarily or effectively enforced, then it may be that a final decree in this case cannot be so enforced.

But it is equally true, and it is a truth which should conclusively dispose of this ground relied upon in the demurrer, that if the inability of this court to award any execution or frame any writ

which would enable the United States to enforce any such decree or judgment against North Carolina or against Michigan did not defeat the jurisdiction of this court in the suits against those States, a similar inability to summarily enforce a decree in this case against West Virginia by execution, levy and sale cannot defeat the jurisdiction of this court in this suit against that State for a settlement, ascertainment, and adjudication of the state of the accounts between the two States.

It is impossible by any conceivable process of right reasoning to apply any principle to the case at bar which would defeat the jurisdiction of this court, upon the ground here discussed, which would not have deprived this court of its jurisdiction in each of the cases just considered.

And so upon this alleged ground of demurrer we conclude that the bill presents a controversy between the plaintiff and defendant States justiciable and solvable in this court, and that the jurisdiction of the court will not be defeated because it may be that the plaintiff may not be able to collect from the defendant, or this court may be unable to compel the defendant to actually pay such sum as the court may adjudge and decree to be due by the defendant.

(3)

To the third ground assigned in defendant's demurrer, namely,

> "That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificatets in the said bill set forth and described,"

our reply is that this assignment is founded upon mistake. It is not true that Virginia sues as trustee for the individuals mentioned or for any other persons. She sues in her own name and for her own benefit, in vindication of her own rights and for her own protection.

It is true that if the relief which she seeks is accorded her it will not only enure to her benefit, but necessarily to th benefit of all of the creditors of the undivided State, as well those who have deposited their unsatisfied bonds in her keeping as those who have never funded the bonds of the original State held by them; as well also those whose bonds and certificates are represented by the "depositing committee," who made the contract which is copied in the bill, as those whose bonds and certificates have not been so deposited.

It is true that the amount of the unfunded bonds and of said certificates which are not represented by said "depositing committee" is comparatively small, but they aggregate over a million dollars. Whether their holdings are large or small, this suit must necessarily enure to their benefit, as it must also to the benefit of all of the unsatisfied creditors of Virginia, for the reason that Virginia cannot obtain the exoneration to which she is entitled unless West Virginia's equitable share of liability upon every bond and obligation of the undivided State shall be ascertained and adjudicated.

Indeed, a little reflection will show it to be true, that the amount and extent of West Virginia's liability in respect to any one of the original bonds representing Virginia's ante-bellum debt could not be ascertained without at the same time by the same token ascertaining her aliquot liability as to all of the others of those bonds.

It will be seen at once that this is true, for under the Wheeling ordinance and the first constitution of West Virginia, framed and adopted in pursuance and effectuation of that ordinance, and under the contract thereby created between Virginia and West Virginia it would be impossible to determine what part of any particular bond West Virginia is legally and equitably bound to pay without first ascertaining what is the equitable proportion of the entire ante-bellum indebtedness of the undivided State.

And so no suit could be brought by Virginia against West Virginia; and, indeed, if an individual could legally institute and prosecute such a suit, no suit could be brought by any individual holder of a single one or any larger number of the bonds of the original State against West Virginia for a settlement and be prosecuted to a finality without an ascertainment of West Virginia's share of the entire indebtedness.

But Virginia's status in reference to this suit and her relation to the bonds deposited with her and the relief she seeks, and to which the bill shows her to be entitled in respect to those bonds and to the whole case, have been already fully discussed in the foregoing part of this brief and they need not be further treated here.

It is true that in the prayer for general relief Virginia asks that—

> "all proper accounts be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix in her own right and as trustee as aforesaid."

But this, we submit, does not convert the suit which she has

brought in her own name and right into a suit by her *as trustee;* for, in the settlement of the accounts which this court may hereafter direct to be taken between Virginia and West Virginia it will be convenient, if not necessary, in the ascertainment of West Virginia's contributive proportion of the original public debt of the Commonwealth of Virginia to show the amounts due to Virginia in her own right and also as trustee. Indeed, the prayer of the bill for the ascertainment of the amount due by West Virginia upon the bonds held by Virginia as trustee might be omitted without impairing the character and effect of the bill.

The paramount and controlling equity which Virginia asserts and relies on, is her right to have a settlement and accounting between West Virginia and herself of all the matters growing out of the partition of her territory and the adjustment and determination of the respective rights and liabilities of the two States. This, we submit, is Virginia's right, and it is not affected by any questions that may be suggested as to the disposition she may make of whatever amount may be decreed by this court to be due to her.

It may be true that she has pledged in advance the full amount of any such recovery to the payment ratably of certain of her old debts, or even that she has made a declaration of trust as to such amount in favor of those creditors; but those are matters which cannot be considered on this demurrer. They are in nowise involved in the ground of equitable jurisdiction invoked by this bill. Virginia's right to compel contributions from West Virginia to the satisfaction of a common liability cannot be impaired or at all affected by the fact that Virginia has declared her purpose to apply the amount recovered to the payment of her debts.

They are matters which may, and doubtless will, be laid before the master to whom the settlement and statement of the account is intrusted, or they may have to be considered and passed on by this court, in the directions it may give to the master for his guidance in the execution of the order of reference; but they form no proper subject for consideration or action by the court at this stage of the case. The only question presented for decision now is, Has Virginia shown by her bill a proper case for the relief asked, of an accounting and for contribution from West Virginia?

(4)

The fourth assignment of grounds of demurrer is so general in

its terms that it is difficult to make to it a specific reply. It is as follows:

> "That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described."

This contention rests largely upon the same grounds upon which the second assignment is based, and the reply to it is very much the same, which is a conclusive answer to that assignment, and the importance of the case will justify some iteration in stating this reply.

The case stated in the bill must on this demurrer be taken to be true as to the facts charged. Among the facts charged are the following, viz:

1. That the restored State of Virginia, in convention assembled, did, on the 20th day of August, 1861, adopt an ordinance:

> "To provide for the formation of a new State out of the portion of the territory of this State."

That section 9 of that ordinance was as follows, viz:

> "9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, &c., as above quoted."

2. That on the 31st of December, 1862, the Congress of the United States, by act, provided that the new State, thus formed in pursuance of said ordinance, should be admitted into the Union by the name of West Virginia.

3. That on the 20th of June, 1863, the State of West Virginia was accordingly admitted.

4. That by act of the General Assembly of the restored State of Virginia, passed February 3, 1863, all property—real, personal, and mixed—owned by Virginia, but situated within the proposed boundaries of West Virginia, was granted and transferred to West Virginia upon the condition, viz, that—

> "The State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State." &c.

5. That under and by virtue of said act there was actually received and enjoyed by the State of West Virginia property of the Commonwealth of Virginia amounting in value to several millions of dollars.

6. That by act of the General Assembly of the restored State of Virginia, passed February 4, 1863, there was appropriated to the State of West Virginia from the public moneys of Virginia the sum of $150,000; and there was further appropriated "*all moneys* not otherwise appropriated then" and that may come into the treasury up to the time when the State of West Virginia shall become one of the United States.

7. That by section 8 of article 8 of the constitution framed and adopted by the State of West Virginia, and under and in accordance with and by reason of which she was admitted into the Union of States, it was provided:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and the legislature shall ascertain the same as soon as may be practicable—and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

8. That the legislature of West Virginia never ascertained the amount of West Virginia's "equitable proportion" of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861; that the State of West Virginia has never accounted for the property of the Commonwealth of Virginia which was turned over to and received by her, amounting in value to several millions of dollars; that the State of West Virginia has failed and refused through a period of forty years, and in the face of repeated solicitations on the part of Virginia, to enter upon any settlement of the accounts between herself and Virginia, but has oftentimes and but recently, through one or the other of the two houses of her legislature, declared that she would not recognize any liability whatever as resting upon her to the Commonwealth of Virginia.

Wherefore, and by reason of the matters of fact aptly charged in the bill, it is manifest that a controversy is presented between the Commonwealth of Virginia and the State of West Virginia to

which the judicial power of the United States extends and as to which this court has original jurisdiction.

West Virginia obtained the consent of the restored State of Virginia to the erection upon the territory of Virginia of this new State, and she procured the aid of the Senators and Representatives of Virginia in Congress in having her invested with sovereignty and admitted into the Union upon the express terms of the "Wheeling ordinance," which bound her to "*take upon herself a just proportion* of the public debt of the Commonwealth of Virginia."

West Virginia obtained admission into the Union of States on an express undertaking in her constitution that—

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State."

West Virginia received and applied to her own uses property belonging to the Comonwealth of Virginia to the amount in value of several millions of dollars, on the express condition that she would "*duly account for the same in the settlement hereafter to be made with this State.*"

Hence it is evident that the "demand" referred to in this branch of the first ground of demurrer is not, as there assumed, "a simple demand for money," but it is a prayer that the *accounting*, so solemnly promised, may now be had, under the direction of this court.

The bill presents a state of facts from which it appears that the case is one for the exercise of the equitable jurisdiction of account upon some of the most important grounds upon which that jurisdiction can be invoked, according to the authorities and precedents.

(*a*) There have been in the first place complicated transactions running back to the creation of this new State, and back of that for about thirty years, embracing numerous loans made by the original State of Virginia and a large number of expenditures of the money thus borrowed in the construction of internal improvements outside and inside the territory now constituting West Virginia.

Any such settlement would necessitate, first, an ascertainment of the amount of the public debt of Virgiia as of January 1, 1861, a matter which in itself would require the services of a skillful and painstaking accountant.

There would also have to be an ascertainment of a great multitude of items of expenditure made by the old State within the

limits of what is now West Virginia, and of a vast number of payments made in the shape of taxes by the people living in that territory towards the suport of the State government, in each case from the date of the inception of the State debt down to the 1st of January, 1861.

There would have to be, moreover, a determination of what wes the proportion of the general expenses of the State government equitably chargeable against the counties and cities now constituting West Virginia during the same period. All of this, and more than is indicated here, would have to be ascertained in order to furnish the data upon wihch to ascertain the just proportion of the debt of the Commonwealth which West Virginia can be required or expected to pay upon the basis preseribed in the Wheeling ordinance.

These complicated statements, and the accounting necessary to evolve from them accurately, fairly, and justly the share of the common indebtedness which can be equitably assigned to West Virginia, alone would furnish an amply sufficient justification for a resort to a court of equity for an account.

But, in addition to this ground, there are others which even more emphatically call for the equitable relief to which the bill shows the plaintiff to be entitled.

(*a*) Prominent among these is the plaintiff's right to contribution. The basis of this right has been already fully stated in this brief, and in the bill. (See paragraph XVI, p. 16 of the bill.)

As to the right to invoke the aid of a court of equity to establish the right to contribution, see

1 Madd Chy., 233, star page 234.
Ex parte Gifford, 6 Ves., p. 808.
Lawson *vs.* Wright, 1 Cox, p. 276.
Collyer on Partnership, secs. 2-3, ch. 8.
1 Story's Eq., sec. 504.
Wright *vs.* Hunter, 5 Ves., p. 792.
Wills *vs.* Huobell's Adm'r, 2 Johns. Chy. R., 401.

(*b*) Another ground for equitable jurisdiction recogniezd by all of the authorities upon equitable jurisprudence and practice is the plaintiff's right to exoneration upon the facts stated in the bill and already fully stated in the former part of this brief.

(*c*) Another ground for equitable relief shown by the bill is the accounting necessary to ascertain what money and property, stocks, and other assets of Virginia were transferred to and received by

West Virginia under the acts of the General Assembly of Virginia of February 3 and 4, 1863. (See pp. 4, 5, and 6, paragraphs VIII and IX of the bill.)

(*d*) Another ground for the exercise of equitable jurisdiction shown by the bill is the avoidance of a multiplicity of suits. Virginia sustains, as appears from the bill, various associated relations in respect to West Virginia, all affecting the property and pecuniary rights of the two States, all growing out of the formation of the new State, closely related to the partition of the territory and property and the apportionment of the common indebtedness of the undivided State, and all necesarily factors to be considered in making any satisfactory or final settlement between the two States.

First, Virginia holds obligations and evidences of indebtedness of the undivided State great in number and large in aggregate amount, paid off or retired by her, doubtless, at different times and under variant circumstances, but each of them giving her a claim against West Virginia to be reimbursed to the extent of West Virginia's liability therefor.

Second. She is entitled to have West Virginia make proper remuneration to her or give her proper credit for the money and property of Virginia which West Virginia received under the acts of February 3 and 4, 1863.

Third. She is entitled to exoneration to the extent of West Virginia's equitable liability upon the various transactions set forth in the bill, hereinbefore fully stated.

It is not only proper, but it is alike West Virginia's and Virginia's right and to their interest, to have the settlement of all of these associated claims and transactions made in one suit, instead of the parties being harassed by a number of suits for the equitable adjustment of matters which can be far more satisfactorily, intelligently, and fairly considered and adjudicated in one suit.

(5.)

The fifth ground assigned in the amended demurrer—

> "That it does not appear by said bill that the Attorney-Gentral has ever been authorized to institute and prosecute this suit in the name of the Comomnwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of

March 6, 1900, which is referrtd to and made part of said bill,"

is refuted by the bill. In support of this statement it is only necessary to refer to the following parts of the bill.

The act of the General Assembly of Virginia approved March 6, 1900, printed at pages 41-42 of the bill, entitled

> "An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth in the premises,"

in the second section thereof authorized the Virginia Debt Commission, apointed under the joint resolution of March 6, 1894, upon certain conditions mentioned in that section,

> "by and with the advice and approval of the Attorney-General of Virginia to take such action and institute such proceedings on behalf of the State as may in the judgment of the commission and the Attorney-General be needful and proper *to protect the interest of the State, and bring about and carry into effect a settlement as aforesaid.*"

The bill avers (paragraph xx, p. 11) that—

> "This suit has been instituted at the request and direction of said commission, and in strict conformity with the provisions of said act of March 6, 1900."

The exhibits filed with and as part of the bill, and particularly the report made by said commission to the General Assembly of Virginia on the 9th of January, 1906, Exhibit No. 8, pages 43-50 of the bill, prove the truth of this allegation, though its truth, of course cannot be questioned by the demurrant.

(6.)

The sixth ground of demurrer assigned in the amended demurrer is:

> "That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinitely (*sic*) and uncertain that no proper answer can be made thereto."

The bill, with as much exactness and particularlity as is possible under the circumstances, sets forth with much detail the facts upon which the plaintiff claims to be entitled to relief.

It is as full and precise in asserting the demands which it asserts against the defendant as it is reasnably practicable to make those allegations without first having had the accounting with the defendand which is the primary relief for which the bill prays.

If Virginia could, without such an accounting with West Virginia, state with definiteness just what is the sum West Virginia should pay to Virginia, an action of assumpsit might have sufficed; but no remedy at law could give her the relief to which she is entitled by way of exoneration, nor is there any adequate remedy at law by which the complicated and more or less intricate accounts can be so digested and stated upon equitable principles as to reach a result which will be just to the parties.

(7.)

The seventh assignment made by defendant's amended demurrer is:

> "That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an acocunt or to a discovery from this defendant."

This has already been answered in the answers made to other alleged objections to the bill. The plaintiff's right to an account is unquestionable upon any one of the several grounds already discussed; and a plaintiff is entitled to discovery in any case in which any right to equitable relief exists, and the defendant is in possession of any information, documents, or records which may throw any light upon the questions at issue or facilitate a just solution of those questions.

(8.)

The eighth and last ground of demurrer assigned is:

> "That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

This objection is possibly even more technical than some of the others presented in the demurrers.

It was not necessary under the English chancery practice, adopted

by this court in 1792 for the guidance and direction of suitors and practitioners therein, to have any prayer at all for special relief.

Under the prayer for general relief the plaintiff could obtain all such relief as he was found by the chancellor to be entitled to upon the state of facts alleged in his bill and established by his proofs.

> "The old bills in chancery did not contain any special statement of relief, but only what is called the prayer for general relief." * * *
>
> Adams' Eq., m. p. 309.
> Mitford's Pleading, m. p. 39..
> Cook *vs.* Martin, 2 Atk., p. 141.

Under later practice in England, the prayer for general relief was still held to be sufficient, though it became the universal practice to insert a special prayer, and to conclude with the prayer for general relief.

> Adams' Eq., m. p. 309.

But there are prayers in the bill for special relief, namely,

> "that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises;'

These prayers not only ask for the specifice relief stated, but that

"the court will adjudicate and determine the amount due to your oratrix by the State of West Virginia."

An adjudication is a solemn judgment of a court. The word "adjudicate" is defined to mean:

> "To determine in the exercise of judicial power; to pronounce judgment in a case" (Anderson's Dict. of Law).
> "Synonymous with adjudge in its strictest sense" (Abbott's L. Dict.).
> "To determine judicially; try and decide; adjudge" (Standard Dictionary).

So a prayer for an adjudication by the court is a prayer for a judgment.

But such a prayer is unnecessary in a bill invoking the chancery jurisdiction of account.

The judgment or decree upon the account when taken and confirmed by the court is a necessary incident to the relief sought:

> "for it is implied if not expressed in the decree to account that the balance shall be paid to the party entitled."
> 1 Madd Chy. Pr.; title, Account, p. 86.

But where there is a prayer for special relief which does not adequately define *or even inaccurately state* the relief to which the plaintiff is shown upon the case presented to be equitably entitled, such relief as is adequate and appropriate to the case can and should be granted by the court.

I Daniell's Chy. Pr., ed. 1846, p. 434.

The modern English practice is

> "to pray particular relief, though if the particular relief prayed for in the bill cannot be given exactly as prayed, the court will assist the particular prayer under the general prayer; but relief inconsistent with the specific relief prayed cannot be given under the general prayer."
> 2 Madd Chy., m. p. 172.
> Beaumont *vs.* Beaumont, 5 Ves., p. 495.
> Muckleston and Brown, 6 Ves., p. 52.

The proposition asserted in this eighth assignment is negatived by repeated decisions of this court.

It will be noted that the bill contains prayers for special relief

and also a prayer for "all such other, further and general relief as the nature of the case may require and to equity may seem meet."

In English *vs.* Foxhall, 2 Peters, p. 612, this court declared that—

> "There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly prayed. But such relief must be agreeable to the case made by the bill."

And in Watts and others *vs.* Waddle and others, 6 Peters, pp. 389-403, this court said:

> "Although there is no specific prayer in the bill to be paid the rents and profits, yet the court think that under the general prayer this relief can be granted. *Under this prayer any relief may be given for which the basis is laid in the bill.*"

And in Walden, &c., *vs.* Boley and others, 14 Peters, pp. 164-5, this court decided that—

> "A court of equity cannot act upon a case which is not fairly made by the bill and answer. *But it is not necessary that these should point out in detail the means which the court shall adopt in giving relief.* Under the general prayer of relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it."

See also, to same effect—
Boone *vs.* Chiles, 10 Peters, p. 177.
Stevens *vs.* Gladding, 17 How., p. 455.
Georgia *vs.* Stanton, 6 Wall. p. 50.
Texas *vs.* Hardenburg, 10 Wall., p. 86.
Jones *vs.* Van Doren, 130 U. S., p. 692.
Hayward *vs.* Eliot Nat. Bank, 96 U. S., p. 611.
Lockhart *vs.* Leeds, 195 U. S., pp. 427-437.

In the case cited this court decided that—

> "There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers."

These authorities would seem to unquestionably establish the suf-

ficiency of the prayers for relief in the bill, and to effectively dispose of the eighth ground of objection laid in the amended demurrer.

The grounds of objection to the bill alleged in the original demurrer have not been noticed, for the reason that they are all merged in or covered by the amended demurrer.

Upon the whole case presented, it is respectfully submitted that the demurrers should be overruled, and the defendant required to answer the plaintiff's bill.

MARCH, 1907.

WILLIAM A. ANDERSON,
Attorney-General of Virginia.
HOLMES CONRAD,
Of Counsel for Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Argument of Mr. Chas. E. Hogg, for Defendant.

MONDAY, MARCH 11, 1907.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF MR. CHAS. E. HOGG, FOR THE DEFENDANT.

MONDAY, MARCH 11, 1907.

MR. HOGG. May your Honors please: This is a suit in equity instituted in this Court by the Commonwealth of Virginia as sole plaintiff against the State of West Virginia as sole defendant.

To put the Court in possession of the essential facts of this case upon which the plaintiff rests its claim for relief, it is sufficient to say, (these facts appearing from the face of the bill and its exhibits, and matters of which the Court will take judicial notice), that in 1820 or 1825 the State of Virginia entered upon a work of internal improvement within its boundaries, having for its object the projection of a canal from James River to the Ohio for the purpose of connecting its seaboard with the western waters; the building of certain railroads projected in the same direction and in certain other directions; the construction of highways and bridges, and certain public buildings. To carry on this work it became necessary to raise funds on the credit of the State of Virginia by means of the sale of bonds, which were made from time to time during the period intervening between 1820 or 1825 and 1861. At that time the indebtedness of Virginia contracted in this way approximated $30,000,000.

JUSTICE DAY. In 1861?

MR. HOGG. In 1861, the beginning of that year.

During the progress of this work nearly all of the proceeds derived from the sale of these bonds were expended within the present limits of Virginia, very little of those proceeds being expended within the limits of the territory of what is now the State of West Virginia.

In 1861 a convention assembled at Richmond and adopted an ordinance declaring the intention of the State to withdraw from the Union. That ordinance was submitted to popular vote, and it was claimed by the authorities at Richmond that it had been ratified.

The great masses of the people in the territory now composing the State of West Virginia, and other sections of Virginia, did not believe that the State had the right to take steps looking to its withdrawal from the Union, and delegates assembled, representatives from that part of Virginia composing West Virginia, in convention in June, 1861, to take steps to restore the status of the State to its former relations with the General Government. That convention adopted an ordinance having in view the formation, ultimately, of a new state. In that ordinance all of the machinery of state government was provided for, including the various co-ordinate branches of the government, and the legitimate status of Virginia by that convention was restored. Virginia was then recognized by all the Departments of the National Government, and her delegates as representing the people of Virginia in that convention as the State Government of Virginia. That convention in its ordinance provided for the steps to be taken for the creation of a new state out of a part of the territory then lying within the bounds of Virginia west of the Appalachian Range of Mountains. It was also provided in that ordinance for the election of delegates to frame a constitution, in convention to be assembled for the proposed new state. In the ordinance they also provided for the assumption of West Virginia's just proportion of the debt created by Virginia prior to January, 1861, as already mentioned. The language of the ordinance with reference to the debt is as follows:

> "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State Government since any part of said debt was contracted, and deducting therefrom the moneys paid into the Treasury of the Commonwealth from the counties included in the said new State during said period."

This is the declaration of Virginia herself, made on the 20th day of August, 1861.

In accordance with the other provisions of this ordinance, the convention to frame the constitution of the proposed new state assembled, the constitution was framed, and in that constitution with reference to this public debt, the following provision was embodied:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this state, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This constitution was ratified by the people within the territory of the proposed new state in April, 1862; and in May, 1862, the General Asembly of Virginia gave its consent to the formation of West Virginia out of the portion of the territory described in the ordinance and the constitution for the new state. That part of the Act of the General Assembly of Virginia, enacted in May, 1862, and giving its consent to the formation of the new state, reads as follows:

> "Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia to include the counties of Hancock, Brooks, * * * * * according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed proposed by the convention, which assembled at Wheeling on the 26th day of November, 1861."

Subsequently, in December, 1862, an Act of Congress was passed authorizing the formation of a new state out of a portion of the territory of Virginia as set forth in the ordinance of 1861 and the constitution of 1862; and but for one matter which had not been embodied in the constitution of the new state she would have been admitted into the Union by that Act. Congress, in the Act passed in December, 1862, recites the holding of the convention of August, and the adoption of the ordinance of 1861—recites the fact of the holding of a convention for the framing of the constitution for the proposed new state in 1862; also the consent of Virginia, as evidenced by her act of May, 1862, and admits West Virginia by that Act into the Union with this proviso: That slavery shall be exclud-

ed from its boundaries. And when that was done, proclamation thereof should be made, and thereafter the proposed new state should be admitted into the Union. And on the 20th day of June, 1863, West Virginia, under this compact, composed of these various documents and acts, became a new state of the Union.

Recess until 2:30 P. M.

After Recess. 2.35 P. M.

MR. HOGG. In the convention which adopted the ordinance of August, 1861, when the matter of assuming a portion of the public debt arose, the basis of its adjustment also came up. It was known by Virginia that nearly all of the proceeds derived from the sale of the bonds had been expended within her present limits, and it was also known that the work of internal improvement had not as yet reached the West Virginia line, and that if the new state were formed it would be impossible for Virginia to go on and prosecute the work as a state enterprise after the new state had been severed and a new state government organized. It was also known to the representatives of the people of the proposed new state that if they were to undertake to meet that improvement and complete it that it would have to be done out of their own public resources, or by private enterprise. Therefore, when it became necessary to adopt, in connection with the new state, a just proportion of the public debt, the method of determining that necessarily arose. They therefore decided, and embodied it in the ordinance, that Virginia should be credited with all of the money expended within the limits of the proposed new state, and charged with all the taxes paid into the public Treasury of Virginia from the time of the creation of the debt, less the ordinary expenses of government; and that the difference between those two matters would constitute West Virginia's portion of the public debt. Therefore the basis had been adopted by Virginia herself in her own convention.

JUSTICE HARLAN. You say "Convention of the State of Virginia." What convention do you refer to?

MR. HOGG. The convention which met to restore the status of the state government, and maintain the relationship of Virginia as a state to the National Government after the Ordinance of Secession.

JUSTICE HARLAN. That was known as the Pierpont?

MR. HOGG. Yes, and is so designated in the bill.

When the subject came up in the convention which met to frame the constitution of the new state, there was another question that was open, and that was the tribunal in which the just proportion of the public debt of Virginia should be determined. The basis had already been promulgated, which was acceptable to the new state, and therefore to settle that matter, the convention framing the constitution of the new state declared that the legislature of West Virginia should ascertain the same as soon as might be practicable, and provide for the liquidation by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years. That was satisfactory to Virginia, as evidenced by the Act giving her consent for admission, for the constitution of the new state was before the legislature when the Act was passed, and with that provision in the constitution, Virginia gave her consent. Congress passed the Act giving the consent of the National Government to the creation of the new state, with all of these provisions in the constitution as to the bases upon which, and as to the tribunal by which, this just proportion should be determined.

Now your Honors will preceive that after the creation of the new state, it became obligatory upon her to ascertain that just proportion as soon as was practicable, and in the manner designated by the ordinance. After the restoration of peace between the states, Virginia brought suit in this Court, assailing the integrity of the territorial limits of the new state, claiming certain counties, which were recognized by the new state as being a part of her territory, were not in fact a part of her territory, but really belonged to the old state. Pending that suit, West Virginia, on the basis agreed upon between the two states, could not proceed to act because the determination of her just proportion depended upon whether or not the certain counties in controversy, were actually within the territory. That suit in this Court remained undetermined until the 6th of March, as I now recollect, 1871; and on that day it was determined that West Virginia's territory, as she had claimed it, was intact, and the case was determined in favor of the defendant.

Now then, up to that point of time, neither state, owing to the condition of affairs, could act with reference to this debt. The first expression of Virginia with reference to her public debt was that contained in an Act of her General Assembly approved March 30th, 1871, in which Virginia by her own act proposed to make settlement with her creditors of the old *ante-bellum* debt.

JUSTICE BREWER. After the decision in the case?

MR. HOGG. After the decision of the Supreme Court. She, in that Act, proposed to assume two-thirds of that debt, issue new bonds for it, and to receive to herself in trust, the surrender of the old bonds, the settlement of the other one-third to await a settlement to be thereafter had between West Virginia and Virginia. Accordingly, after this enactment, the creditors of Virginia did avail themselves of the provisions of that Act, and a great deal of the old debt was funded upon that basis.

The next expression of Virginia with reference to her public debt was that contained in an Act of the General Assembly of Virginia approved March 28th, 1879, by which she provided an abatement of the rate of interest and divided her then outstanding indebtedness into two classes, which it is not necessary to mention here in the statement of the facts, but this Act of 1879, proposing the abatement and new terms of settlement of the two-thirds which she had assumed, provides that, "The owners of all classes of bonds mentioned in this Act, who shall exchange their securities for the bonds created under this Act, and who shall not have yet received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, shall receive certificates of a like character to those issued under the act of March 30th, 1871, when they make such exchange, and the State of Virginia will negotiate or aid the creditors holding all of such certificates issued, under this Act, or previous acts, in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this Act, shall be taken and held as a full and absolute release of the State of Virginia from all liability on account of said certificates."

Under these two Acts, the Act of 1871, and that of 1879, nearly, if not quite all, of her old indebtedness created prior to 1861 was funded on the basis prescribed by these enactments, thus relieving her of all liability upon the one-third part of her original *ante-bellum* obligations. So the matter rested until a third expression of the State of Virginia touching her said debt, so far as it related to West Virginia, was made, which was an Act of her legislature approved February 14, 1882.

JUSTICE BREWER. Up to that time was there any adjustment of the one-third?

MR. HOGG. There was no adjustment up to that time of the one-third.

Now, under this Act of 1882, containing an extended preamble setting forth what purports to be an account between the State and her creditors, and showing the aggregate of principal and interest in two distinct totals in separate columns, and declaring the assumption of two-thirds thereof as her equitable portion, fixing the total amount of this equitable portion as of July 1st, 1882, at $21,035,377.15, and then provides for the funding of this sum by the issuance of bonds drawing interest at the rate of 3 per cent., Virginia obtained a very considerable reduction of the two-thirds which she had agreed with her creditors to assume by the Acts of 1871 and 1879, better terms for its settlement, and a reduction of the rate of interest.

When she funded her debt again under the Act of 1882, this provision in that Act appears:

> "For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this Act, the said share having been heretofore determined by the Commonwealth of Virginia, the said Commissioners shall issue certificates, substantially in the following form, viz: No. .... The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ..... Dollars, dated .... day of ....., and No. ....., leaving a balance of ..... dollars, with interest from ..... to be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth."

And it is then signed by the Second Auditor, and the Treasurer.

Now a further Act of February, 1892, was passed, which bears the following title: "An Act to Provide for the Settlement of the Public Debt of Virginia, not Funded under the Provisions of an Act Entitled An Act to Ascertain and Declare Virginia's Equitable Share of the Debt created before and actually Existing at the time of the Partition of her Territory and Resources, and to Provide for the Issuance of Bonds covering the same, and the regular and prompt payment of the interest thereon, approved February 14, 1882." This Act of 1892 provided for the issuance of $19,000,000 in bonds in lieu of $28,000,000 of outstanding obligations of Virginia, not funded under the Act of February 14, 1882, hereinbefore

mentioned, and prescribed the form of the new bonds to be issued under this Act and the coupons thereof. This Act also provides that in taking up these outstanding bonds before issuing new bonds in lieu thereof there shall be deducted, "One-third of the principal and interest of such obligations as were issued prior to the 30th day of March, 1871, and also deducting one-third of the principal and interest of such obligations as are issued under the Act approved the 30th day of March, 1871, as do include West Virginia's portion." This Act then provides that all balances of the debt of Virginia shall be borne by the State of West Virginia, and issues a certificate similar in form and character to that issued under the Act of 1882. By virtue of this act of legislation Virginia made a further reduction of the principal of her debt and received a more favorable rate of interest and better terms as to payment. That was in 1892. About two years after that a joint resolution was adopted by the Legislature of Virginia providing for the adjustment with the State of West Virginia of the proportion of the public debt of the original State of Virginia, proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same. This resolution was approved March 6th, 1894, and in its preamble refers to the acts by their titles, passed by the General Assembly of Virginia relating to her debt, concluding the preamble of this resolution as follows: "Whereas, the present State of Virginia has settled and adjusted, to the entire satisfaction of her people and the creditors, the liability assumed by her on account of two-thirds of the debt of the original state." The resolution then creates a commission "Authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia." But in creating this Commission, to which she confided the duty of negotiating a settlement with West Virginia, it is provided: "But said Commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State which she has already provided for as her equitable proportion thereof. All expenses incurred by said Commission and said Board of Arbitrators, including reasonable compensation of the members thereof, shall be paid out of the proceeds of such settlement or by the holders of said certificates who are the beneficiaries of such settlement, but without subjecting the State to any expense on this account."

Now a further Act was passed by the Virginia Legislature and approved March 6th, 1900, reciting the previous acts of said Legislature relating to the public debt of said State, and also reciting that "Whereas, in each of said Acts provision is made for issuing to the creditors of the original State of Virginia who should accept the new bonds provided for by said several acts, certificates for such proportion of the obligations surrendered by them as was deemed proper to be borne by the State of West Virginia, to-wit: One-third of the amount of said obligations, of which certificates this State holds a large amount, through the agency of the Commissioners of its Sinking Fund and Literary Fund." In accordance with the provisions and requirements of the Act approved March 6, 1900, the Commission entered into an arrangement with the duly authorized representatives of the holders of the deferred certificates issued by Virginia, without recourse upon her and received by her creditors in settlement of one-third of the original debt, whereby this Commission by and with the advice of the Attorney General, was to institute suit in the name of Virginia in this Court, and these deferred certificates issued upon West Virginia, without recourse upon Virginia, should be assembled and placed in the hands of the Commission. The Commission created by the State of Virginia and the Committee representing the holders of the deferred certificates met and entered into an agreement whereby they surrendered to the then Commission all of these deferred certificates representing, as claimed by Virginia, the one-third part of the debt which was to be borne by West Virginia, and in that agreement it was stipulated that Virginia should incur no expense on account of any suit instituted in this Court in her name against West Virginia for the purpose of enforcing payment of these deferred certificates owned by the original holders or assignees of the old debt, and that the bondholders should bear all expenses. After that arrangement had been consummated, suit was brought in this Court, in which the facts as I have stated them essentially appear, and the bill prays for an accounting between the States of Virginia and West Virginia, and also prays that the principles upon which such an accounting shall be had may be ascertained and declared, and that a true and proper statement be made of the matters and things above set forth, such accounting to be had and statement made under the provision and direction of this Court, by such auditor or means as may be by the Court selected, and that proper and full reports of such accounting and settlement may be

made to this Court; and that the State of West Virginia may be required to produce before such Auditor and persons selected, such books and proceedings as may be among her public records which may aid and show the facts and actual state of the accounts growing out of the matters and things above recited and set forth, in order that a full and correct settlement and adjustment of the account between the two states shall be had. And that this Court shall adjudicate and determine the amount due, and so forth.

At the October term of this Court, 1906, a demurrer was filed by the State of West Virginia which was subsequently amended, and in that demurrer was set forth the grounds upon which it is contended that no liability to Virginia or right to maintain this suit appears upon the face of the bill or its exhibits. Without going into detail with reference to the points of argument, I desire to say that this demurrer raises the first proposition in this form: That the State of Virginia has asserted here in this bill a pure money demand, and seeks a personal decree for that amount against the State of West Virginia. Before calling your attention briefly to the reasons why we think this point ought to prevail upon this demurrer, I desire to state that there is also embodied in this bill a claim for these certificates issued by Virginia representing West Virginia's one-third part of the old debt in the hands of the Literary and Sinking Funds of Virginia; and also a claim for property localized within the State of West Virginia consisting of roads, lands, bridges and so forth. And also $150,000 appropriated by the General Assembly of Virginia in February, 1863, which is also made a part of the demand. It may be insisted that the right to maintain a suit by one state against another for a purely personal demand is not an open question, but we think that this case presents the proposition as to whether this Court can take cognizance of a purely personal claim on the part of a state and assert it against another so as to make this tribunal available for purposes of a controversy of that character. In this particular case there is nothing to make it an equitable case unless it be on the ground of an accounting, and that if a decree were entered in this case it would be unavailing because it could not be enforced. But I do not desire, if your Honors please, to argue that, because I have not the time.

JUSTICE BREWER. The resolution of the Convention was that the West Virginia Legislature should ascertain the amount, and that was postponed until after 1871. Has West Virginia done anything since then?

MR. HOGG. West Virginia has not been able to do anything for this reason, that Virginia undertook to settle it; and began in 1871 upon the basis that she only owed two-thirds, and when she provided a Commission to settle with West Virginia, it was upon the arbitrary basis that West Virginia must assume one-third.

JUSTICE BREWER. She settled with the bondholders. Did she make any proposition of settlement to West Virginia?

MR. HOGG. None whatever, excepting the proposition that the Commission might arrange it, provided it did not undertake to settle upon any basis excepting that West Vriginia was liable for the one-third.

Now then the next ground against the exercise of the jurisdiction of the Court in this case to determine the principles upon which this adjustment should be made, is this: That when the ordinance that Virginia adopted in 1861 providing how the accounting should be had, and when the Constitution of West Virginia, to which Virginia assented, and upon which the Act of Congress was predicated, admitting her into the Union, provided that that amount should be ascertained by the Legislature of West Virginia as the body to act, it was a solemn compact entered into between the two states under which that just proportion should be determined; and that no Department of the General Government, no Department of either of the State Governments, could change that compact except by agreement.

JUSTICE WHITE. Your argument is that an agreement was made for the adjustment on a particular basis?

MR. HOGG. That Virginia never did observe and never would observe.

JUSTICE WHITE. Then there was no agreement to compel?

MR. HOGG. That was not the exact position. The exact position was this, that Virginia undertook herself, beginning with 1871 and extending down to 1882, to settle this upon her own terms, and that Virginia, when she proposed to settle with West Virginia, put restrictions upon the Commission authorized to act, fixing the basis at absolutely one-third of the debt, so that West Virginia was precluded from meeting Virginia upon any terms of adjustment, except those which she has prescribed in violation of the compact.

JUSTICE HARLAN. Does West Virginia admit that she owed anything?

MR. HOGG. West Virginia has expressed herself in her Legislature as, on the basis adopted, owing nothing.

JUSTICE HARLAN. Does she admit that she owes anything on any account?

MR. HOGG. West Virginia disclaims any liability to Virginia on any account.

Now then, if your Honors please, another proposition arises in this case, and that is whether this is a controversy between two states within the meaning of Section 2, Article 3, of the Constitution. Your Honors will perceive from the bill and its exhibits that this suit has been brought for a settlement of the deferred certificates issued by Virginia to the bond holders; that these certificates were issued without recourse upon Virginia, and that they were assembled by the owners and their Committee into the hands of the Commission, and that this suit has been brought by Virginia for the benefit of the holders of these certificates; and that if a personal decree were rendered in favor of Virginia, it could not inure to her benefit.

Furthermore, if it be argued that the obligation which West Virginia assumed, and which was a just proportion of the old debt, was really payable to Virginia, when Virginia settled her part of the old debt with the creditors and transferred to them all deferred certificates representing the other third, and was released from all liability on account of it, her interest in this debt, excepting what she had assumed, ceased and determined, and therefore having settled her proportion as declared in her own Legislature, and no more than her proportion, and having disposed of the other third by her own certificates without recourse upon her, that her interests ended and that she could not be heard to prosecute a suit in this Court for relief on account of those certificates, because the Court could grant none.

Furthermore, if it is assumed on the other hand that when the two states were divided the obligation of West Virginia became a joint one with Virginia to the creditors, and Virginia by her own Act settled in entirety for her own proportion, being released by the surrender of the old debt to her, that would release West Virginia unless she had been privy to the arrangement by which that debt was settled.

JUSTICE BREWER. The effect of that adjustment was simply to reduce the amount of indebtedness.

MR. HOGG. The effect of that was then your Honor, as understood by Virginia, that she simply determined by her act what part

Virginia should assume, leaving the one-third unsettled and represented by these deferred certificates which Virginia had issued against West Virginia.

JUSTICE BREWER. Was one-third released also?

MR. HOGG. No, sir, the one-third still stands out.

MR. McCLINTIC. The bonds were cancelled.

MR. HOGG. Yes, they were. The old bonds, when they were surrendered and the certificates issued, were cancelled so that the debt was destroyed; and Virginia is not asserting in this case any claim for contribution, and if she were she could not maintain it, because no court of equity would decree contribution until the plaintiff had made it appear that she had paid more than her just share. Virginia only claims to have paid her just share, and has been released entirely from the one-third which she has allotted to West Virginia, ignoring entirely the compact, saying that the holders must come into this Court through the State of Virginia as the plaintiff and compel West Virginia to account, for what? Not to Virginia; she gets no benefit; she is entirely released. For no person except the owners of these deferred certificates issud by Virginia without recourse upon herself, against West Virginia.

The other claim that is made in the bill is for certain parts of the old debt represented by deferred certificates that were transferred by the State of Virginia to the Commissioners of her Literary and Sinking Funds. These were mere state agencies created for the fiscal purposes of the state, and any bonds or deferred certificates held by them could not be regarded as a debt against Virginia within the meaning of the compact of August, 1861, or of the Constitution of West Virginia of 1862; in other words, as to that part of these bonds and the deferred certificates representing one-third of them in possession of the Commissioners of her Literary and Sinking Funds Virginia had never become a debtor, she still held them by her own fiscal agents, and therefore it constitutes no debt against the State of West Virginia.

Now as to the third claim made by Virginia against West Virginia, that is asserted under an Act of the Legislature of Virginia passed on the 3rd and 4th days of February, 1863, after Congress had given her consent to the creation of West Virginia, and when Virginia ceased to have any absolute control over West Virginia, so far as imposing any additional burdens upon her as a condition of coming into the Union is concerned. This act of February 3rd, 1863,

relates to property localized within the territory of the new state, and declares that she shall account for it upon a settlement between the two states thereafter to be had. Our contention is that when Virginia gave her consent to the formation of the new state, the only obligations which she imposed upon the new state were those stated in the constitution of the new state, the sole ground upon which she gave her assent; and that the fact that she passed subsequently an act of her legislature seeking to make the new state responsible for the property within her limits could not act as a modus to give vitality or force to that act, because it was done without the consent of the new state, and the new state, under well settled principles of law, would be entitled to all the public property localized within her territory; because it will be recollected that Virginia's government at the time she gave her consent to the formation of the new state was already provided with the instrumentalities and means of carrying on the operations of government. She had everything necessary to equip her. The new state according to that contention would not only have to bear her just proportion of the public debt, but it would have to make compensation to Virginia for all public property left within her domain at its fair value, and then assume all the burdens of government in the protection of her citizens and the carrying on of her relations as a state. That cannot be enforced against the new state.

There is another objection to this feature of the bill, your Honors. When Virginia by her act of legislation authorized the institution of this suit in her name against West Virginia, she restricted in the act the matters to which that bill should refer, and that was to determine a just proportion of the public debt to be borne by West Virginia that had been created on the part of the old state prior to January, 1861; and Virginia by her own showing, by the exhibits filed with her bill, in effect restricted her officer of the law instituting this suit to confine it to her demand on the score of the public debt created before the war, the proceeds of which suit, if any obtained, were to inure to the benefit of the holders of the certificates.

Now another objection to these two additional matters, and to the whole suit, is this: If it be conceded that the claim asserted by Virginia with reference to her public debt be one of equitable jurisdiction, it does not admit of argument that the claim for property localized within the boundaries of the new state, and the $150,000 mentioned in the bill which was used by West Virginia as a part of the personal property pertaining to local institutions in the state,

does not constitute a subject of equity contest. This Court has expressed itself with reference to the principle which is to distinguish an equity cause from a law cause. Wherever the demand is for a simple judgment for money, or wherever it is simply a claim for damages and does not involve any sort of trust or lien or equitable doctrines to be applied, it must be asserted on the law side. The amount of the demand in this case, if Virginia has any claim against West Virginia for this property localized within her territory, would be its value. If she obtained any money pertaining to local institutions in West Virginia, it would be that amount. Therefore, in this case, Virginia has sought to blend in one suit an equitable claim with a legal demand, which would oust this Court of its jurisdiction, whatever the rule may be in many other jurisdictions to the contrary. If your Honors please, in many jurisdictions, where a court takes cognizance of a suit in equity, on one well recognized principle of equity, it will hold it for all purposes. This is not the rule in the federal courts. It is the policy of the Courts of the United States not to permit a party to be deprived of the right of trial by jury by blending a legal cause with an equitable one. And on that score this Court would not have jurisdiction of this case. We therefore contend that this demurrer ought to be sustained; as all the facts which I have recited appear upon the face of the bill and its exhibits, and the matters of which this Court will take judicial notice, the pleading of which is unnecessary; and that this Court will not take jurisdiction to enforce a simple money demand, because it is without power to make it effective.

Secondly, that the parties to this suit, by their compact embodied in the ordinance of 1861 and the constitution of 1862, the Act of the Legislature of Virginia of 1862 and the Act of Congress admitting the state into the Union, have already appointed and provided a tribunal, to-wit, the Legislature of West Virginia, by which this amount shall be determined. The states have already provided the basis upon which it will be determined, and it cannot be changed by judicial action.

In the third place, we contend that the State of Virginia has no such interest in this suit as will authorize her to maintain it; that it is a suit brought in her name for the benefit of holders of the deferred certificates alone. No decree can be pronounced upon this bill that will inure to the benefit of Virginia.

In the next place we contend that these holders are so directly interested in this suit, being represented by the Commission created

by the State of Virginia, and the Committee acting for them, that this Court cannot, as a matter of justice and equity, undertake to determine the amount that West Virginia should be liable for, nor the method by which that is to be arrived at in the absence of these parties so vitally interested; that if the bill were sought to be amended by bringing them upon the record as parties, they would necessarily in the very nature of things occupy the position of the real plaintiffs in the cause, and being individuals, under the Eleventh Amendment to the Constitution, they would not be permitted to do in conjunction with the state as a nominal party that which they would be prohibited from doing as sole plaintiffs, and that they cannot be heard on that ground. And on the further ground, if your Honors please, that this suit, even if it be conceded for the sake of argument that the debt is a proper subject of cognizance on the part of this Court—that the plaintiff has blended with it these legal demands, and they are simply legal demands without doubt; and therefore the jurisdiction of this Court cannot be exercised, and the plaintiff on any of these grounds mentioned cannot maintain this suit.

JUSTICE HARLAN. Suppose the State owns the bonds of another State; really owns them themselves. What would you say as to the jurisdiction of this Court of a suit by one state against another?

MR. HOGG. To enforce their payment?

JUSTICE HARLAN. Suit to get judgment.

MR. HOGG. Your Honors have never decided that question.

JUSTICE HARLAN. It was decided against one ————.

MR. HOGG. That was a proceeding wherein you executed a decree without embarrassment by the officer of your own Court. You did not disturb the state government; did not ask anything from the State government. You simply ordered a sale of personal property, a power which the Court could properly exercise. But I would not like to answer that question because I would do so on a point that I do not think I ought to express myself upon, as it does not necessarily arise in this case. But it is a serious question as to whether it can be enforced; and it is conceded I believe in the briefs of Counsel for the Plaintiff in this case, that there is no power in the judiciary of a state or the National Government that can control the power of taxation by a state for the purpose of obtaining satisfaction of judgment, rendered against a state or the National Govern-

ment; and that the judiciary has only the power to compel tribunals or courts to do that which the Legislature has prescribed they shall do, and which may be done by mandamus. It must be a pure ministerial duty not embodying the exercise of discretion. And that the matter of levying for taxation, and carrying on the various instrumentalities of the government, is a duty exclusively confined to the legislative branch of the government, and with which the judiciary will not interfere.

It is apparent from the bill in this cause, with the exhibits made a part of it, that its decision does not necessarily involve a determination of the question whether this Court may render a judgment or decree in *personam* against a state. No case has ever been before this Court making it necessary to decide this point in order to a rendition of the judgment of the Court. It is clearly apparent that there is no such state of facts set forth in the bill as to bring this cause within the constitutional provision authorizing the maintenance of a suit in this Court by one state against another. The whole tenor of the bill goes upon the theory that Virginia is suing in her own name on behalf of the holders of the deferred certificates issued by her without recourse upon herself, against the State of West Virginia. She is a self-constituted champion in this Court of the rights of those persons who have already released her from any liability to them, and have accepted her promise to institute this suit as a full guarantee of satisfaction of any and all claim which they ever pretended to have against her. That she cannot maintain this attitude in a suit as plaintiff, for the purpose of obtaining substantial relief, has been repeatedly decided by this Court, and to argue the question is unnecessary, as the authorities supporting this position are fully set forth in the written brief filed in the cause, and the principles upon which the decisions rest are familiar to the Court.

It is respectfully submitted that each ground of demurrer assigned by the defendant presents an unanswerable objection to the maintenance of this cause, and that the bill ought to be dismissed by this Court upon demurrer alone, without subjecting the defendant to the expense and delay of further controversy by means of an answer and the taking of proof in support of it. Indeed, the essential propositions of law necessarily arise upon the face of the bill, and the decisions of this Court show that their determination must be in favor of the defendant.

Supreme Court of the United States.

OCTOBER TERM, 1096.

Argument of Mr. Holmes Conrad, for the Plaintiff.

MONDAY, MARCH 11, 1907.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF MR. HOLMES CONRAD, FOR THE PLAINTIFF.

MONDAY, MARCH 11, 1907.

MR. CONRAD. If the Court please, The Commonwealth of Virginia comes before this Court and asks its equitable aid in the ascertainment of the contributive share of West Virginia to a common burden which rests now upon both States, which was never a joint debt, but was an obligation which West Virginia inherited by her birth.

We are told in the briefs that the State of Virginia cannot maintain this proceeding, and cannot ask equitable aid here until she has paid off and discharged the entire debt; that one cannot come into a Court of Equity for contribution until that one has paid off the debt upon which he seeks aid.

For the purpose of correcting an error in our brief—the light colored brief—and also asking your attention to the authority, page 18 of the brief for the Commonwealth of Virginia gives a citation to "2nd Spence, Equitable Jurisprudence." It should be 1st Spence instead of 2nd.

The authority is this: 1 Spence Equitable Jurisdiction of Court of Chancery, page 662. The author is considering those cases in which

the Court of Chancery has enforced obligations arising out of certain relations in which the parties stand to each other, on principles of equity independently of contract, and after referring to the practice in the English Courts, he says:

> "It was not necessary to wait till some one was damnified by having paid, or having a claim made against him for the whole; a bill might be filed to settle the amounts due from each individual of a body liable to one common burden, and to compel the payment by each of his share."

That is, a Court of Equity, in the exercise of its preventive jurisdiction, will not require that a burden of debt, resting upon two or more, shall be absolutely paid off and discharged by one of the number, before it will extend to that one the relief, which this court alone can afford, of fixing the liability upon those on whom it must ultimately be fixed, and doing by one decree, what must otherwise be done by successive suits, that is, apportion the liability among those who must in the end sustain it, and requiring each to contribute the amount which equitably and fairly should be borne by him.

I shall not array before you the cases in which this doctrine has been enforced, or the text writers who have recognized and sustained it by reason and authority, nor shall I stop now to consider the question suggested by Mr. Carlisle, that no such relief can be granted in this cause because our Bill nowhere alleges that Virginia has paid off the entire public debt evidenced by the bonds of the old Commonwealth. I may take occasion later on to call your attention to the fact that so far as Virginia and her creditors are concerned, she has paid all that in equity and good conscience they are entitled to demand of her in a court of Equity. She has issued to them her new bonds for two-thirds of the aggregate of the principal and interestest of the old Public Debt, up to January 1861. She has paid the interest, and reduced the principal of that new debt. She has paid off and discharged other liabilities of the old Commonwealth for which West Virginia was liable with her. Meanwhile West Virginia, having received and appropriated to her sole uses public assets of the old Commonwealth to the amount of millions of dollars, has paid nothing on the common debt, and declines to account for the funds she has received and appropriated.

I want to ask your attention now, while I recite briefly, what is alleged in the Bill as to the history of this Public Debt. You have been told by Prof. Hogg, that Virginia created this debt back in the

20's, in providing a system of internal improvements. You are doubtless familiar with the admirable article by Mr. B. R. Curtis published sixty odd years ago, in which he discusses the history of our State debts, the policy that led to their creation, and the ethical questions involved in the judicial ascertainment and enforcement of their liability. But there is a feature involved in this case, that is quite peculiar, but which my learned brother Prof. Hogg did not advert to. It is a matter of public history, clearly established by contemporaneous public records, specifically stated and charged in the Bill, and susceptible of instant proof, it is this: The public debt for which these bonds were issued, was indeed created for the construction of works of internal improvement in Virginia, viz: turnpike roads, canals, railroads, bridges &c., and, as an instrument adapted to the end in view, banks, in which Virginia subscribed for three fifths of the capital stock. Why were these internal improvements entered upon at so great cost? Not for the improvement of Eastern Virginia, but solely for the development and betterment of Western Virginia. It had come down to us as a tradition that the domestic peace of the old Commonwealth had been greatly disturbed, by the dissensions that had marked the first half of the 19th century, between the cis-montane and the trans-montane sections of the State. The published Debates in the Convention of 1829-30 are treasured as priceless monuments of the ability, patriotism and courage that marked the actors on that stage. We have caused the journals of the Senate and House of Delegates of Virginia, during the period in which this debt was being created, and bonds isued therefor, to be examined and the votes for and against the creation of each portion of this debt to be accurately noted, and we are prepared to show this significant result. On each vote taken it appears from the record that the members of both Houses, from the region now constituting West Virginia, advocated, urged, insisted on and voted for the creation of the Debt and the issuance of the bonds, while the members from the remaining parts of the State, in very large part voted against it. The significance of this fact lies in this, that it appears that this public debt to the payment of which we are asking that West Virginia shall contribute, was in fact and in truth created and incurred for the benefit of this very section of Virginia,—for the benefit of these very people who are here as defendants today, resisting this attempt to make them contribute towards the payment of this debt.

This public debt would not have been created, these railroads,

turnpikes and canals would not have been builded, but for the purpose of developing in the Western parts of Virginia those vast stores of mineral and vegetable wealth which were seen and known, though not yet ascertained and developed more than a hundred years ago by the people of Virginia. I might, if it were proper, and my time allowed, mention to you the names of men familiar in the history of Virginia, and in the history of this country, who more than a centrry ago had explored all this western region, and had then taken up large bodies of these lands, which they held through their own lives and transmitted to their posterity as an heritage of priceless value.

Now, one more feature of this public debt. In 1861—the period arbitrarily fixed—it was a burden resting upon the Commonwealth of Virginia, of which commonwealth the region now known as West Virginia, constituted, not a—part—not a section, not even a—member, but Virginia herself, just as much as the James River Valley, the Shenandoah Valley, or the city of Richmond the capital of the State. The debt was contracted by the people of West Virginia, through their Delegates and Senators in the General Assembly of the State. The Commonwealth of Virginia was the debtor, the obligor in the bonds, her Governor signed them, and her seal attested them, and this was the governor and this was the Seal of the people who resided then, where they reside now in the territory now called West Virginia. It was then the very Commonwealth of Virginia which issued the bonds. Can the change of name rid them of their self imposed liability? If this be so, suppose that the Shenandoah Valley had been added to West Virginia, and then that the Blue Ridge and eastern piedmont region had been added, and then that all that part of the State north of the James river had been added, until nothing was left but the narrow strip lying south of James river. Could the entire burden of the old public debt be cast upon that narrow and impoverished region? Suppose, indeed that by degrees and, it may be for the very purpose of evading the liability for this just and reasonable debt, the entire State of Virginia had acceded to West Virginia and merged her political and physical existence into the State of West Virginia, would a Court of Equity have lent its aid to the success of such iniquity?

Now one other salient feature, briefly: You have heard much of the "Restored State of Virginia"——the restored state. Let me ask your attention to a bit of history. The people of Virginia assembled in convention in Richmond in 1861.—every county in the State being represented in that convention. A majority of the people of

Virginia were opposed to the exercise of the right of secession—a majority of the members of that convention were opposed to it, but a time came when it was no longer an open question, and they adopted an ordinance that had for its purpose the separation of Virginia from the Union. In the end, it failed. A large majority of the people residing west of the North Mountain—which is the eastern barrier of the present State of West Virginia, and the eastern barrier of Virginia,—were opposed to the action of the Virginia Convention,—they were opposed to secession; All of the members of the Virginia Convention from that region, withdrew from the convention, and returned to their homes. In May or June 1861 a mass meeting, of 25 or 30 men was held in Clarksburg, and they called a convention to meet in Wheeling, that convention in turn, called another convention, the members of which were elected in their respective counties, and it called itself a Convention of the people of Virginia, *Stat magni nominis umbra*. They organized a state government, which they called the "restored State of Virginia". Now what was their object? From the outset it was to create a new State. They found out that it required the consent of Congress, and, further, that the Constitution forbade the erection of a new State within the territory of an existing State without the consent of such State. "Therefore" they said, "we must first form a new state government of Virginia, here, of our own people, of Western Virginia people, and then, we, as Virginians, will consent to the erection within our territory, of the new State. We will consent that we, man by man, shall convert this territory, foot by foot, into a new State, which we will call West Virginia. So, it came to pass, that the very same men that one day sat in convention as the people of Virginia, on the next day sat in the same hall, as the loyal people of West Virginia. The same men that one day voted millions of dollars of the public assets of the Commonwealth of Virginia, as a benefaction to the coming state of West Virginia, to be accounted for in a settlement thereafter to be had with Virginia, on the next day sat as the representatives of West Virginia, and with extended hands received the money and property which, as the representatives of Virginia, they had voted to bestow.

Now it is well to bear this in mind, because you have been told already, and it will be directly more earnestly pressed upon you, that Virginia has fully consented to all that has been done. Two large and valuable counties, have since the close of the civil war, been torn from the body of Virginia, on the cruel pretense that she

had consented to her own undoing. When, in truth and in fact the only party who consented, was this same body of people, who on one day sat in convention as the people of Virginia, and the next day sat in convention as the people of West Virginia. "Virginia has really consented" my learned friend says in his brief, has "freely consented to all this" In the name of Heaven, will you pervert and misapply a legal fiction, one that this Court did employ, years ago to sustain its action in wresting the counties of Jefferson and Berkeley from Virginia, and holding that they formed part of West Virginia, in order to relieve West Virginia from its just and reasonable share of the public debt. In the case in 11th Wallace, it was said that the political department of the Government had recognized the action of the restored State of Virginia, as valid and binding, and therefore this court could not review that action.

A little while ago, a demurrer was filed to our Bill, on four grounds, and a month or six weeks ago you were asked to extend the time for hearing this case, in order that what was called, "an amended demurrer" might be filed. We made no objection, and it was done. Now, to day, what is the aspect of the case. The grounds of demurrer are practically abandoned, or ignored, by Mr. Carlisle, and you are asked to sustain the demurrer on a ground not hitherto assigned or indicated, save in the brief of counsel. We are now told that this court cannot entertain jurisdiction of this case, because, forsooth, the parties here, have, more than forty years ago, selected an arbitrator to decide the case.—that forty five years ago, they chose the legislature of the State of West Virginia, and clothed it with power to hear and determine that while the power thus conferred has never been exercised,—indeed has not at any time heretobeen asserted, or claimd to exist, that nevertheless it has never been revoked or surrendered and is therefore a valid, subsisting power to day; that this cause is in fact so far pending before that chosen tribunal as to defeat any jurisdiction in this Court to take cognizance of it. My learned friend, Mr. Carlisle, in his brief, pages 37-38, uses this language in asserting this claim:

> "The two States have heretofore, by compact between themselves and with the consent of Congress, as required by the Constitution, designated a tribunal to ascertain and settle West Virginia's share of the debt. This tribunal still exists, and is unquestionably competent to discharge the duties imposed upon it. And, moreover, but most important of all, it is the only tribunal existing, or that can be established, possessing the power to provide for the payment of

> West Virginia's share of the debt, when the same has been ascertained, in accordance with the terms of the compact. It cannot be coerced by any judicial or other civil process known to the Constitution and laws of this country. No court can compel it either to adjust the debt or to provide a sinking fund, or impose taxes, issue bonds, or appropriate money."

The argument is that the two States of Virginia and West Virginia, did forty five years ago covenant together that the debtor State alone should be clothed with power to ascertain and determine the fact and the amount of her liability, and that while it was charged with doing that "as soon as may be practicable" yet that it alone was to be the judge of such practicability, and though more than four decades have passed and nothing done, yet are you powerless, despite your broad jurisdiction in such controversies, despite the large powers with which you are clothed, you are impotent to spur this derelict arbitrator to due activity, or reach forth your hand and shear him of the authority which he claims to hold, yet refuses to exercise. That once an arbitrator it is always an arbitrator, immune from all judicial supervision or control. Is not the folly of such contention stamped upon its face. That Virginia, being *sui juris*, did, in fact and in truth, consent that West Virginia should be the sole arbiter of her own liability, did invest her with infallibility, and clothe her with irrevocable authority, and allow her to the end of Time in which to act.

Could anything be more preposterous than the suggestion that even if such a compact had been entered into, and forty five years had elapsed during which period nothing had been done or attempted by the arbitrator, that no presumption would be allowed from such long inaction, that the arbitrator had declined, or had repudiated or abandoned the undertaking. You cannot infer, according to my brother Carlisle's argument, that the chosen arbitrator had never accepted the task or entered upon its duties, that notwithstanding forty five years of unbroken silence, and absolute inaction, you are not warranted in the conclusion that the powers conferred upon the arbitrator have become somewhat impaired, if not altogether extinct.

Let us now consider briefly, what this alleged "compact" is.

It is set up here as the ground of a demurrer to the Bill filed in this cause. Surely it forms no ground of demurrer. It is nowhere asserted or claimed in the Bill. If it could be availed of as a defence

in any form here, it must be as a Plea, of "another suit pending", for its contention is that there is another tribunal, of competent jurisdiction, chosen by the parties hereto, to which this present cause of action has been referred, and before which it is now pending. That solely is no ground for a demurrer. The fact relied on to sustain the objection is not a fact apparent on the Bill. There is no pretense that the Bill sets up any such compact, or submission to arbitration. The defendant, straining after this impracticable defence, reaches out and seizes upon something that is not in the Bill, and seeks to read it into the text of the Bill that thereby he may make for himself a ground of demurrer.

How was the compact formed, and how is it now shown to have had existence?

It is said that the State of West Virginia, by its Constitution, assented to what is known as the "Wheeling Ordinance", which provided that the new State to whose formation it then consented, "should take upon itself a just proportion of the public debt of Virginia existing prior to the first of January 1861". But that "it assented to it with the qualification or addition, that its equitable proportion of the debt should be ascertained by its own legislature as soon as practicable, and that the legislature should provide for its liquidation by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty four years". (Mr. Carlisle's brief, pages 34-35.) It is further stated that the Act of Congress providing for the admission of West Virginia into the Union recited that Virginia had consented to the formation of the new State, by an act of her Legislature passed on the 13th May, 1862, which act provided that certain counties therein named, were admitted "according to their boundaries and under the provisions set forth in the Constitution for the State of West Virginia. The Convention of the Restored State of Virginia, which adopted the Wheeling Ordinance, asembled on 20th August 1861. The Convention which framed the constitution for the State of West Virginia, assembled on November 26, 1861, and this constitution was submitted to the people for adoption on the 3d of May 1862. The Act by which it is said Virginia gave her consent, is alleged to have passed on the 13th May 1862. The Act of Congress under which West Virginia became a State, became a law on the 31st December 1862. West Virginia was admitted into the Union on the 20th June 1863.

Now let us briefly consider these events and the dates on which

they occurred, and see, if we may, how this compact theory will work out.

Virginia, by a Constitutional provision, consents to the formation of the new State within her territory, but on the expressed condition that the new State "should take upon herself a just proportion of the public debt of Virginia &c" The people of Virginia in convention assembled, three months later, frame a scheme of a constitution for the proposed new State, and they, in such scheme of a constitution, assented to Virginia's plan, but, with a radical qualification thereof. Assuming for the moment that West Virginia was then an organic entity, speaking through her organic law, we have a plan proposed by one sovereign, and assented to conditionally, by another sovereign. Assented to only as radically qualified and amended. Has Virginia at any time ever accepted to such qualification and amendment? It must be admited that such acceptance could be made and manifested only through and by the same organ that had originally proposed the plan; that is, a Convention of the people of Virginia. It is not pretended that any Convention of Virginia has ever agreed or assented to the qualification or condition annexed by West Virginia. How then has Virginia accepted? Through her Legislature, and by the Act of May 13, 1862. That is the Legislature of Virginia has by its action, repealed, annulled and set aside this provision of her Constitution. Further; if need exists, or propriety allows that we go any further. This act of the Virginia Legislature of May 10, 1862, which was in defiance of her Constitution, and by which it is said Virginia assented to the West Virginia Constitution, was enacted more than a year before the State of West Virginia was created. Cases are cited by Mr. Carlisle to show that the terms of an instrument framed as a Constitution of a State not yet created and endowed with political organs and existence, become valid and binding upon the State out of whose territory such new State is formed, after Congress has consented to the erection of the new State, but the conditions in those cases, differ widely from those which control here. Here, the new State embraced, substantially the whole of the territory of the old State, and all of the people of the old State. Here the people who consented to give up their territory to the new State, were themselves the people of the new State to whom such territory was given. They were both the donors and the donees, and beside them there were no others. It is but trifling with the truth and mocking our own reason to talk of the people of Virginia consenting, or having any hand or voice in this matter. The

people of Virginia, the real and only people of Virginia resided east of the North mountains, and they knew—as all honest and true men knew, that Virginia had her seat of government in the city of Richmond, that there were her flag and her seal and symbols of her sovreign authority, and that this tragic farce that was being enacted west of those mountains, was being carried on under the protection of the war then raging, and that its sole reliance was the abuse of the power by those in whose hands, for a season, the powers of the general government had then passed. I deny that the Legislature of Virginia had the lawful power to assent to or to accept the qualifications which the West Virginia convention had attached to the plan proposed by the Constitution of Virginia. I deny further that the Act of May 13, 1862 had any validity whatever, so far as is disclosed by the public records to which I have had access. I am aware that this Court relied on that Act in its opinion and judgment in the case of Virginia *vs.* West Virginia, 11 Wallace. . . .but I have ever believed that had that case been prepared by certain Virginia lawyers, and had come before this Court at a more propitions period, the decision would have been in accordance with the views of the dissenting Justices.

The public records show that the Regular Session of the Legislature adjourned *sine die*, on the 13th February, 1862. The Act of May 13, 1862, could then have been enacted only by the Legislature in Extra Session. The Constitution of the State provided that the Legislature could assemble in Extra Session, only on the call by proclamation of the Governor. I have examined the Journals of the Senate and House at this session, and I nowhere find any reference to any call by proclamation or otherwise of the Governor. I have tried to learn by diligent and searching enquiry, and I cannot ascertain from any quarter that this Extra Session was legally and properly convened.

The fact of this Act of May 13, 1862, is alleged only by and in the demurrrer, so that no opportunity has been allowed us to deny that allegation and put the matter of this alleged Act in issue.

MR. CARLISLE. If that act is invalid West Virginia constitutes no part of the Union.

MR. CONRAD. As my friend, Brother Hogg, said "there are a great many delicate questions that you may propound to me, but which I can answer properly, only out of Court, for it might be very unsafe or imprudent for me to answer here. I am required

now to meet the question of the validity of West Virginia. A child born through a Cæsarian operation is as valid a child as one that comes into the world in the usual and ordinary way. As to West Virginia's genesis, and the legitimacy of her birth, you perhaps had better—

> Make no deep scrutiny
> Into her mutiny
> Rash and undutiful.

MR. JUSTICE HARLAN. What was the lawful state of Virgina?

MR. CONRAD. The first public act of my life, was to vote in 1861 against secession but I was a Confederate soldier, thank God, and I recognized as the lawful State of Virginia, that one in whose service I was engaged, and which I thought was a part of the Union.

MR. JUSTICE HARLAN. Part of the United States?

MR. CONRAD. Yes; and represented in Congress, while it was there.

I say this compact that is relied upon now, should not be considered, because it is properly no part of the Demurrer. Not only is it not assigned as one of the grounds of the demurrer, but it depends for its very existence upon a matter of fact which is not alleged in the Bill, and which we are warranted in denying ever had validity and legal effect, viz., the Act of May 13, 1862. Now let us pass rapidly on. Taking up the four grounds of demurrer, as they have been assigned and set out, I venture to say that the Bill cannot be held to be insufficient in law on either of the grounds assigned. There is but one special prayer in this Bill. There is but one ground on which this Bill prays relief. There is but one ground for equitable relief on which we have invoked the aid of this Court, and that is that you ascertain here the just and reasonable contributive share of West Virginia, of this common burden of the old Public Debt of the Commonwealth of Virginia. That is all; and now because it appears that while West Virginia shares with Virginia this common liability it also appears that West Virginia has received a large portion—amounting in value to many millions of dollars, of the public assets of Virginia, has received and applied them to her own exclusive uses and enjoyment, therefore accounts must be taken. To what may be ascertained to be West Virginia's share of the

debt, there should be added so much of the public assets appropriated by West Virginia, as exceeds her proper interest therein. Such accounting must be had, and in the taking of such accounts many questions must arise, and it is manifest that every element that enters into these separate grounds of demurrer, is really only but a matter of account that will have to be taken into consideration and dealt with by the Master to whom this cause may be referred for an accounting.

Let us look at some of the grounds briefly. The first one is because of misjoinder of parties plaintiff. In Bank of United States *vs.* Osborn, Chief Justice Marshall said that the only way by which to determine whether a State was a party to the record, was to inspect the record and see if it was there as a party. Try this objection by this simple test. Inspect this record. See who, and how many are the parties plaintiff whose names appear in the Bill. The Commonwealth of Virginia, sole and simple in her own right; in no other capacity or character. She alone files this bill, and she asks against the sole defendant, West Virginia, that this relief be accorded her. But it is said that while she files the bill in that way, yet she prays relief as a trustee. My brother, Professor Hogg, attempted to read the prayer for relief; but he began too low down on the page and missed that part where Virginia does pray that in her own right and as trustee this account may be stated.

What does she mean by that? That requires a very brief reference again to the history of this case. In 1871 the Legislature of Virginia, having waited in vain for some proffer from West Virginia, having been discouraged by the rejection of the proffers that she made, by West Virginia to come into a friendly adjustment and settlement—in 1871 Virginia issued a call to her creditors, her bondholders, all that would come in, and then she took this debt that existed there, evidenced by her long outstanding bonds, and she added six per cent interest to the principal of that debt up to the date 1871; and she says, "This is my debt." She might have claimed an abatement on account of war by which her revenues were depleted. She might have said that "during the period of war and reconstruction I owe no interest." But she did not. She added six per cent interest to the principal, and said, "I owe all that. I want to pay it." She says, "I can get no estimate from West Virginia of what her share is; but looking at her territory, looking at her wealth, it is reasonable that at least one-third of this debt should belong to her. I have no power to fix it upon her. It is only my estimate—an in-

telligent estimate, a fair and honest estimate; but it is not contractual with West Virginia. It does not bind her." So she said to these creditors, "Come in now and surrender your bonds, and I will give you my new bonds for two-thirds of this aggregate of principal and interest. I will give you my new bonds at six per cent interest, and as far as two-thirds of this debt is concerned, while I regard *it* as paid, what shall we say as to the other third?"

Let me ask your Honors to turn for a moment to the act of 1871.

MR. JUSTICE DAY: What is the date of that?

MR. CONRAD: It is printed in the bill. Look now at the bottom of page 15 of this bill, section 3 of the act. Permit me to read it:

> "Upon the surrender of the old and the acceptance of the new bond for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of this dismemberment,"

and now note:

> "And that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees."

My friend, Professor Hogg, tells you that Virginia wiped out this debt; that now she is maintaining this bill for strangers, lending her name to the suit for them. What does she do? She says to these people, "Give me your bond for a thousand dollars, the old bond of Virginia that you hold, for $666.66. I give you my new bond with six per cent interest. For the remaining $333.33 I will hold your old bond in trust for you. You have surrendered it—you, the bondholders; you, the creditor, you have put your evidence of debt back into the hands of your debtor. At law it would be a presumption of payment, but to repel that presumption I declare to you expressly by law that I hold that bond *in trust for you* to the extent of that one-third."

Now what will happen? Suppose this fails, and suppose we get nothing from West Virginia? The owner of the bond comes and says, "You are a trustee. You hold a bond as trustee for me to the amount of one-third of the face value of the bond. I demand it from you." Virginia, as trustee, would have to surrender this bond back into the hands of the holders from whom she received it, and he would hold it as an abiding claim against her until it was paid. So I would have you understand, despite the statements that have been made here, that Virginia is a trustee only to this extent. The bond could not be cut into three pieces and two-thirds of it held by Virginia and a third of it given to the creditor. The only way that Virginia could do was to say, "While this physical bond is surrendered into my hands, it is not surrendered for cancellation it is not surrendered in evidence of its satisfaction and payment. Two-thirds of it is discharged, but as to one-third, I hold this bond in trust for you."

MR. JUSTICE HOLMES. What do the words, "So far as unfunded" mean? That is not material, is it?

MR. CONRAD. I will explain in a moment. They used that word "funded" because they took the principal and interest and made a new fund of it, and treated it as a new capital, and made a bond for two-thirds of that new capital and gave that bond to the creditors, and took up the old bond from them.

MR. JUSTICE HOLMES. Then it means the total bonds to the extent of about one-third of their value, or something like that, does it not?

MR. CONRAD. It appears it does, as the bonds now stand; as the result of it, yes. These bonds are in the hands of Virginia now, held by her Treasurer.

MR. JUSTICE HOLMES. If I may put my question in a little different way, it does not mean a certain portion of the bonds selected out of a larger number, but a certain portion of all the bonds?

MR. CONRAD. Yes; You are right about it. It means that one-third of each bond is held by Virginia in trust for the owner of that bond, and this little certificate that my friends have talked so much about, both orally and in their brief, is nothing more than a memorandum. It is not an evidence of debt. In the Act of 1879 Virginia expressly says "the acceptance of this certificate shall not be taken or construed as imposing any liability of debt upon me."

What she meant by that was, "I am not going to have two evidences of the same debt outstanding, bonds and certificates. I want it understood that this certificate is nothing in the world but a memorandum of the declaration of trust, the trust upon which I hold one-third of this bond for you". That is what it meant. It has had the effect of a ware house receipt. It is not carried on the stock lists. It has no intrinsic value. It is not an evidence of indebtedness. It is just like a warehouse receipt that one may sell. A creditor receives one of these certificates and examines it, and asks What is it? and is told "Virginia acknowldges by this Certificate that she holds your bond, surrendered by you. Two thirds of it is satisfied and extinguished by her new bond for two thirds of the amount, and the remaining one third remains a subsisting debt of Virginia to you, evidenced by the bond now in her hands, and which she will hold in trust for you, to the extent of such one third of its amount.

MR. JUSTICE WHITE. Do you construe that this was not an assent to the creditors that they would discharge the debt of one third, and look for recovery to West Virginia.

MR. CONRAD. I think not. I was a member of that Legislature and I did not then, or since, understand that to be the construction which it was intended to bear.

MR. CARLISLE. I contend otherwise.

MR. JUSTICE WHITE. Your idea then is, then, that the State of Virginia meant that the holder of these bonds would say to the State of Virginia "Nothing has been done with this trust. I gave up one third of what you owed me and put in your hands the evidence of the debt. I want my bond back against you, because I have not been paid by the State of (West) Virginia, although it was in honor bound to pay it"

MR. CONRAD. Yes; not only in honor bound, but legally bound, because according to her expressed declaration she said "I hold this bond in trust for you to the extent of one third." Let me answer that further. There is no contractual relation between Virginia and West Virginia. None between West Virginia and these bond holders. They could not sue her as West Va. land passes by descent to two heirs, free from liens, but charged with the ancestors debts. This is not a joint debt of the heirs. It is a common debt There is no liability upon them except to the extent of assets descended, but to the extent of the estate inherited by them they remain liable.

What are the general creditors to do? If the heirs have come in and taken possession of the land that has descended, they might be

held, but could not be held on a bill at the suit of the creditors more than to the extent of the assets descended; but there is no contractual liability. So it was with Virginia. This was a congenital liability. I would liken it to what one member of the bench would recognize as original sin, but in the preparation of our brief my colleagues made me strike it out, because he said there might be some members of the bench who did not believe in original sin. But that is just the likeness. That is just where West Virginia stands, and sometimes her attitude has induced me to suspect that she regards it as original sin. [Laughter.]

This is the first time that I have heard an open, explicit, undisguised repudiation of her debts. Heretofore, through the mouths of her governors, she has come forward and never denied it. She has come forward with alluring and illusory proffers and overtures of settlement; but when we approached her she receded and receded, until like the Cheshire Cat in Alice in Wonderland, there was nothing left of her but the grin. [Laughter.]

I say that when they talked about there being a misjoinder of parties there is no foundation. The bill itself repels it. When they talk about there being a misjoinder of the causes of complaint, what are they? I beg your attention to this. They come in and say, "You are suing us here for a contribution to this debt." Then you show that the State of Virginia, this "restored State," turned over to us millions of dollars worth of property, in the last paroxysm of maternal solicitude before this child was born. They gave millions and millions of dollars, and these gentlemen say you cannot unite those two things in the same bill. A and B are in partnership, involving millions of money and long transactions, and A goes to the coffers of the firm and takes out all the money, and B files a bill for an accounting, and in the cross bill he says, "A, my partner, the defendant, has appropriated all the available assets;" and A comes in with a demurrer on the ground of a misjoinder of the cause of action, saying, "I am perfectly willing to settle the partnership account, but it is unkind of you to call on me for the assets of the firm that I have appropriated."

Here were millions of dollars' worth of property that Virginia might have taken and applied to the payment of her public debt; $600,000 worth of bank stock, property of all descriptions, running up into millions, that Virginia could have taken and converted into money and applied to this debt. West Virginia has taken that property. She holds it now, and when we come and ask that she

come into a settlement in order that it may be ascertained and determined what is her contributive share of a common burden she says, "You must not call upon me to account for these state assets that were turned over to me by Virginia because that is a misjoinder of causes of complaint." But further than that I have not the breath left to go into it much now, but in the bill you will find it plainly stated that when the restored Government of Virginia turned over $150,000, turned over all the property belonging to Virginia within the limits of the state, she added this: "To be accounted for in the settlement hereafter to be had between the two states."

To each one of these acts where money was appropriated by the "restored government" that express condition was annexed: "I will give it to you, but it is to be accounted for in the settlement hereafter to be had between the two States;" and mark you, please, that was after the alleged compact. This was after the alleged compact that took place May 13, 1862. But here in 1863, not once nor twice, but many times, does this "restored State" of Virginia, standing upon the ragged edge of her own dissolution, seeing death right before her—she, in contemplation of her instant extinction, gathered up all the available property of Virginia that was within her reach and turned it over to the Treasury of a State that had not yet been born!

Now they say that "While we will come into a settlement of account, we do not think you have got the right to embrace in your bill praying for that settlement, the public assets that were turned over to us and received by us, and which are at this moment in the Treasury of West Virginia." I want your Honors, please, when you come to construe this Act of the West Virginia Constitutional Convention that calls upon the Legislature of West Virginia to ascertain the amount of the debt and pay it, to decide whether that really means, by any just, fair, and reasonable construction, that they intended to clothe the legislature of the debtor State with the judicial power of hearing and determining that question of liability.

When was this done? When was this debtor empowered to act? "As soon as practicable." In my early professional life a bond was sent to me, payable "when convenient." When convenient—I did ask my father for advice about it, but as usual he told me to find it out and work it out for myself. With the aid of a court I did. The court held that a bond payable "when convenient" was payable within a reasonable time, and construed it to mean payable on demand, and it was paid. Here is an obligation that is to be fulfilled

when it may be practicable. Who is the judge of the practicability? My learned and distinguished opponent here says that there is no power on this earth that is able to determine that matter and exclude this arbitrator from the exercise of his function; that you cannot say that "as soon as may be practicable" means within a reasonable time, and that a reasonable time has long since passed, and that this alleged arbitration is *functus officio*.

CONCLUDING ARGUMENT OF MR. HOLMES CONRAD.

TUESDAY, MARCH 12, 1907.

MR. CONRAD. If the Court please, at the hour of adjournment yesterday I was about to call the attention of the Court to a statement that had been made by Professor Hogg in his oral argument, and it is stated also in the briefs of counsel at great length; and that was that the State of Virginia had no interest in this litigation; that the creditor had absolved her from liability, and that this, if anything, was but a suit prosecuted here in the interest of persons who are strangers to Virginia now, but who were holders of evidences of her indebtedness. I called your attention yesterday to a passage in the act of 1871, known as the first funding act, by which it was provided that these bonds of Virginia, surrendered by the holders and held by Virginia, were held by her in trust for the owners of the bonds, and I stated that if this attempt at a settlement failed, which was the trust upon which Virginia took them, that those owners of bonds could come forward and demand the restoration of them from Virginia and hold them as subsisting evidences of her indebtedness.

Let me ask your Honors now to look at the certificate that was issued, on page 47, at the bottom of page 47 and on page 48. This is the certificate that was issued by Virginia as a memorandum or token or declaration of the trust upon which she held those bonds:

> "Treasurer's Office, Richmond, Va.
>
> "This is to certify that there is due to ———— heirs, executors, administrators, or assigns, ———— Dollars, being one-third of bond surrendered under the provisions of an Act approved March 30, 1871, entitled 'An Act to provide for the funding and payment of the public debt,' namely, Bond No. ————, with interest, amounting to ————, payment of said one-third with interest thereon

at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded in trust for the holder hereof or his assigns."

Now the State of Virginia holds those bonds in trust. Why? Because the State of Virginia alone had the right to come into a court of equity and demand that West Virginia should exonerate her by contributing a just and equitable part of the common burden that rested upon both.

Now it was stated further that under the act of 1881 a different form of liability was created. It is not improper for me to remind your Honors of a fact in history. There was a time when a tide swept over Virginia, a piratical crew seized the ship, headed by General Mahone and one Riddleberger, and they did essay to repudiate every dollar of Virginia's liability. The property owners, the debt payers, the respectability of the State, opposed it; but these two leaders summoned their cohorts from the masses of the people, and they did succeed in obtaining control of this Legislature, and they did attempt to repudiate the debt. But behind them stood the vested rights of the creditors under the act of 1871, and a score of cases came before this Court, in every one of which the liability of the State of West Virginia was recognized. In the case of Hartman and Greenhow your Honors laid down the doctrine of public law that the mere fact of separation placed by the operation of public law a liability upon both these divided, discordant, and belligerent sections, a common burden that each must contribute to.

Now in 1881 and 1882 they passed another act. I will ask your Honors to look for a moment at the certificate. You will find it on page 29, at the top of the page:

"No.....

"The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ..... dollars, held by....., dated the ..... day of ..... and numbered ....., leaving a balance of ..... dollars, with interest from ....., to be accounted for by the State of West Virginia, without recourse upon this Commonwealth."

Such a fulmination coming from a debtor in his private capacity, that he had equitably discharged the debt that was held by his creditor, and evidenced by a bond, would be equally ineffectual. The clamor of the debtor, his avowed purpose to repudiate, the expression of his willingness to do it, and the statement in this formal manner that he had done it, was a mere *brutum fulmen* in the air. It amounted to nothing.

But what is the meaning of that statement that it was "without recourse upon this Commonwealth?" Did that mean as a proposition of law that the creditor could sue West Virginia, that the act of Virginia in setting apart one-third arbitrarily was binding upon West Virginia so as to create a cause of action against her, enforcible by the creditor? If it meant that, it would not be recognized by any court. What it meant really was what it elsewhere says on page 19 under the act of 1879. It was really meant to express the same thought, where the same repudiating legislature controlled by the same melancholy influences made this first essay at repudiation by the act of 1879. They said:

> "The acceptance of the said certificate for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the State of Virginia from all liability."

Did it rest there? No; it says:

"From all liability *on account of the said certificates.*"

There was no legal liability resting upon Virginia on account of those certificates. If they had said, "The acceptance by the creditor of this certificate shall be taken and recognized as an agreement upon his part to release Virginia from all liability upon her bonds," it might well be argued that the creditor had the right to release the debtor and that the acceptance of the new bonds operated as a release. But they were careful not to say so. They said, "It shall operate to release Virginia from all liability on these certificates."

I said yesterday that these certificates were no evidences of debt. They could not support an action. They were mere memoranda, mere declarations of trust, affording in a court of equity a basis for the recognition of the trust; but they went no further.

Now it was said yesterday that there was no evidence of liability anywhere. May I ask you to look at page 90 of our record? There is a statement made by the second auditor of Virginia on the 17th of September, 1902,—a tabulated statement which shows that the

total issue of what he calls West Virgina scrip was $18,277,000 and odd dollars. Those are the bonds that are owned now, to-day, by the creditors of the old Commonwealth of Virginia; bonds which the creditors placed in the hands of Virginia upon the solemn trust, which she undertook, that she would hold them to abide a settlement with West Virginia and dedicate the proceeds of them to those creditors.

Now he says this is a suit for those people. Pardon an illustration. A mortgagor mortgages his property for $10,000. The mortgagor has his unhappy day; creditors are pursuing him, and his mortgage is not yet due and cannot be enforced. He picks out certain of his creditors and executes a declaration of trust, and says that "the net proceeds of this mortgage, when foreclosed and recovered, I hold in trust for A, B and C, my creditors." Now suppose a bill of foreclosure is brought by the mortgagee against him; Can he come in, as West Virginia comes in here, on a demurrer, and say, "I as mortgagor no longer have any interest in these things; I have assigned the net proceeds of them?" There has been no assignment of the mortgage. The legal title is in him. The right of action and recovery is in him. He has merely dedicated the proceeds, when recovered and when received, to the payment of certain designated debts. These people who have a claim in morals and a claim in equity under this equitable assignment, would they be proper parties as defendants to a bill? Could they come in, or could the suggestion of their names be brought in, between an action of the mortgagee against the mortgagor to arrest the proceedings of foreclosure?

That is what Virginia has done. She says, "West Virginia owes in equity and good conscience a part of this common burden. I say to you creditors, who surrendered your bonds, that when that is recovered I hold it as a sacred trust fund, to be applied to the payment ratably on your debt."

One other point, and I conclude my share of this duty. There is a fourth assignment of error here in these words: It is the second in the course of the order followed:

"That this Court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this

Court, and this Court has no power to render or enforce any final judgment or decree thereon."

What are the controversies? The Constitution says that the controversies between two or more States are justiciable in this Court. It says that this Court has exclusive jurisdiction over such controversies. The Constitution sets no limit to the character or class of the controversies. It is broad and ample in its terms. It excludes, perhaps, criminal cases, but where resides the authority to say that thus far shall you go in the definition of a controversy under the Constitution, and beyond that you shall not proceed? What class of cases or controversies are you going to say are justiciable here under the Constitution, and what classes are excluded? There is no defination, no limitation. All civil controversies, money or other. If any are, these are justiciable here. But they say, "you cannot proceed here; a state cannot proceed as a trustee." Why, you have proceeded against a State as a trustee, the State of Michigan. In an opinion delivered by Mr. Justice Peckham, he says "Michigan is liable because she holds the money as a trustee." I use his language. Can it be claimed that the United States shall be sued as a trustee and yet not sue?

Suppose some benevolent person by grant or devise gives to the State of Massachusetts a hundred thousand acres of land lying within the limits of West Virginia, to be held by her in trust for three designated institutions of learning. It cannot be controverted that Massachusetts can take that trust. Since Vidal *vs.* Guard's Exrs. it has never been questioned that a corporation can take and hold, for any objects that are germane to the objects of its government, property as trustee.

Cannot Massachusetts take and hold on these trusts? Suppose West Virginia claims one half of that land, under some of her tax titles, and the Attorney General of Massachusetts advises that State that the claim of West Virginia is not well founded; that the claim is not a valid one, and cannot be maintained, and that it is the duty of Massachusetts, having accepted the trust, to protect the trust fund: How can she protect it? Can it be questioned that she can come into this Court, holding the legal title, and by her bill ask that you brush away the legal clouds that obscure her title? Where can you put your fingers on the fallacy of the reasoning? Where can you say the trust is not valid? The trustee may take; she may take, but cannot sue? In what character cannot she sue? Can she not come in here and state her claim and case? Can

she not come in here as the Commonwealth of Massachusetts, using the term or words trustee as a mere description of her person, or leaving it out, to set out the cause in the bill and will not your court as a court of equity make a decree according to the equity of the case?

So I say, by any analogy that is fair, you may find that a State may take and hold on trust; and if she can take and hold, what a mockery it would be to say that the courts of the land are not open to her to protect the trust funds that are in her hands?

But they say you cannot render a judgment, you cannot enforce a judgment. The argument is that a court will not do a vain thing. It will not proceed to judgment, there to be halted, if the court knows in advance that the judgment, if rendered, is an impotent judgment and cannot be enforced. It will not go through the mockery of a suit, will it? Judge Marshall, in one of his great judgments, called attention to a class of cases that received the court's jurisdiction by reason of the *subject-matter*, and another and wholly different class of cases that attracted the jurisdiction of the court by reason of the *parties*. You cannot enforce a judgment against a State? Why not? Because it did not enter into the contract in the beginning? Mr. Webster, in the well known letter to Baring Brothers, said that credit was given to a State on the faith one had in the sovereign. What sanction or security has the bond holder of a State? Has it ever been pretended, when this Court day after day renders judgment to the amount of millions of dollars against the United States—that it could award a writ of *fieri facias?* Has it ever been asked that you put a writ of *fieri facias* into the hands of your marshal and send him with a posse at his heels to the Treasury, where that writ would be an "open sesame" to fling open the doors of the Treasury to him, and allow him there to satisfy the judgment? What becomes of the sovereignty of the State— not in the ridiculed sense of that much abused word, but of a State that maintains its own existence, a State that keeps its own life in its body? What becomes of it if every creditor can come with his execution and subject to seizure the assets of that State, notwithstanding the obligations that rest upon it infinitely superior to those which it owes to its creditors? In that Parliament of Man which the poet looked forward to, we have erected a tribunal before which empires, kingdoms and republics come and submit to its jurisdiction. Has it ever been suggested by the boldest that power should be put into its hands to award a

writ, backed by physical power, to enforce the execution of the judgment that it rendered? May I commend to your notice the most philosophical, the most satisfactory exposition of this that I have been able to find? It is an opinion sirs, of the Supreme Court of Louisiana, delivered by one well known to some of you, in the case of Carter *v.* The State, in the 42 La. Annual. I have made quite a copious quotation from the case in my brief. You will pardon me if I read but the closing sentence on page 40. I ask you to look at it, at the closing of it:

> "Counsel asks, of what use is the power to render judgment against the State, if the court is powerless to execute the judgment? That question was anticipated by Mr. Hamilton in the discussion of the Constitution of the United States before its final adoption. 'To what purpose,' he asked, 'would it be to authorize suits against sovereign States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State.' Federalist, No. 81. He never dreamed that authorizing suit against a State would imply the right to issue *fieri facias* on the judgment.
>
> "Puffendorff says: 'And if the prince gives the subject leave to enter an action against him in his own courts, the action itself proceeds rather upon natural equity than on municipal laws. For the end of the action is not to *compel* the prince to observe the contract, but to *persuade* him.'
>
> "In England claims against the Crown might be prosecuted before certain courts, in the form of petitions of right, with the consent of the King, but it was held by Lord Mansfield that 'if there were a recovery against the Crown, application must be made to Parliament, and it would come under the head of supplies for the year.'"
>
> Macbeth *vs.* Haldimand, 1 Durn. & East., 172.

By the way, that latter part is a part of the quotation, and the marks indicating it were left out by the printer. Then we add:

> "We have examined all the authorities quoted by counsel and find none of them to support his contention. We are quite certain that no precedent exists sustaining the issuance of a *fieri facias* on a judgment against a sovereign State in her own courts, though rendered with her own consent.
>
> "The only recourse for satisfaction is by application to the Legislature, with whom the judgment should surely have great *persuasive* force, but none *compulsive.*"

If this demurrer is to rest upon the proposition that you have no

jurisdiction because you cannot constrain a State, or constrain the United States, by the menace of a *fieri facias*, then it needs no further argument from me. We need not go any further.

Have I occupied thirty minutes this morning?

MR. CARLISLE: Twenty-five minutes.

MR. ANDERSON: Take as much time as you like.

MR. CONRAD: Let me ask your attention, your Honors, a moment to the reasons that are given why this jurisdiction must exist. In the case of Ableman *v.* Booth the court says:

> "The Constitution of the United States, with all the powers conferred by it on the General Government and surrendered by the States, was the voluntary act of the people of the several States, deliberately done for their own protection and safety against injustice from one another."

That is the reason that is given for the erection of this Court itself, to prevent injustice being done by one State to another. Judge Story says:

> "Some tribunal exercising such authority, is essential to prevent an appeal to the sword and a dissolution of the government."

This Court said, in Chisholm *vs.* Georgia, that in every controversy of a civil nature between the States this Court has exclusive jurisdiction, and it was held by Mr. Randolph Tucker that these cases affecting boundaries and property rights and territorial rights of all kinds are proper cases for this jurisdiction.

We come here and rest our case upon three distinct grounds. They are stated here. They are rested upon the principles of public law quoted from the opinions of this Court, that "where a State is divided into two or more States, in the adjustment of liabilities between each other the debts of the parent State should be ratably proportioned among them." That is in Hartman *vs.* Greenhow.

MR. JUSTICE HARLAN: Please read that again.

MR. CONRAD: "Where a State is divided into two or more States, in the adjustment of liabilities between each other the debt

of the parent State should be ratably proportioned among them." That is an opinion of this Court that has received no dissent.

MR. CARLISLE: You do not claim that as a part of the opinion? There is no question of that sort in the case.

MR. CONRAD: I quote the language of Mr. Justice Field. He was speaking of this very Virginia debt. West Virginia was not a party to that suit, but the Court is here laying down a doctrine of public law which I do not understand can ever be *obiter dictum*. If the Court was rendering an opinion there on a state of facts involved in that case, in the absence of a party in interest, it would be *obiter*. But I do not understand that when this Court in any case announces without qualification a doctrine of public law or municipal law, that that would be taken to be *obiter*, because, if it is law, like the law of gravitation, it must be true in one case as in another. You cannot have law, public law, or the principles of public law, for one case, and the same principle with a modification for another case. So you cannot by an *obiter dictum* create law.

We rest again upon this ordinance of the convention of Virginia —"Restored Virginia"— to provide for the formation of a new State out of a portion of the territory of this State. That was the object of the ordinance, by which it was provided that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st of January, 1861;" and when this new-born State of West Virginia came to Congress for admission, she came with a constitution in her hands which, she said, laid down principles upon which she claimed to be a republican State—I mean republican in the broad constitutional sense— a republican form of government. And upon the faith of that constitution she was admitted into the Union.

That Constitution provides that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

MR. JUSTICE HARLAN: What page of your brief is that on?

MR. CONRAD. Page 20. West Virginia demanded reinforcements in this case. The reinforcements came, and found a condition

already existing. The reinforcements were not satisfied. They created a new ground of complaint, and I want my distinguished friend, when he stands here, to point out to you upon which ground of demurrer or under which ground of demurrer he finds this creation of his own fancy, this compact. He says that that provision which I last read to you, that the Legislature of West Virginia should ascertain the amount of the debt and pay it, created West Virginia an arbiter, a judge in its own case, to determine the fact and the amount of its liability, and to pay it. Shall I dignify that proposition by any argument to show that the word "ascertain" is to find out—learn from some auditor, learn from somebody erected and designated and empowered to ascertain this amount—learn what it is, and when you have learned it, provide by a sinking fund for its payment in thirty-four years? I ask you if that is not the strict, honest, fair meaning of the word "ascertain" as it appears there? Even taking the restored government of Virginia as it was, even assuming what was the actual fact, that although the same people, head by head, as the people of West Virginia, that their metamorphosis, their transition, their Jekyl-and-Hyde performance, that converted them from loyal Virginians into loyal West Virginians in 24 hours—even that would not have emboldened them to come forward and say that Virginia, by whatever appellation she might be known, had consented that a debtor should be the judge of the facts and the liability and the amount of the liability.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Argument of Hon. William A. Anderson, Attorney General of Virginia, for the Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

COMMONWEALTH OF VIRGINIA.

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF HON. WILLIAM A. ANDERSON, Attorney General of Virginia, for the Plaintiff.

MR. ANDERSON: If your Honors please, from the statements of this case which have been made by the counsel for the defendant and the plaintiff, the court, I hope, has already apprehended the salient facts out of which the issues presented here arise. Some of the most important of those facts are matters of public history, of which the Court will take cognizance.

Whether *in invitum* or not—whether as a result of a legal fiction or not, Virginia was dismembered and partition made of her territory, and out of that territory, as it existed in 1861 and in 1863, a new State was created. Prior to the creation of the State of West Virginia, an indebtedness enormous, considering the then resources of the Commonwealth of Virginia, had been created for the purpose of carrying out the system of internal improvements, begun in the early 20's, in large measure, as the bill states, designed to develop and furnish access to the territory which now constitutes the New State. A significant fact in connection with the history of the creation of this debt is that a large portion of it, as the bill states, was placed upon the Commonwealth of Virginia by the votes of the Representatives of that portion of her territory which now constitutes the State of West Virginia, and against

the votes of a majority of the representatives of that portion of her territory which now constitutes the Commonwealth of Virginia; and that, as to nearly the whole of that indebtedness, it received the sanction of the representatives in her General Assembly from the region now constituting West Virginia, and would never have been contracted but for the authority and sanction thus given.

I mention these circumstances as constituting not only a part of our equitable claim, but of our just legal claim, against West Virginia.

There can be no question, I suppose, that, as a proposition of public law, this indebtedness which amounted at that date to about $33,000,000, bound the entire people of the undivided State.

MR. JUSTICE BREWER: You say that these improvements were made partially for the benefit of West Virginia. Does the record show what the improvements were?

MR. ANDERSON: The record shows only general terms, not in detail, if your Honor pleases; They were canals, railways, turnpikes and other internal improvements. The record shows that several million dollars of the public moneys obtained by loans authorized by the laws of the Commonwealth were actually expended within what is now the territory of West Virginia, and that in larger measure these improvements were designed for the purpose of connecting West Virginia with the markets of the world and in developing the resources of what is now the territory of that State, in coal and iron and timber. The bill does not go minutely into the history of all these loans, because it would have unduly encumbered the record with a vast mass of statistics which could not throw any light whatever upon the principles to be decided by the Court.

Now if your Honors please, I suppose it will be accepted as a well settled principle of public law and public justice and public right that, on the 20th day of June, 1863, when West Virginia became one of the States of the American Union, that debt, independently of any stipulation between the parent state and her daughter, constituted an equitable and a moral claim, against the people and the property both of West Virginia and Virginia, and that, as has been decided by the Supreme Court of Virginia, in more than one case, and as has been held by this Court, both States and the people of both States were bound for the payment of those obligations.

As between the States this liability was limited by agreement, or by ordinance of convention, by provisions in the constitution and laws of the two states, which constituted an agreement, providing that as between the two States, the portion of the debt to be borne by West Virginia should be ascertained upon a prescribed basis.

But independently of this, according to recognized authorities, the debt should be ratably proportioned between the two states.

The most just, and a moment's consideration will show the most equitable, and having reference to the facts of this case, the fairest, basis of adjustment would have been to extend precisely the same rate of taxation upon the property of the people of both States until the whole debt should have been satisfied, principal and interest; and at the same time to have divided the public assets of the two States between the two States in proportion to their respective property values. That would have been a fair and just and equitable basis of settlement: Or else, the debt should have been divided, as of June, 1863, and not as of the arbitrary date fixed by the Wheeling ordinance, in proportion to the taxable values and with reference to the existing and prospective property conditions of the two States, because the debt was based upon the property both present and prospective of the original State. But by what is termed the Wheeling Ordinance, adopted by a convention, a revolutionary convention most irregularly assembled in the city of Wheeling, in August, 1861—

MR. JUSTICE HARLAN: There was a revelution all around, then, in the country.

MR. ANDERSON: There was, at that time revolution in the air, if your Honor pleases.

It was however a revolutionary convention, although its acts have been made *de jure* since, by recognition by the political departments of the United States Government, and of the government of Virginia and their validity can be no longer questioned.

I suppose there is no disagreement between counsel on that question.

This convention met at the city of Wheeling in August, 1861, and the circumstances that were referred to by my colleague as to that convention are worthy of consideration when you come to view its action. That convention gave the consent, and as we shall see, the only consent ever given by the Commonwealth of Virginia to the formation of the new State of West Virginia.

But the circumstance which has already been mentioned by my colleague, and which is a matter of fair consideration here now, that convention was elected by the same constituency which afterwards constituted the convention of the people of West Virginia, and in its personnel it was substantially the same as what was afterwards the convention of West Virginia, and to a large extent the same with the legislature of West Virginia; that the members of that Virginia convention went across the street to another hall and met subsequently in the same hall as the Legislature of West Virginia—

MR. CARLISLE: As the convention of West Virginia, not as the legislature.

MR. ANDERSON: Yes, as the convention of West Virginia; That is a circumstance to be considered in viewing the action of these conventions, and as justifying us in claiming that those stipulations shall not be construed rigidly against Virginia; that they should be construed liberally, as to her, the grantor, though she may be regarded as being, and strictly against a grantee who under these circumstances formulated the contract, which was to bind both parties.

MR. JUSTICE PECKHAM: Has this Court decided upon that point in the 11th Wallace case?

MR. ANDERSON: In the 11th Wallace case it was established that the Wheeling government was the government of Virginia, and the effect of that decision was to uphold the validity of what is known as the Wheeling ordinance.

Now instead of letting these questions be settled upon the principles of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment. We have to concede that we cannot go behind this, that we must accept it.

Section 9 of the ordinance, giving the consent of Virginia to the formation of the new State, reads as follows—

MR. JUSTICE HARLAN: What are you reading?

MR. ANDERSON: From the Wheeling Ordinance quoted at page 3 of the brief of the counsel for the plaintiff. Section 9 of the ordinance reads as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period."

That is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of this new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards, in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitutes a primary obligation and lies at the very foundation of the right of West Virginia to be a State.

Subsequently, there being some delay in the formation of the new State, various statutes were passed by Virginia, two of which are cited in the bill, making contributions to the new State when it should be formed. One of them is not cited in the bill. It is the statute of 1862, appropriating $150,000 to the new State when formed. There are two statutes of the year 1863, and one of 1862.

MR. McCLINTIC: That was repealed by the act granting $150,000.

MR. ANDERSON: I was not aware that that act was repealed.

MR. CARLISLE: It was repealed.

MR. ANDERSON: I accept the statement, as I only discovered that act a few days ago in looking over a compilation of the statutes of the Restored Government of Virginia, to which I had not had access before. The other acts are cited in the bill.

MR. JUSTICE HARLAN. When you speak of "the other acts," you include the act of February 3, 1863?

MR. ANDERSON: Yes, sir.

MR. JUSTICE HARLAN: Will you turn to the other acts?

MR. ANDERSON: Certainly.

MR. JUSTICE HARLAN: You say property belonging to Virginia to the amount or value of several million dollars was transferred from Virginia and was received by West Virginia on the express condition that the State of West Virginia should render an account. Does this record contain a statement of the circumstances surrounding the acceptance of that condition?

MR. ANDERSON: The record states that under that act, the act of February 3, 1863 several million dollars of the property of Virginia was turned over to and accepted by West Vriginia.

MR. JUSTICE HARLAN: You mean there is an allegation on that subject in the bill that is to be taken as true on the demurrer?

MR. ANDERSON: Yes that the property amounted to several million dollars that West Virginia received as a result of that act.

MR. JUSTICE HARLAN: You say "as the result." and the brief says "on the express condition."

MR. ANDERSON: On the express condition prescribed in that act,—that it should be accounted for in the settlement to be made between Virginia and West Virginia. Here is the quotation:

> "The State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State, provided that no such property, stocks, and credits shall have been obtained since the reorganization of the State government."

That is to say, it should not include property that had been obtained by Virginia after the organization of the restored government.

Now, if your Honors please, by the terms of the Wheeling Ordinance, prescribing the basis upon which the debt was to be adjusted, there was no provision made for any contribution from Virginia to West Virginia by way of dowry or dot, starting the new daughter upon her career.

It was necessary that money should be provided for the maintenance of the new State, when it should be formed, until it could provide means from its own resources.

Nor did the Wheeling ordinance make any disposition of the

property distinctly belonging to the Commonwealth of Virginia and located within the State of West Virginia. The stocks of incorporated companies, particularly the bank stocks, and the other property of the State, consisting of large quantities of both real and personal property. But this act, which will be regarded, as I take it, as a constating enactment—this act was an essential part of the stipulations in reference to the creation of the new State, the partition of the common property of the old State and the assignment to West Virginia of a portion of it which the mother state was willing that she should receive, but upon a condition that it should be brought into account in the settlement to be had between the two States.

MR. JUSTICE HARLAN: The acts of 1863 are not printed in the record or in your brief?

MR. ANDERSON: No sir, they are not. There is nothing in either act inconsistent with the brief or the allegations in the bill All that is material is printed.

MR. JUSTICE HOLMES: The provision for accounting is on page 5 of the record.

MR. JUSTICE HARLAN: Those acts should be in the brief.

MR. ANDERSON: If your Honors will allow us, we will file additional briefs. The briefs for West Virginia were handed us only on Saturday, and we have not had any opportunity to reply to them. In these additional briefs we will incorporate these Acts *in extenso*, or have them printed separately.

Now when the war ended and the Restored Government of Virginia became in fact and in law the only government of Virginia and was installed at Richmond—

MR. JUSTICE HARLAN: Was that the same government? Was that the same governor?

MR. ANDERSON: Yes; Francis H. Pierpont, the governor of the Restored Government of Virginia, moved with that government to Richmond and became the only governor of the Commonwealth, and his authority was recognized by all the people of Virginia. That government took steps looking to the settlement of the debt and appointed a commission to confer with West Virginia but its efforts were abortive. No satisfactory response was made; or such response as was made was made under such conditions or at such a time that

it was impracticable for the commissioners to meet, and so the matter stood until after the reconstruction of the State.

In 1869, a new Legislature of Virginia was elected and all the officers of the State government then chosen were subsequently installed. That Legislature, on the 30th of March, 1871, enacted the first general statute looking to and providing for a settlement by Virginia with the creditors of the common State. That statute is copied in full in the bill at pages 13 to 16.

Your Honors will observe that by that statute the Commonwealth of Virginia, then just emerging from the war, with her fields devastated and many of her homes in ashes, nearly all of her personal property destroyed, her real estate depreciated enormously in productiveness and in value, actually assumed not only two-thirds of the principal of the original debt, but assumed also two-thirds of all the interest which had accrued upon it including the war interest, and assumed two-thirds of the interest upon eight million dollars of that interest which had been already capitalized, and issued new bonds at six per cent interest for this two-thirds, which amount thus assumed aggregated more than the entire funded debt of the State as it existed on the 1st of January, 1861.

It was soon discovered that she had undertaken a burden which she was unable to bear, and various negotiations were had between her and her creditors looking to a farther adjustment of the debt; and there was litigation between her and her creditors, occasioned by efforts on their part, under the act of 1871 to intercept her revenue as it was flowing into her treasury.

As a result of those negotiations and controversies, both financial and political, various attempts at adjustment were made, all of which are set forth in the bill, until on February 20, 1892, a final settlement was made, which has been accepted by the creditors, and which is being carried out by the Commonwealth.

Now these matters are merely set forth in the bill, if your Honors please, for the purpose of showing the present relation of Virginia to these transactions, and giving frankly and fully a history of all her dealings in regard to the public debt. It is not pretended for a moment by the counsel for Virginia that West Virginia's rights could be affected or modified by these negotiations and contracts between Virginia and the common creditors, except in so far as payments under them might give Virginia an equitable claim to contribution from West Virginia.

In that connection I desire to call the attention of the Court to

facts which go far to show that Virginai, taking everything into consideration, has done as much, has made as great efforts, and as great sacrifices in order to satisfy the common indebtedness, as an exacting creditor could expect of her. I desire to call your Honors' attention to the statement furnished by the bill as to payments which she has actually made on account of that indebtedness. That statement is found on page 79 of the record, and is a part of the admirable address of Mr. Randolph Harris, made before the authorities of West Virginia, the joint finance committee of the Senate and House of the legislature of that State, in the winter of 1905. Its figures are taken from the records of the State.

It will appear from that statement that Virginia has paid, or has assumed and issued obligations for, and therefore satisfied, so far as West Virginia is concerned, the enormous sum of $71,377,904.34, in principal and interest. And yet while Virginia has done so much, West Virginia has not paid one dollar on account of that debt.

MR. JUSTICE WHITE: Is this statement on page 79 exclusive of the one-third?

MR. ANDERSON That is exclusive of the one-third represented by the certificates of Virginia, but it is not exclusive, as I understand it, of certain obligations of the old State, which Virginia has paid in full. It includes all of her contributions from her treasury and her property in settlement of the common debt of the undivided State.

Now various efforts were made by Virginia to effect an amicable settlement with West Virginia at intervals from 1866 down to 1905, by proposing a reference of the matter to joint commissions, by a proposition of arbitration, and finally by the creation of what is known as the Virginia Debt commission under the Joint Resolution of 1894. Under that resolution an effort was made to bring about a conference between the representatives of Virginia and West Virginia, and an accounting, but the proposal then made by Virginia was declined, and West Virginia refused—failed and refused—to have even a conference with her for the purpose of endeavoring to ascertain by a free interchange of views whether some amicable settlement could not be reached.

It is true that in adopting that resolution the General Assembly prescribed as one of the limitations of the powers of that commission that not more than two-thirds of the debt should, as a result of that settlement, be assumed by Virginia. But there was no such

stipulation, as I understood my learned brother to contend for on yesterday; namely, that West Virginia should assume one-third of the debt. It was recognized that there would inevitably be some loss which would fall upon the holders of the securities of the original State. It was not contemplated or expected that West Virginia would undertake to pay one-third of the debt with the interest upon it from the first day of January, 1861, but it was hoped that she would meet her obligations to such an extent as would satisfy the common creditors and relieve Virginia from further liability in regard to the debt.

Those overtures failed—in fact they never reached the stage of a negotiation, because West Virginia refused to entertain the proposition at all.

In 1900 Virginia still endeavored to bring about such an adjustment, not only in her own interest but in the interest of her creditors, of all the common unsatisfied creditors of the two States.

Accordingly; the Act of March, 1900, was passed by the General Assembly of Virginia and approved by the Governor, which conferred upon the Commission additional powers, plenary and unrestricted powers, to make a settlement of this debt upon any terms which would be approved by the Commission, by the public creditors and by the Attorney General of the State, subject only to the qualification that the creditors should accept whatever might be recovered for them from West Virginia in satisfaction of their claims. There was no limitation in that Act at all, as to the proportion which West Virginia should pay, or the proportion which Virginia should pay. The whole matter is referred to the Commission with the absolute discretion and power to make a settlement which should be binding upon all parties, subject only to the qualification above stated. As appears from the bill and exhibits made a part of it, that Commission acting for the public good, and repressing the natural pride which men would feel under such circumstances, pocketed that pride, made a pilgrimage to the capital of West Virginia and solicited from the executive officers of that State and from its General Assembly an opportunity to be heard, which was courteously granted. Thereupon Mr. Randolph Harrison, one of the members of that Commission and its authorized mouthpiece, in an address which was made a part of this bill, and which conservatively and within the limits of truth presents Virginia's case, appealed to the authorities of West Virginia to have an accounting, an amicable adjustment, and frankly informed them that if that overture was de-

clined the only alternative would be a resort to the courts of the country for the redress of wrongs and for the vindication of rights which this record shows to exist. And so this suit was brought and a bill setting forth these facts was filed; and to this bill our friends come here and demur upon grounds which I shall now, very rapidly review.

It is not necessary to discuss the original demurrer, because that is merged in, and all points made in it substantially covered by the amended demurrer.

The first of those grounds is as follows:

> "That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the Legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the 1st day of January, 1861."

It is impossible that there can be a misjoinder of parties plaintiff here, because there is only one plaintiff; as it would be equally impossible that there could be a misjoinder of parties defendant, because there is only one defendant.

If this ground of demurrer means anything it means, strictly speaking, that the bill is multifarious, because it joins different causes of action.

The demurrer assumes as true what the bill negatives.

It assumes it to be true that the bill is brought by Virginia not in her own right, but as trustee for certain holders of certificates whose names are not disclosed. The fact is that the bill is brought by Virginia in her own right only; only in her capacity as a state, her corporate capacity. It is not brought as trustee; it is not brought for the purpose of administering or executing any trust. She might possibly have been heard to maintain this suit as trustee, but she does not sue in that capacity. She sues only in her own right, and in the assertion of equities which I shall discuss later on.

This is a mistake which counsel have made from a too careless reading, or too superficial consideration of the bill. The learned counsel, our brethren from West Virginia, in their brief, actually

assert that the suit is brought for the certificate holders, that is, the holders of these receipts which irginia has given to the holders of the obligations of the Old State.

The suit is brought by Virginia, and the rights which she asserts, and the remedies which she craves at the hands of this Court are apparent on the face of the bill. That objection, as your Honors will see, is founded entirely upon misapprehension.

But the counsel make another mistake. In arguing that point, the learned counsel who opened the case for West Virginia assumed, what is not true, that Virginia has been released as to the bonds of the old state represented by these certificates, and for which the certificates were given. They are mistaken as to that. The bill recognizes that certain obligations, legal obligations, still rest upon Virginia in reference to that unfunded portion of the common debt. Nor is that an open question, nor can it be a question in this case, for in the case of Antoni *vs.* Wright, in 22 Grattan, pages 864-5—

MR. JUSTICE WHITE. Is it referred to in the brief?

MR. ANDERSON. No sir, it is not referred to in the brief.

In a dissenting opinion, Judge Staples states in that case in concise terms the relations of Virginia in reference to that unfunded debt. The question was not directly presented in that case, but the views expressed by Judge Staples were not at all in conflict with the principles enunciated by the decision of the majority of the Court. The doctrine as laid down by him was afterwards approved by that Court in an unanimous opinion in Greenhow *vs.* Vashon, in which the Court, in its opinion quotes from Judge Staples' opinion and approves it.

MR. JUSTICE WHITE. What case is that?

MR. ANDERSON. That is the case of Greenhow *vs.* Vashon, reported in 81st Virginia, pages 336, *342* and *343*. The Court will pardon me for reading briefly from that decision. In delivering the opinion of the Court Judge Richardson quoting Judge Staples' language and adopting it, says:

"I am therefore unable to perceive that the State has derived any advantage from the creditor's acceptance of the provisions of the Funding Act. The contract, if such it be, is wanting in the essential element of a valuable consideration, so much relied on in the opinion of the Supreme Court of the United States." "The creditor surrenders his bond and obtains a new one for two-thirds of his

debt, and coupons for the interest. For the remaining third the bond is held in trust by the state, and a certificate is given him stating that payment will be provided for in accordance with such settlement as may be made with West Virginia. If that State is faithful to the obligations resting upon her, the creditor will receive the other third also. On the other hand, if she repudiates these obligations, there is no agreement or understanding absolving the state from the payment of such third. It is as much bound for the payment of the whole debt as before the passage of the Funding Bill."

Your Honors will see from the statement filed with the bill at page 73 of the Record, that $12,703,451.79 of these certificates issued under the Act of 1871 are still outstanding, leaving only about $1,600,000 of the certificates issued under the subsequent acts in the hands of the public.

Again, our friends charge that the bill is multifarious because they claim that it unites several causes of action; and they base their argument chiefly upon the averment of the bill, that, under circumstances which are to be equitably considered in connection with the adjustment of this entire matter, Virginia has a right to bring into the account the money and property which, under the Acts of February 3rd and 4th, 1863, she voted to West Virginia.

There were large sums of money and several million dollars of property of the undivided State turned over to West Virginia under those acts upon condition that they should be accounted for in the settlement which was to be made between Virginia and West Virginia. Our friends say that that allegation makes the bill obnoxious to the objection of multifariousness, because it unites a legal demand with an equitable demand. In their argument they call it multifariousness; and if their objection made in their demurrer means anything, it is that the bill is *multifarious*, though they charge that it is a *misjoinder* of parties plaintiff and a misjoinder of causes of action.

Now, in the first place, if your Honors please, we deny that this demand set out in regard to the accounting for the money and property which were turned over to West Virginia under the Acts of February, 1863, is an independent and separate demand, or disconnected with the other demands made in this suit.

These transactions are all parts of one great transaction, the dismemberment of the State, the partition of her territory, and the apportionment of her debt and assets. West Virginia has received, as the bill avers, several million dollars of assets of the Undivided

state; and when Virginia states that fact in her bill brought for the purpose of bringing about a settlement with West Virginia, objection is made that that renders the bill obnoxious to the charge of mulfariousness because it is an independent and separate transaction, and is uniting a legal demand with an equitable demand.

MR. JUSTICE MOODY. Mr. Attorney General, do I understand, by the course of your argument, that you understand that when one state comes into this Court and presents a statement of its controversy with another state, that that statement is to be adjudged by the rules of common law or equity pleading. Do you state that?

MR. ANDERSON. I do not state that. This Court is governed by the rules of pleading adopted by the Chancery Courts of England.

MR. JUSTICE HARLAN. Why is it governed by them?

MR. ANDERSON. This Court has adopted them under its rule as a guide only, but it is not of course absolutely bound by them.

MR. JUSTICE HOLMES. May it not be that when you come to controversies of this nature that somewhat more liberal dealings should be the guide?

MR. ANDERSON. It is not necessary to ask for indulgence at the hands of this Court upon this question. The authorities without exception justify just such pleading as we have resorted to, and the assertion of just such claims as we have blended together.

MR. CHIEF JUSTICE FULLER. You are willing to have the bill sustained on any grounds, are you not?

MR. ANDERSON. On any grounds (laughter).

But I want to meet the objections of my friend, the learned counsel who opened this case for West Virginia.

I am grateful that our learned friend has written a book, an admirable book upon the subject of Equitable Proceedure and Practice. At Section 136 of the first volume of Hogg's Equity Proceedure, published in 1903, the learned author lays down the principles and doctrines which govern this question in language which I would not change if I had been dictating it for the purposes of this case. It seems to be an excellent treatise on this subject.

"Courts of equity," he says, "have declined to announce a general rule applicable to all cases of multifariousness, being guided by considerations of convenience in each particular case rather than by any absolute rule. But there are certain cardinal principles which have been established by repeated and numberless decisions in the courts of equity, and, if borne in mind, it will seldom, if ever, be found difficult to determine whether multifariousness exists in the particular case." And now the learned author, who is the learned counsel in this case for West Virginia, states what those principles are:

"First, a bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite in his answer and defend different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delay might be occassioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing.

"Second. It will be treated as multifarious where there is a demand of several matters of a wholly distinct and independent nature, in the same bill, rendering the proceedings oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statements of the several claims of the other defendant or defendants, with which he has no connection.

"Third: A bill against two or more defendants will be regarded as multifarious which also embodies a separate and distinct claim against one of the defendants only.

"Fourth. A bill will not usually be regarded as multifarious where the matters joined in the bill, though distinct, are not absolutely independent of each other, and it will be more convenient to dispose of them in one suit.

"Fifth. A bill against several defendants who have a common interest centering in one point will not be held multifarious."

Now we are willing to rest this case as to this ground of demurrer upon those propositions, thus aptly expressed by the counsel for West Virginia; but the learned author goes further, and states a principle that he says is settled by all the decisions, and which absolutely disposes of his demurrer upon this ground, and that is:

"Sixth. A blending of two causes of action in the same bill, one

of which is of equitable cognizance and the other legal, will not render the bill multifarious, as the latter will be treated as mere surplusage and stricken from the bill and the cause retained as to the equitable ground of suit."

I need make no other reply, and could make none more conclusive, to the argument of the learned counsel, or the briefs filed in this cause, upon that point.

The second ground of demurrer is that this bill does not present a controversy within the meaning of Section 2, of Article III, of the Constitution of the United States, which confers upon this Court jurisdiction to hear, try and decide all controversies of a civil character between two or more states. As we have argued in our brief, the word "controversy" has been too frequently interpreted by this Court to leave any doubt as to its meaning as applied to this case.

It is precisely the same word by which jurisdiction is conferred upon Federal courts of controversies between citizens of different states, of controversies to which a state is a party, and of controversies to which the United States is a party. Again and again, from the case of Chisholm, executor, *vs.* Georgia, to the last decision rendered involving this question—that in the case of United States *vs.* Michigan, 190 U. S., pp. 379, 396 and 406, has this Court held that it embraced every kind of civil controversy which can arise between individuals or communities. No case has ever arisen in this Court in which a state has ever before asserted a pecuniary demand against another state, but Chief Justice Marshall passed upon that question. Our friends will probably say that it was an *obiter dictum* of the Chief Justice, but in Cohens *vs.* Virginia, the great Chief Justice was defining the word "Controversy," and adjudicating the question as to the effect of the adoption of the 11th Amendment upon the jurisdiction of this Court, and his discussion of the meaning of that word, and of the effect of that amendment upon the jurisdiction of this Court as conferred by Section 2 of Article III of the Constitution, was entirely germane to the main question in the case then being considered. The Chief Justice in that celebrated case decided that jurisdiction of all controversies of whatever character between a foreign state and one of the United States, or between one of the states of the United States and another state of the Union, was not affected by the 11th Amendment, but was still conferred upon this Court.

And in the case of the United States *vs.* North Carolina, 136 U. S., 211 this Court took jurisdiction of a suit brought by the United

State against the state of North Carolina to recover interest upon bonds of the State of North Carolina.

Our friends may say that the question of jurisdiction was not raised in the case. This Court said in 143 U. S., 621, in United States *vs.* Texas, that the question of Jurisdiction was considered by this Court in United States *vs.* North Carolina; that it was necessarily considered because this Court could not acquire jurisdiction by consent, could not exercise jurisdiction nor take jurisdiction in a case without passing upon the question of its right to exercise jurisdiction. And the question was considered and finally disposed of by this Court in U. S. *vs.* Michigan, which was a suit for money, a pecuniary demand asserted by the Government of the United States against the State of Michigan, in which this Court took jurisdiction, and in which this Court held that it not only had a right to decide and adjudicate the case, but to enter up judgment. In the last paragraph of the decision of the learned Judge who gave the unanimous opinion of this Court in that case it is declared:

> "There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this Court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon." 190 U. S., 406.

Now if this Court can not execute a judgment of the United States against a state; if a judgment of this Court in favor of the United States against a state is a valid judgment, although no execution of *fieri facias* may effectively issue upon it, and no process can be awarded upon it which will compel the defendant state to obey such judgment and pay the amount which it shall award, then by the same token and the same argument, a judgment of this Court in favor of one state and against another would be valid, if such a judgment of the United States against a state is valid.

The third ground asserted in the demurrer is:

> "That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described."

If your Honors please, that statement comes, as has been already pointed out, entirely from a misapprehension of the bill. The bill is not brought in the name or for the benefit of the bond holders, or of the certificate holders, whose bonds were deposited with Virginia and which she holds as trustee; but the suit is brought by Virginia in her own right, and in the assertion of two equitable grounds of relief which will be hereafter mentioned. I frankly concede that any judgment in this case in favor of the Commonwealth of Virginia must enure to the benefit of the common creditors of undivided Virginia, whether they be those who have deposited their obligations in her custody, or be those who have not, up to the present time, deposited their obligations in her keeping.

In the very nature of things, if your Honors please, no suit could be prosecuted in this Court to decree, ascertaining the liability of West Virginia upon any one, or any one hundred of the obligations of the Old State, which would not ascertain her liability upon the entire debt, and therefore necessarily operate to the advantage and benefit of all of the common creditors of the Commonwealth. So that, in that sense, the suit is for the benefit of the creditors of Virginia to whom she has given her certificates, but it is no more for their benefit than for the benefit of all the other creditors of Virginia.

Now what are the equities that Virginia is asserting? The first is the equity of contribution.

Our friends, either because they have failed carefully to read this bill, or are strangely misapprehending it, state that Virginia has paid no part of this debt excepting her own share. The fact is, and the bill shows it, that Virginia has paid in full some millions of dollars of the common obligations, the *ante-bellum* obligations, of the State. Our friends failed to note that upon the face of the bill, and in express terms, a statement was made of this claim as a basis upon which the state is entitled to contribution from West Virginia. At page 9 of the bill, paragraph 16, there is this brief statement of that claim:

> "Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia, contracted before her dismemberment, those so paid off or retired by your oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the Funding Acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, considerably in excess of $25,000,000, by far the greater part of it

being now, of course, on account of the interest computed thereon, at the rate of 6 per cent per annum, the then legal rate in both states. For all of these obligations taken up and payments made on account of the common debt, your Oratrix has in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor."

And we invoke the equitable jurisdiction of this Court for an accounting with West Virginia, in order to ascertain the amount to which Virginia is entitled to contribution from West Virginia by reason of the fact that Virginia has satisfied in full obligations of the old state aggregating, as of this date, including interest from 1861, over $25,000,000. So as to that, Virginia makes a substantive demand upon West Virginia for such amount—as shall be ascertained under a decree of this Court, after an accounting shall be had, to be West Virginia's fair and just aliquot portion of the liabilities of the common state which Virginia has paid in full. Our friends misapprehended that claim and the statement of facts made in that paragraph of the bill.

Now, if your Honors please, another and equally valid ground of equitable jurisdiction which this bill invokes is, that there shall be an accounting with West Virginia for the purpose of ascertaining her portion of this indebtedness, and having that liability of West Virginia adjudicated, not by way of contribution to Virginia, but in exoneration of Virginia. All the authorities recognize this as an equitable ground of relief, and Virginia's claim to it here is of the highest equity. As has been decided by her own Court, in the cases to which I referred, and as appears from an examination of the contracts which she made, Virginia is still bound for $12,700,000 as of July 1st, 1871, being the one-third of the bonds which were funded under the Act of March 13th, 1871, and for which one-third she gave her certificate to the common creditors. That is still a claim against Virginia, and a common burden upon Virginia and upon West Virginia, to the extent of West Virginia's equitable liability; and Virginia seeks the aid of this Court for the purpose of obtaining exoneration to the extent of West Virginia's liability therefor. Independently of any contract between her and the common creditor, and the certificate holders to whom the bonds of the undivided State belong, she is entitled to this relief and exoneration, to the extent of West Virginia's liability, from the common burden resting upon both states, it being conceded that West Virginia's portion of that liability must be ascertained upon the artificial and

arbitrary basis prescribed in the Wheeling ordinance of August 20th, 1861.

But she has a further, and for her perhaps, a more important relief to ask at the hands of this Court, by reason of her contact with the holders of more than nine-tenths of the certificates issued by her under the funding Act of 1871. This agreement was made by her creditors in recognition of the large provision which she had already made for the common creditors; namely, that those creditors would accept not merely or in fact such sum as might be recovered from West Virginia—I wish your Honors to observe the language of the stipulation.—not merely that they would accept such sum as should be recovered from West Virginia, but that they would accept the adjudication of this Court against West Virginia in full satisfaction and discharge of any claim or liability which the common creditor might have against the Commonwealth of Virginia. Now as to that stipulation, West Virginia's rights are not affected by it, nor is it prejudicial to West Virginia; nor is it a stipulation of which West Virginia has any right to complain, because it does not add one cent to and cannot increase in the slightest degree the liability or obligation of West Virginia. The contract will be found at pages 83 to 86 of the bill. It is not necessary that I shall read it, because I have stated accurately its stipulation, that the creditors to the extent of these millions, of these certificates for these deposited bonds, will accept the adjudication of this Court against West Virginia in full discharge of any farther claim against Virginia. That gives Virginia a direct personal property interest in this adjudication, an interest co-extensive with the amount of the common unsettled liability, an interest as important to her as if she had actually paid off the whole of the $12,700,000 of certificates and a right to relief because of that interest, by obtaining an adjudication against West Virginia. And it boots not, in reference to this aspect of the case, whether this Court is powerless to enforce its decree or not. Its decree will be as effective, by the stipulation between Virginia and her creditors, it will be as effective to give her immunity from further liability and exonerate her from any claim as if the the execution could be levied upon $50,000,000 of money of West Virginia in the Riggs Bank in the city of Washington.

Recess until 2:30 P. M.

AFTER RECESS: 2:30 P. M.

MR. ANDERSON: If your Honors please, in the few minutes

that are left to me, I will refer briefly to the grounds of demurrer which I have not already considered, most of which have been so satisfactorily and exhaustively discussed by my colleague as to obviate any necessity on my part for any elaborate reference to them.

The fifth ground of objection assigned in the amended demurrer is, that it does not—satisfactorily appear—that the Commonwealth has ever authorized this suit to be brought. I hope it is not necessary that I should show my warrant of attorney for appearing here for the Commonwealth, but I will say to the learned and distinguished counsel who is to follow me (Mr. Carlisle), that that warrant is as plenary and as authentic as that which authorizes him to represent West Virginia, and which I do not impeach. This suit is brought entirely within the limits of the authority conferred by the General Assembly upon the Virginia Debt Commission, and the bill avers that it is brought in strict conformity with those powers, and not only avers it, but the exhibits filed with the bill prove the allegation.

The sixth ground is that the bill does not definitely and sufficiently set forth the reasons and demands asserted by the plaintiff. I do not understand exactly what is meant by that assignment of objection. As it could not be contended that a surviving partner who was suing for a settlement with his co-partner, after a dissolution of the partnership, should state precisely the balance of account between them—so a claim that there shall be any such particularity of allegations here, can have no foundation, for the very object of this suit is to ascertain what the parties could not ascertain, namely, what is the state of the accounts between them; and that is the very question which is referred to this tribunal which is vested with judicial power for the purpose of adjudicating all such controversies.

The seventh ground of objection assigned in the demurrer is, that the allegations in the bill are not sufficient to entitle the plaintiff either in her own right or as trustee, to an account. We have shown that our suit is for exoneration and contribution, and that an accounting is necessary to determine the respective rights and liabilities of the parties.

The eighth ground is that the bill does not contain any prayer for a judgment or decree or any other final relief against this defendant. The bill asks for an adjudication against the defendant and for general relief; and in our brief we have shown that the prayer

is ample according to English Chancery practice, and repeated adjudications of this Court.

Now in the remaining five minutes of my time I will briefly refer to the last ground of objection, made for the first time in the briefs of the learned counsel, and one upon which they seem chiefly to rely; Which is, that there was a compact between Virginia and West Virginia by which it was covenanted by Virginia and West Virginia, that the Legislature of West Virginia, should be the final arbiter of all matters in controversy between the two states with reference to the amount and payment of the common debt. The language of the instruments upon which counsel rely justifies no such conclusion. One is an alleged Act of the General Assembly of the Restored Government of Virginia, of May 13th, 1862, by which Virginia gives consent—the date is important, if your Honors please—by which on the 13th of May, 1862, Virginia gives her consent to the formation of the State of West Virginia in accordance with the provisions of the Constitution which had been proposed by a convention of the people of West Virginia which met in the month of November, 1861. Now is it a fair conclusion from the language used in that Act, and the language used in the proposed Constitution for West Virginia in regard to the public debt, that Virginia, by giving her sanction in that form to the formation of the State of West Virginia, bound herself irrevocably and eternally to abide by an adjudication or ascertainment of the amount of liability of West Virginia to be determined by West Virginia? It is incredible that sane men fairly representing the interests of the Commonwealth of Virginia should have assented to any such proposition, and the language that they used cannot be construed fairly or justly to have any such effect. The provision in the Constitution of West Virginia relied upon was designed as a mandate from the people of West Virginia to its own representatives, imposing upon them a duty, namely, as soon as practicable to ascertain the amount of West Virginia's portion of the public debt, and to provide for a fund for the payment of interest and the extinction of the principal thereof in thirty-four years. It has now been nearly forty-four years since West Virginia became a state, and she has done nothing in this regard. But, if your Honors please, the Constitution which was in fact adopted by West Virginia has never been approved by Virginia; nor has Virginia, except by the Wheeling ordinance of August 20, 1861, ever given her valid consent to the formation of West Virginia. If the Act of April 13, 1862, is a valid Act, which we deny, she has not

given any such consent by that Act, for the reason, and the conclusive reason, that the consent there given was for the formation of the new state in accordance with the provisions of a constitution which had been proposed by a West Virginia convention which first assembled in November 1861, and that is not and never was the constitution of West Virginia. Congress gave a conditional consent to the formation of the State of West Virginia, and the condition upon which that consent was given was that West Virginia would adopt an amended constitution; and it appears that West Virginia did adopt an amended constitution in 1863, which is found in the volume entitled Constitutions and Statutes of Virginia and West Virginia, 1861 and 1866, published at Wheeling, under the Act of the Legislature of West Virginia enacted in 1866. That amended constitution was proposed and submitted to the people of West Virginia, and was adopted by the people of West Virginia, long after the alleged Act of May 13, 1862, and became the constitution under which West Virginia was admitted into the Union. Virginia never approved of or gave her consent to that amended constitution. So that my friend's contention that there is any compact falls, because the constitution which was the consideration of that supposed compact and upon which it was predicated, has no existence, but was afterwards repealed and abrogated by the adoption of an amended and a different constitution.

In addition to that, if your Honors please, if there had been anything in the contention of our friends, West Virginia has repealed and repudiated any such liability or obligation. In 1872 West Vriginia adopted her present constitution, and it contains the only expression of the fundamental law of that State. From that constitution this covenant, as our friends on the other side are pleased to term it, was eliminated; and the mandate of the people of West Virginia that the Legislature of that State should ascertain and provide for the payment of West Virginia's just share of this debt, contained in the former constitution, was stricken out, thereby leaving this question where the law of the land leaves such controversies, solely within the jurisdiction of this Honorable Court.

If your Honors please, I have but one word more to say. All that Virginia asks here is that what is right shall be done; that she shall not be denied the relief to which she is entitled, either upon the narrow technical grounds of defense which are asserted here, or by reason of ingeniously contrived construction of Acts of the Legislature of Virginia, and of provisions of the former constitution of

West Virginia, which reasonably interpreted cannot possibly be given any such meaning as is contended for by the learned counsel.

I thank the Court for the kind and patient attention which they have given me.

Supreme Court of the United States

OCTOBER TERM, 1906.

ARGUMENT OF HON. J. G. CARLISLE, for the Defendant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL No. 7.

COMMONWEALTH OF VIRGINIA
vs.
STATE OF WEST VIRGINIA.

ARGUMENT OF HON. J. G. CARLISLE, for Defendant.

MR. CARLISLE: If your Honors please, I thought from what was said by the Attorney General for the State of Virginia, in his address to the court before the recess, that it was conceded by him that the compact which is set up in the bill was binding upon both States, and that the settlement of the controversy between them must be made by this or some other tribunal in the manner prescribed in the Wheeling ordinance. I am somewhat surprised, therefore, to see, when he comes back since the recess, that he takes the position that there is no compact between the two States. I do not propose, however, to discuss that question at the beginning of my remarks, but I had thought that this concession upon the part of the representative of Virginia would enable me to abbreviate my argument to a considerable extent.

MR. ANDERSON: I did not use language of that kind.

MR. CARLISLE: The counsel read the ordinance, and then stated distinctly that that was the compact binding upon the parties.

Of course the ordinance itself could not constitute the whole compact; it was the act of only one party. The compact had to be made between both parties, and the State of West Virginia, when the convention assembled to form a constitution, accepted the proposition

made by Virginia in the ordinance that she should assume her just proportion of the public debt to be ascertained in a certain manner, but with the condition that her own legislature should ascertain what that proportion was, and provide for its payment by the establishment of a sinking fund.

But I pass from that for the present. The first question to be considered in this case is whether the court has jurisdiction, for if it has not, it will not decide any other question raised by the demurrer. The court, however, cannot decide whether it has, or has not, jurisdiction of the case without first ascertaining the character of the parties, the nature of the claim asserted, and the character and extent of the relief demanded. I propose first to show what Virginia has done with regard to the old public debt, and in doing that it will be made apparent to the court why we have fallen into what counsel say is a misapprehension of the bill, and why we are contending that Virginia is suing in a representative capacity as trustee for the owners of the cetificates.

In the first place, it is distinctly alleged in the bill that Virginia holds these bonds in trust. The exact language is that Virginia "received and holds said original bonds, so far as unfunded, in trust for the creditors who deposited the same with her, or his assigns"; and when we look at the prayer of the bill, we find this language: "That the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix, in her own right and as trustee as aforesaid." But if the words trust or trustee had not been used in the bill, the court, after an examination of the several statutes passed by the legislature of Virginia, and the contract made between her commission and the creditors, could reach no other conclusion than that the State is suing here, so far as the settlement of the old debt is concerned, not in her own right, but as a mere representative of the holders of the certificates. She has bound herself by contracts through her commission, appointed under her own statute and clothed with her authority, to prosecute this suit for the settlement of the certificates, and to pay over the money that may be recovered, whatever it may be, to a committee appointed by the creditors, not even allowing this court, or any other court, the power to direct the distribution of the fund among the beneficiaries when it is received, as I will show the court before concluding.

Now the first act of Virginia to provide for funding her debt was passed on the 30th of March, 1871; and I desire to call the attention of the court for a moment to some of its provisions, because it has been argued here that notwithstanding the act, and notwithstanding what was done under it, the State of Virginia still remains bound for the unfunded one-third of the public debt. I think the creditors of Virginia will be very much surprised and very much pleased when they hear that her counsel have taken that position. The act provided for the funding of two-thirds of the principal and interest of the debt, and declared that it was Virginia's full equitable share of the indebtedness; and it provided that certificates should be issued to the holders of the debt for the other one-third, to be provided for in accordance with such settlement as might thereafter be made with West Virginia. It expressly required every one of the bonds to be surrendered to the treasurer of the State of Virginia, and cancelled; so that not only was Virginia's liability for the unfunded portion released, but the evidence of the debt itself was extinguished.

MR. JUSTICE BREWER: Were all the bonds surrendered?

MR. CARLISLE: Not all under that act. I will come to that after while.

MR. JUSTICE WHITE: Was that the act referred to in the 81st Virginia case?

MR. CARLISLE Yes, sir, that was the act; and I wish to say, without disrespect to the court by which that action was decided, that the only controversy in the case related to the right of a holder of coupons to have them received in payment of taxes. They were coupons attached to bonds issued by Virginia under the act of 1871.

MR. JUSTICE WHITE: It was stated that the effect of that was not to release Virginia?

MR. CARLISLE: But there was no such question in the case. In the case of Higginbotham *vs.* The Commonwealth, 25 Grattan, 627, the court expressed the opinion that the two States were bound ratably to the creditors for the old debt as it stood in 1861, but that question was not involved in the case.

MR. ANDERSON: The Higginbotham case was directly in point.

MR. CARLISLE: I have examined that case carefully, and the only question was as to the liability of Virginia for the payment of dividends on the capital stock of the James River and Kanawha Company, and the court expressly stated that the question of Virginia's liability for the one-third of the debt not funded under the act of March 30, 1871, was not involved in the case, and that it expressed no opinion on that subject.

I will read the language of that act from my brief, though the act is printed in full in the record. I read from page 7 of the brief:

> "Upon the surrender of the old and the acceptance of the new bonds for two-thirds of the amount due, as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment."

Now what obligation did Virginia assume by the issue of that certificate?

MR. JUSTICE HARLAN: Your quotation reads further: "And that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assigns."

MR. CARLISLE: In trust, yes, sir; that is stated in the act, and in the certificate issued for the one-third.

MR. JUSTICE HARLAN: You said the bonds were cancelled.

MR. CARLISLE: They were. That is shown at the top of the next page. All the acts required the surrendered bonds to be cancelled, and one of them provided that they should be cancelled by punching holes through them.

MR. ANDERSON: The contract was endorsed.

MR. CARLISLE: There is no evidence of that in the record.

MR. ANDERSON: You will find it on the books, an endorsement on each bond.

MR. CARLISLE. I have seen only what the act says. It was provided in every one of the acts that the bonds should be cancelled.

MR. JUSTICE HARLAN: It says: "But in cancelling and registering the bonds as above directed, in every bond and coupon surrendered under this act holes shall be punched in one or more places, and in such a manner as to render a new funding of the same impossible, and every bond and coupon so cancelled shall be filed for reference.

MR. CARLISLE: Now, what was the obligation assumed by Virginia by the issue of these certificates? Was it to pay money? None of the counsel has said to the court that if Virginia should fail to provide for this additional one-third by a settlement with West Virginia, that the holders of those certificates could come back upon the State of Virginia and demand their amount in money. That has not been suggested. What the holder could do, perhaps, would be to demand his bond, but that would be of no value to him, because the bond has been cancelled, and I will also show before I get through that nearly all of the holders of the certificates issued under the act of 1871 have deposited their certificates with the commission under a contract which releases Virginia.

MR. JUSTICE HARLAN: If Virginia had a settlement, would not it be bound by these acts to contribute for payment the amount of those certificates?

MR. CARLISLE: I think under the contract with her commission she would have to pay the certificate holders whatever she might receive from West Virginia, but no more; and she is suing for that, and according to my understanding of what constitutes a trustee, this makes her a trustee just as much as the State of Kansas was trustee for the Missouri, Kansas & Texas Railway company in the case decided in this court only two weeks ago.

The next act was March 28th, 1879. It contained the same provision with regard to the cancellation of the bonds, provided that exactly the same kind of certificate which had been issued under the act of 1871 should be issued to the holders of bonds that might be surrendered under the provisions of that act, and it expressly provides in the body of the act that persons who present their bonds for refunding and accept certificates thereby release Virginia from all obligations upon the certificates.

Then the next act was in 1882, and it contained precisely the same

provision in regard to the cancellation of the bonds; and provided for the issuance of certificates. Certificates were issued in which the parties receiving them agreed that they would look to West Virginia for the one-third, without any recourse upon Virginia. Counsel says that such a certificate was merely a memorandum made by Virginia herself, and amounts to nothing; but if your Honors please, when a bondholder surrendered his bond and accepted a certificate under these provisions, he agreed to look to West Virginia for his debt, and that he thereby released the State of Virginia. And, moreover, as I have said, the act itself under which the refunding was made, provided that if he took the certificate, he should release the State of Virginia.

The act of 1902 contained exactly the same provision with regard to the cancellation of the bonds, and with regard to the certificates for the unfunded one-third, absolutely releasing Virginia from all liability on account of debt. And then, in addition to all this, in 1894 the State of Virginia passed a joint resolution providing for a commission to adjust the old public debt; but I will not stop now to read it. The preamble recites that Virginia had already settled, to the satisfaction of her creditors and her people, her two-thirds of the debt. And then the commission was authorized to negotiate with the State of West Virginia, but only upon the basis that the State of West Virginia would agree that the share of Virginia was only two-thirds; and if such was the case, of course West Virginia's share must have been one-third. Gentlemen admit in the argument that it would be impossible for the court to ascertain West Virginia's share without also ascertaining Virginia's share, because Virginia's share, as between the two States, is the whole of the debt less West Virginia's proportion.

No adjustment was made by the commission. Mr. Randolph Harrison, a member of the commission, went down, as has been stated today, to West Virginia, with this resolution in his hand, which was the only authority he had, to demand that West Virginia should acknowledge her liability for one-third of the debt.

MR. ANDERSON: I beg pardon, but that was the act of 1900.

MR. CARLISLE: I will show that the act of 1900 did not repeal that part of the joint resolution, or any other part of it, and that the commission when it went to negotiate with West Virginia, was bound by the provisions of the resolution of March 6, 1894. When it sues it may get less, or get nothing, but it could not negotiate

for anything less without violating the provisions contained in the very act under which it held its position.

Now it has been said here to-day that Virginia has made repeated efforts to settle this debt, and the statement has been made that West Virginia made no response.

MR. CHIEF JUSTICE FULLER: Has West Virginia made any effort?

MR. CARLISLE: I will show that she has, if I may be allowed to do so. The statement was made this morning that Virginia appointed a commission, and that the commission communicated with the State of West Virginia and could get no response. I have here the whole official correspondence between the authorities of the two States on that subject.

MR. ANDERSON: That was appointed in 1894.

MR. CARLISLE: I am going back to 1871. In 1871 West Virginia appointed a commission, and it promptly sent a communication to the Governor of Virginia stating that it had been appointed, and was then assembled to take up the matter and adjust it; but the Governor declined to do anything. Here is the correspondence.

MR. CHIEF JUSTICE FULLER: Had we not better have all of these facts put in?

MR. CARLISLE: I allude to it only because it was brought in here in the argument this morning.

MR. ANDERSON: But what I referred to was in 1894.

MR. CARLISLE: After Virginia had assumed only two-thirds and had declared that West Virginia was liable for one-third, that State refused to negotiate with her on that basis. But West Virginia went further in 1871, and she asked that the account be furnished by Virginia, but that State declined to do so, all of which is shown in the correspondence.

MR. CONRAD: The facts were that she asked Virginia to furnish the commissioners with copies of the record from the Auditor's and the Treasurer's offices, and Mr. Rogers told them that they had no clerical force with which to furnish those copies, but that they might send clerks there and the books would be opened.

MR. CARLISLE: That is correct. The creditor, the party alleging that other owed one-third of the debt, said: "I will not make out or furnish the evidence of my account against you, but if you are willing to send somebody here at an expense of several

thousand dollars to copy the accounts and vouchers and find out what you owe me, I will give you permission to do so." That is the position taken by Virginia.

Now, if your Honors please, certificates were issued under all of these acts to which I have referred, and the exhibits filed with the bill show the amount.

MR. JUSTICE WHITE: You said just now—and I am trying to get at what is in the record and what is not in the record—something about an express agreement waiving the claim against Virginia. Is that in the record?

MR. CARLISLE: It is in the statutes, in the certificates and in the contract, and I am looking now, if your Honor please, for the statement of the amount of certificates issued; but I can state it approximately from memory. There was a little over $18,000,000 of these certificates issued, which shows that the State of Virginia funded about $36,000,000 as her share of the debt and interest. There were issued under the act of 1871 certificates to the amount of about $15,000,000, and over $10,000,000 of those certificates have been deposited with the commission under the contract releasing Virginia. They were first deposited with Brown Brothers & Company, who were the custodians appointed by the holders of the certificates, and afterwards taken away from Brown Brothers & Company by the Virginia commission, and are now held by them. Over $10,000,000 of the certificates of 1871 have been deposited under the contract, which your Honors will see, as the Attorney General has said to-day, absolutely released Virginia, whether she ever gets anything from West Virginia or not. There was altogether in the hands of the commission on the 6th day of January, 1906, between thirteen and fourteen million dollars of the certificates issued under the funding acts. The others are held by Virginia herself or her sinking and literary funds, or are outstanding in the hands of the original holders of the bonds or assignees, for they have been sold in the market and speculated upon for a great many years; but Virginia sues in this case not only for the benefit of those who have deposited their certificates, but under the act of March 6th, 1900, she sues for a settlement for the benefit of all certificate holders; so that it makes no difference on the question of trusteeship how many bonds have been deposited with the commission. It might make a difference ultimately, but not in the argument on this demurrer. If there are some of the certificates of 1871 still outstanding, and the court should hold that Virginia has not been released from them,

she might have a claim in her own right for them if she could maintain action for contribution against West Virginia before she has paid more than her own share, which we think she cannot do.

Now the State of Virginia, as I think this record shows conclusively, is released from the whole of the debt, except what she has assumed to be her share. The State of Virginia, suing upon the compact, or suing to recover in accordance with the general rules and principles of equity for an adjustment and apportionment, cannot divide the claim into several parts, and sue for her own alleged share, or part, of West Virginia's liability, and sue for somebody else for another part. Whatever West Virginia's liability is in this matter must be ascertained, as we insist, in the manner prescribed by the compact, and it must be ascertained *in solido*. It is one single liability; but Virginia comes now, in the bill and in the argument, and attempts to split it into different parts, alleging that she sues in her own right on account of some certificates, and for the benefit of others in regard to other certificates. That cannot be done; this is one entire claim, not an indebtedness upon the part of West Virginia to each separate creditor. The compact was made between the two States alone, and not between them or either of them and the creditors. Virginia alone was the original creditor, whose bonds have gone into the hands of the public; and whatever changes may have taken place in her constitution or government, whatever changes may have taken place in her territorial area, she remained the same political entity, and continued to be bound by the obligations just the same as if no change had been made. West Virginia's obligation was to Virginia until that State was released, and not to the creditors. I was surprised to hear the argument made this morning and yesterday that one of the objects of this suit was to secure exoneration for the State of Virginia. So far as I am aware, this is an entirely new ground for the exercise of equity jurisdiction. Certainly it cannot constitute a ground for relief when the parties to whom the obligation is due are neither plaintiffs nor defendants in the suit. If Virginia owes the debt, or any part of it, no court has the power to exonerate her until she pays it. If she does not owe the debt, then there is no necessity for an exoneration by the court. If she has been released, she needs no exoneration; and if she has not been released, this court cannot exonerate her until she pays the debt; and even if it could, it would not do so in a case where the persons to whom she owes the debt cannot be heard except through her as their trustee.

Now, if your Honors please, a word as to the compact. And here I wish to say that counsel has fallen into singular error in the discussion of this question. They speak as if the consent of the Legislature of Virginia was necessary to make the compact valid. There are two provisions of the constitution of the United States which have a bearing upon the question. One is found in the first Article of the constitution, which provides that no State shall enter into a compact or agreement with another State without the consent of Congress. The other is found in the Fourth Article of the constitution, which provides that no State shall be created out of part of the territory of another State, or within the limits of another State, without the consent of the legislature. The legislature is not mentioned in the provision of the constitution in regard to compacts; and this compact was made by the sovereignty conventions of the two States. All the legislature did by the act of May 13th, 1862, was to comply with the provision of the United States Constitution which requires the consent of the legislature to a division of a State and the formation of a new State within the old jurisdiction. If this compact was not made by the two sovereignty conventions, it was not made at all. The legislature, when it passed the act of May 13th, 1862, however, consented to the division of the State under the constitution which West Virginia had formed and presented, and which was then before Congress on her application for admission into the Union; and Virginia in that act instructed her Senators and representatives to vote for the admission of the State. Since the recess, counsel has brought in what he calls a new constitution of West Virginia which he says was adopted in 1863. He says that West Virginia was not admitted into the Union under the constitution to which the legislature of Virginia had consented, but under the amended constitution of 1863; but if you will examine the so-called new constitution, you will find that it is, so far as this subject is concerned, identical with the constitution which was pending before Congress when Virginia passed the act of May, 1862. Congress, it will be remembered, required West Virginia, before admission into the union, to make a provision prohibiting slavery within the limits of the State; and the people of the State did that. They assembled in convention, struck out from the constitution the original provision on that subject, and inserted one prohibiting slavery in the State; and the State was admitted under that constitution by proclamation issued by Mr. Lincoln on the 20th of June, 1863, in accordance with the act of Congress.

Now let us look at the compact. I am not going to discuss the question at length, or recite the circumstances under which it was entered into. All the political departments of the government have recognized the convention assembled at Wheeling in April, 1861, as the convention of the State of Virginia. That convention proposed that a new state might be formed to be called the State of Kanawha, to include certain counties, and that the new state should assume its just proportion of the public debt of Virginia as it existed on the 1st day of January, 1861, to be ascertained, as stated in the ordinance, by charging to the new state all the money expended within her limits—within the limits of that territory—since any part of the debt was contracted, and with her just proportion of the ordinary expenses during the same time, and crediting the new state with all the money that had been paid in from that territory during the same period. That was Virginia's own proposition to the new state. Of course there was no state of Kanawha at that time, and therefore there was no second party to the proposed contract; but subsequently the people within that territory assembled in a sovereignty convention, and then for the first time they had a right, and the power, to consent or dissent from the proposition that Virginia had made. It was still open; it had not been withdrawn; and the new state accepted it with these additions: that the amount of the debt should be ascertained by the legislature of the new state as soon as practicable, and that it should establish a sinking fund sufficient to provide for the payment of the interest and the redemption of the principal within thirty-four years.

MR. JUSTICE HOLMES: Where are the words with regard to these two matters to be found? I have looked for them but I do not find them.

MR. CARLISLE: They are in my brief, if your Honor please.

MR. MAY: On pages 4 and 5 of the bill they will be found.

MR. CARLISLE: Now those two documents constituted the compact, provided the State of Virginia, through her legislature as required by the constitution of the United States, should have given, or should thereafter give, its consent to the formation of a new state. That consent was given after the name of the proposed new state was changed to West Virginia. The ordinance of the Wheeling Convention was well known; it was a public act, and it was before Congress upon the application of West Virginia for admission to the Union. The constitution of West Virginia, in which the proposition

of Virginia was accepted with the conditions I have stated, was before Congress, and that body admitted the state into the Union, and thereby, according to the decisions of this court in the case of *Green vs. Biddle*, and the case of *Virginia vs. West Virginia*, Congress affirmed all that had been done between the two States; and as said by this court in the case of the State of *Pennsylvania vs. The Wheeling Bridge Company*, the compact became a law of the Union, and it has therefore all the force and effect of a statute constitutionally passed by the Congress of the United States.

Now if your Honors please, that ordinance is binding in whole, or not binding at all; every part of it is binding or no part of it is binding. The gentleman certainly conceded before the recess that the ordinance was valid. The ordinance alone could not constitute the entire compact; for, as I said, it was completed only when the State of West Virginia, in its convention, accepted the obligation to pay a just proportion of the public debt, and provided the conditions and terms upon which she would accept and pay it. Now the gentlemen, as I infer from the arguments made here, are willing to stand on the ordinance, but they deny that the parties ever intended to allow the legislature of West Virginia to adjust the matter, or if they did, they say it was unjust and unreasonable; but that was a matter for the parties to contract about, and they did contract about it. If this ordinance is valid, and I assume that this court cannot say it is not valid, because if it does, then, as was said in the case of *Green vs. Biddle*, West Virginia is not in the Union—

MR. JUSTICE HOLMES: Would it be beyond the possibility of argument if you should say that the circumstances did not constitute such compact as you say it did?

MR. CARLISLE: I do not see how such an argument could be properly made.

MR. JUSTICE HOLMES: The question would arise in my mind: Supposing that there were no compact there, whether any and what principles could be applied; and whether or not the principle that was suggested by the Attorney General might not be applicable, that is to say, that presumably upon such a separation, your clients should assume their proportion of the debt equal to the ratio of the taxable property in their part of the State, as compared with the taxable property of the other part of the State?

MR. CARLISLE: If the compact was not valid, I do not see how

the Court can hold that West Virginia was constitutionally admitted into the Union.

MR. JUSTICE HOLMES: I am not intimating that the compact is invalid, but it seems to me, is it not possible to doubt whether the purposes you advert to constitute a compact or contract?

MR. CARLISLE: If there is no compact—and, omitting for the purposes of the discussion the proposition that I have made that West Virginia is not in the Union—then the basis of settlement suggested by the Attorney General of Virginia would be so manifestly unjust to the State of West Virginia that I do not think the court would entertain it for a moment. His suggestion is that West Virginia should continue to impose taxes; that is the theory that the same proportion of taxes should be collected in West Virginia as in Virginia, to pay off the old public debt, leaving Virginia in possession of nine-tenths, if not more than nine-tenths, of all the public works and property of every kind procured by the expenditure of the money realized from the issue of the bonds. West Virginia, a separate and independent State, would go on and pay, along with Virginia, for all the public property, although not one-tenth of it might be located within her boundaries.

MR. ANDERSON: You misapprehend me, Mr. Carlisle. I said that as West Virginia has the assets, the property should be adjusted equitably.

MR. CARLISLE: How can West Virginia get any of the canals or turnpikes or other public works that Virginia has? They are there, and Virginia must keep them.

MR. MOLLOHAN: They have sold to the railroads.

MR. CARLISLE: It is an impossible proposition to be carried out; Virginia has got the property, and it cannot be taken away from her. Now, if your Honors please, when this ordinance was passed, and when the constitution of West Virginia was adopted, the amount of the public debt was known, approximately at least, to all the parties, and it was understood, as it is alleged in the bill, to be about $33,000,000; it was agreed between the parties that, without going into the question of the expenditure of public money for public works in Virginia, if they would charge West Virginia with the money expended in her territory during the period concerned and with her ordinary share of the expenses of the State and credit her with the money she had paid in, the result would show what

was her just proportion of the public debt existing on the 1st day of January, 1861.

All that your Honors have heard today and yesterday about how the borrowed money was expended, in the construction of turnpikes and canals and railroads leading to or over the Appalachian Range of Mountains, is utterly foreign to this case. It does not make any difference if Virginia threw this money realized from the bonds into the Atlantic Ocean. West Virginia has agreed, and Virginia has agreed, that they will make the calculation on the basis set forth in that ordinance, and that the result will show what proportion of the debt West Virginia should assume, a debt which they knew all about. The amount of the debt and the purpose for which it was created have nothing whatever to do with the settlement under the terms of the ordinance. They are not factors in the problem submitted under that agreement. The only questions here are how much money was expended within the limits of West Virginia, how much was her just proportion of the ordinary expenses of the State, and how much had she paid in. When these three items are ascertained, you will have her share of the public debt according to the agreement.

Now what have Virginia and her creditors done? Without consulting West Virginia, they have created a situation in which the plan agreed upon by the States for the ascertainment of West Virginia's just proportion of the public debt cannot be executed without the grossest injustice to that State. It was agreed, as I have said, that West Virginia's just proportion of $33,000,000, the amount stated in the bill, would be ascertained in the manner I have stated. Of course that assumed that the State of Virginia would pay the $33,000,000. But Virginia has adjusted, I think one of the exhibits here shows, about $21,000,000 principal and interest. But I do not care whether it is fifteen or twenty-five million, or any other sum less than the entire debt, for if you carry out the terms of the compact on which the parties both agreed, West Virginia will be required to pay to Virginia just as many dollars as she would have been required to pay in case Virginia had paid a hundred million dollars on her debt. This is so, because the amount of the debt cuts no figure whatever in making the adjustment. They knew the amount of the debt, and they agreed upon the basis of settlement. West Virginia will be required to pay exactly the same amount to Virginia, who has adjusted only two-thirds of the debt, as she would have been required to pay if that State had paid all of it; and that

situation has been created by Virginia and her creditors without the consent of West Virginia.

I am not able to argue this case on any theory except that the compact is valid, because I do not see how the court can ignore it entirely and undertake to adjust the matter between the two States upon the general principles of equity or international law. I cannot see what other theory the court would adopt. Virginia arbitrarily took the position that the State of West Virginia was liable for one-third upon a rule that she had established herself; and one of her commissioners, Mr. Harrison, went down and talked to the legislature of West Virginia about the debt and tried to convince it that the State was bound to pay one-third of it, and insisted that the State was equitably liable for that proportion, because, he said, the formation of the State of West Virginia had deprived the State of Virginia of about one-third of her territory and about one-third of her white population. This contention was founded upon a supposed rule of international law that the States would be liable according to the proportion of territory and the proportion of population detached from the old State; and that has been Virginia's position since the year 1871. In that year Virginia repudiated the compact by her statute, as your Honors will see, and from that time on, during a period of thirty-six years, she has constantly and persistently refused to recognize the contract or to settle with West Virginia on the terms of the contract.

MR. CONRAD: She refuses owing to her innocence of any such contract. She never heard of it. I never heard of it.

MR. CARLISLE: The compact has always been a matter of public record, and besides it was based on Virginia's own proposition. Now let us see if there is any injustice in allowing the legislature of West Virginia to adjust this matter. We were asked yesterday by one of the members of the court whether West Virginia denies that she is liable for any part of the debt. Of course I am not here with authority to speak for West Virginia as to what she will do hereafter. We are here to show the court, if we can, that there is no judicial tribunal in this country that has the power to coerce the legislature to act; that the legislature alone has the power to adjust and pay the debt, and that Virginia has no cause to complain because it has not been done. Virginia, as shown by the bill, has in her own possession and under her control, every account, every voucher, every document, every particle of evidence necessary to make the adjustment, and she has never furnished West Virginia

with a scrap of paper or made any demand on the legislature of that State to adjust the debt in accordance with the compact; and yet Virginia makes the complaint that West Virginia, the debtor, has not followed her up and endeavored to get a settlement with her, when the debtor has not a particle of evidence upon which she could ascertain the amount of the liability. Let the creditor make out her account; let her prepare the papers in her own possession and send them to West Virginia and demand a settlement as provided in the compact. If West Virginia refuses, that will be time enough to make a complaint against her.

MR. JUSTICE HOLMES: I have seen it somewhere in these papers, but I cannot keep the run of them—I have seen a statement somewhere here that the West Virginia legislature has repeatedly denied any liability whatever.

MR. CARLISLE: I think that is a fact, your Honors, since Virginia made the adjustment with her creditors and paid only her own share of the debt; but I will come to that presently.

MR. JUSTICE HARLAN: Why do you say that an adjustment if now made under the compact would be unjust to West Virginia?

MR. CARLISLE: This obligation is from West Virginia to Virginia, and under the situation that now exists a settlement under the terms of the ordinance, which prescribes the method of adjustment, would require West Virginia to pay precisely the same amount of money that she would have been required to pay to the State of Virginia if that State had paid the entire $33,000,000 of her debt and all the interest upon it.

MR. HOLMES: She could not pay more than her just share.

MR. CARLISLE: She is to be charged with certain items and credited with certain items according to the ordinance, and that is the end of it. But Virginia has repeatedly declared that she would not settle according to the ordinance, but would merely ascertain what the public debt was on the 1st of January, 1861, and divide it by three. A school boy could have made that settlement. If the debt was $33,000,000, it was declared that West Virginia's share was $11,000,000, and that Virginia was only responsible for $22,000,000. Of course West Virginia has refused to agree to that.

Now these States are not co-obligors—

MR. JUSTICE DAY: These States are not what?

MR. CARLISLE: I say these States are not co-obligors; that is conceded by the other side.

MR. ANDERSON: It is a common debt, like that of co-partners.

MR. CARLISLE: No, it is not a common debt. If one man owes a debt, and another man agrees with him, not with the creditor, that he will pay a certain proportion of the debt, or will reimburse him as to a certain proportion when the debt is paid, they are not co-obligors. That is the situation here. The State of Virginia alone owed the creditors; they never had a claim against West Virginia; they never held her bonds; they never had a contract with her; they never had any evidence of an obligation on her part that they could present and demand payment. She has agreed in the compact to assume a just proportion of the debt, but Virginia has arbitrarily settled for herself what West Virginia's portion was, one-third, and she has adjusted the other two-thirds, which she herself has declared is her own just proportion. Now she sues West Virginia and demands a contribution from her. For what? She concedes that she has paid only her own proportion; that she has paid exactly the same amount to the creditors that she would have been required to pay if West Virginia had paid everything now demanded from her; and yet she wants contribution. If they were co-obligors, one of them could not sue the other until he had either paid the whole debt or at least had paid more than his own share. That is well settled law. In the other case supposed, where one man owes a debt and another promises to pay one-third of it, or to reimburse him to the amount of one-third, and the original debtor pays only two-thirds, and has been released, he cannot compel the other to pay him the other third. That is the case we have here; Virginia has decided for herself what her just share was, and she has paid it or adjusted it, and no more. We think—and if this matter is ever adjudicated we are satisfied that the result will show—that Virginia has never paid anything like her just share.

MR. JUSTICE HARLAN: Is this bill broad enough, assuming that we have jurisdiction—with that question out of the way, is this bill broad enough to enable this court to make a decree without reference to this settlement that you speak of, to tax West Virginia for such an amount of the debt as would be a fair amount?

MR. CARLISLE: I think not, because you are bound to abide by the compact. If you disregard the compact, if the court repudiates it—of course I use that word in a respectful sense—then it can settle it upon any principles it may adopt, provided it has jurisdiction, and should find that Virginia has any claim at all; but she has paid no more than her share and has been released,—

MR. JUSTICE HARLAN: That would be a question generally whether she would be entitled to anything?

MR. CARLISLE: Yes, sir.

MR. JUSTICE HARLAN: Is the bill broad enough, if we have jurisdiction, to enable us to make a decree for such sum as would be fair and equitable?

MR. CARLISLE: Yes, if the compact can be disregarded; but we think that is not a supposable case, because the compact was undoubtedly valid.

MR. JUSTICE HOLMES: Under the general principles of equity, under that bill, if it should turn out the other way, that West Virginia was the creditor of Virginia.

MR. CARLISLE: I suppose, if the creditors were parties and should file a cross bill—

MR. JUSTICE HOLMES: I mean, any bill that prays for an amount, does it by implication submit to whichever way it may turn out?

MR. CARLISLE: The counsel on the other side concede very frankly in their brief, in express terms, that this court has no power to enforce a decree against the government of a State.

MR. JUSTICE WHITE: Is there a question here as to the power of this commission to sue?

MR. CARLISLE: The commission has not sued, and could not sue in its name, but the position we take is that there is no authority to use the name of Virginia in a suit, except for the purpose of settling the question of West Virginia's proportion of the debt, and that they have included in the bill other claims.

MR. JUSTICE WHITE: Suppose we put the compact out of the way. Suppose that, merely; let us suppose that is out of the way. You proceed on the assumption that the State of Virginia has the right to remain liable, and as the result of liquidation suppose you would find that West Virginia's share was only the one-twentieth of this debt; then the decree would be against Virginia for a much larger proportion of this debt than she assumed to pay. Does the resolution authorize the parties to accept judgment?

MR. CARLISLE: Not at all. The act under which the suit is instituted, provides expressly that Virginia shall be released, no matter how small may be the amount collected from West Virginia, or

if nothing shall be collected from West Virginia. That has been very distinctly stated in the act, and in the contract with the depositors.

MR. CONRAD: All that proceeding contemplated was a settlement with West Virginia. That failing, they have recourse to the courts. Now if we invite West Virginia here by a bill for an accounting, and an account is stated, and a balance is found to be due from Virginia to West Virginia, we proceed on the theory that inasmuch as we have invoked the jurisdiction of the court, a decision should not be given against West Virginia.

MR. JUSTICE WHITE: If, instead of a settlement between the creditors by Virginia and the commission and the issuance of certificates, it turns out that the certificates were issued for a much less proportion than Virginia owed, would not the creditors undo that settlement and make Virginia liable?

MR. CARLISLE: I think they ought to do it. Your claim (addressing Mr. Conrad) has been that Virginia has not been released.

MR. CONRAD: No, it is not.

MR. CARLISLE: Then the idea of Mr. Justice White is perfectly correct, and there ought to be a decree against Virginia for the remainder, if the adjustment was not correct, but of course that cannot be done in this case.

MR. JUSTICE HARLAN: A decree against Virginia in whose favor. The creditor is not here.

MR. CARLISLE: Certainly not, and I have not said it could be done in this proceeding, but only that the creditors ought not to be bound by the adjustment.

MR. JUSTICE HARLAN: The court has nothing to do with the bondholders?

MR. CARLISLE: No, but Virginia would have.

MR. JUSTICE HARLAN: The money would be collectible by Virginia if she got a decree in this case?

MR. CARLISLE: Yes, and she would pay it over to the committee representing the holders of the certificates, and the committee has provided for a tribunal to distribute it.

MR. CONRAD: Virginia is not suing her bondholders.

MR. JUSTICE DAY: What weight, if any, would attach to the compact if any action had been taken on it? You have stated it that way—

MR. CARLISLE: I have stated, your Honor, that West Virginia, as far back as 1871, appointed a commission to make the settlement under the compact.

MR. JUSTICE DAY: Does that appear in the bill?

MR. CARLISLE: I made that statement outside of the record in response to a statement made by the other side, which was also outside of the record.

MR. JUSTICE DAY: This stands on a demurrer to the bill?

MR. CARLISLE: Precisely.

MR. JUSTICE DAY: What weight, in your view, has this?

MR. CARLISLE: I do not suppose that the court could consider this outside matter at all, and I have merely alluded to it here—

MR. JUSTICE DAY: What weight, if any, could be given to what has been done by the Virginia legislature under the so-called compact?

MR. CARLISLE: The complaining creditor has never made any account or demand upon the legislature of West Virginia to settle according to the compact; but counsel has stated that she tried to negotiate with the alleged debtor, but could get no response, when it appears by the record in the case that the compact has been repudiated by Virginia for thirty-six years.

MR. CONRAD: We never heard of it.

MR. JUSTICE DAY: If it does not exist, then by common consent they cannot act upon it.

MR. CARLISLE: The bill alleges that Virginia has tried to negotiate; but how and when? We only know from her statutes and resolutions the terms and basis upon which she tried to negotiate, that is upon the basis that West Virginia owed one-third.

MR. ANDERSON: The last proposition was unconditional.

MR. CARLISLE: No, it was not unconditional. Mr. Harrison's speech before the legislature of West Virginia is made part of the bill, and the court can look at it. He tried to show by argument that West Virginia owed one-third. The vital question in this case is whether the court has jurisdiction. The time allowed will not enable me to argue this question fully; but I think it is not necessary to argue the question as to the jurisdiction of the court to entertain a suit brought by a State as trustee.

MR. CHIEF JUSTICE FULLER: We know about that.

MR. CARLISLE: On the other hand if it appears that Virginia has filed this bill in her own right, and has no interest whatever in the alleged claim, that would dispose of that part of the proceeding. Now, what is jurisdiction? As I understand it, jurisdiction is the power to hear and determine causes between parties who are properly before the court, and to render decrees and judgments, and enforce them. This court does not sit—no court sits—merely for the purpose of ascertaining and declaring what the legal and equitable rights of the parties are, and stop at that point. The powers of a court are remedial, not declaratory; it must render judgments or decrees; it must redress wrongs; it must enforce rights, and it can have no jurisdiction of a case in which it cannot do these things, or some of them. There has been a good deal said here today about the meaning of the word "controversy." That word does not appear in that part of the constitution which confers original jurisdiction upon this court in cases where a State shall be a party. It appears only in that clause of the constitution which defines the judicial power of the United States. When we come to the clause that confers original jurisdiction upon this court, it speaks of a case, not a controversy, where a State shall be a party. But I suppose that is not very material, because the court can take no jurisdiction of a controversy until it has assumed the form of a case. A case must be made, and there must be parties, subject to judicial process; there must be judicial proceedings, and there must be a judgment or decree and an execution.

The word "jurisdiction" as used in the constitution must be understood to mean now just what it was understood to mean when that instrument was adopted. It means, as I have said, the power to hear and determine the cause, to render judgments and decrees, and enforce them by judicial process of some kind or other. Bouvier, and Black, and all the other elementary authorities, and law dictionaries, sustain this definition. Blackstone says in the first volume of his commentaries, on page 242 of Cooley's edition:

> "All jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress, and the sentence of the court would be contemptible unless the court had the power to command the execution of it."

This court has said in the case of Riggs *v.* Johnson County, reported in 6 Wallace, in an opinion by Mr. Justice Clifford:

> "Want of jurisdiction in the Circuit Court was not alleged in the return, nor was any such ground assumed by the

circuit judge who refused the writ. Experienced counsel, however, have made that point in this court, and it becomes the duty of the court to determine it before examining the merits. Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.

"Express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record.

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution. Congress, it is conceded, possesses the uncontrolled power to legislate in respect both to the form and effect of executions and other final process to be issued in the federal courts. Implied concession also is, that Congress might authorize such courts to employ the writ of mandamus to enforce a judgment rendered in those courts in a case where the ordinary process of execution is inappropriate, and where the judgment creditor is without other legal remedy."

I have quite a number of authorities to cite on this point, but it is elementary that a court will not exercise, or attempt to exercise, jurisdiction unless it can enforce its judgment. Now if this claim is to be determined upon the compact, the court, in order to enforce whatever judgment it may render that will afford relief, must discover some process heretofore unknown and exercise some power heretofore not recognized, to compel the legislature of West Virginia not only to proceed to ascertain the amount of the State's obligation, but to establish a sinking fund sufficient to pay it, for that is what the parties have agreed to.

MR. JUSTICE HARLAN: Suppose a State sued another to recover a tangible piece of property, and judgment was given in its favor by the court: could the court by its process compel the delivery of that property?

MR. CARLISLE: I think that might be done, unless the property was used, or intended to be used, for public property, because that is something the court could do without disturbing the operations of the State in the least.

MR. JUSTICE HARLAN: If there is a suit to recover specific bag of money, it would have jurisdiction to do that?

MR. CARLISLE: I am not called upon to deny that, in this case; but if the money had been collected for public purposes, or was held for the public use, I do not think it would make any difference whether it was in a bag, or loose in the treasury, or deposited in a bank; no court could seize it and apply it to the payment of a judgment, unless the legislature had appropriated it for that purpose.

MR. JUSTICE HARLAN: Your contention broadly is that when the constitution was framed, the men who framed it gave extraordinary jurisdiction only in certain cases, and did not intend to give the court jurisdiction in suits to be brought by one State against another to recover money. Suppose it was a suit to get a will construed?

MR. CARLISLE: In that case the court would give all the remedy the nature of the case required. In the case of a will, the only remedy necessary would be to construe it for the instruction and guidance of the parties concerned. If a suit is brought for the recovery of a specific article of property, unless it is public property it can be seized, and its seizure would not interfere with the legislative or executive authority of the State, or with the autonomy of the State, and will not disturb the relations between the State and the general government under the Constitution.

MR. JUSTICE HARLAN: If you should find some property owned by the State, could an execution be levied upon it?

MR. CARLISLE: I suppose it probably could, unless it was public property; I would not question that. But my contention is that the court cannot enforce the compact without taking control of the executive and legislative departments of the State of West Virginia, and compelling the legislature to adjust the account; and then if the court complies with the compact, it must compel the legislature to pass an act, and the governor to approve it, establishing a sinking fund. That is the way in which the debt was to be ascertained and paid.

But suppose the compact is abandoned, what would the court do? It has been settled in so many cases that I will not undertake to enumerate them—they are recited in my brief—that this court cannot levy a tax; that it cannot compel the State authorities to issue bonds, that it cannot compel them to appropriate money, or to

exercise any other constitutional function committed to their judgment and discretion. As far as this court can go, is to compel a municipal or ministerial officer of a State to perform some duty which the proper authorities of the State have already authorized him to do, or required him to do. The cases on this subject are numerous, beginning with Rees *v.* Watertown, and coming down to a very recent period, in which this court has used the very strongest language in denying its jurisdiction to interfere with the constitutional authorities of a State. I contend that some construction must be put on the constitutional provisions which will not derange the relations between the general government and the States, which the constitution itself establishes. If you give a judgment or decree in this case for money, in what other way can it be enforced? It is conceded here that West Virginia has no property except public property; it has no private property—

MR. ANDERSON: We said we know of none.

MR. CARLISLE: But it is said that this court has heretofore decided this question. I think not. The court has held over and over again that it could entertain an action to adjust the boundaries between two States; but in such cases no judicial process is necessary to execute the judgment of the court. When a court has determined what the true boundary line between two States is, the political departments of the country, State and Feredal, respect that decision.

MR. JUSTICE WHITE: Now right there, Mr. Carlisle; It has often been said that, prior to the adoption of that provision of the constitution and the creation of this jurisdiction, sovereignty existed in these States; sovereignty existed in them prior to the formation of the constitution, and in the ultimate course of things if that jurisdiction could not be enforced by the courts there must be war, and the purpose of inserting that provision in the constitution, the States, being deprived of all power of waging war against each other, was to create some tribunal, not in the narrow sense of litigation between parties, by which the ultimate solution of all these great controversies could be determined without recourse to war. Now did not that proceed upon the theory that if the States entered into the constitution and if they consented to the constitution, they would respect the judgment of the tribunal which the constitution created, and therefore in testing the power, you were not to determine it by the narrow rules by which you determine whether the court has the power over an individual?

MR. CARLISLE: I know, if your Honor please, that has been the argument always.

MR. JUSTICE WHITE: You say the States would respect a decision of this court with respect to a boundary?

MR. CARLISLE: Yes; they cannot do otherwise.

MR. JUSTICE WHITE: Why would they not respect a decision otherwise?

MR. CARLISLE: In the case of Kentucky *v.* Dennison, it was expressly held by the court that under the constitution of the United States and the act of Congress, it was the constitutional duty of the State of Ohio, through her governor, to surrender fugitives from the justice of other states of the union. The governor of Kentucky made a demand upon the governor of Ohio for the surrender of a fugitive from justice, the governor of Ohio refused to obey it, and an action was brought in this court, and the court held, in the strongest language, that although it was the duty of the State of Ohio to comply with that demand, there was no power in the court to compel it to do so.

MR. CONRAD: That was put upon a political ground.

MR. CARLISLE: No; upon the ground that although it was a solemn constitutional duty, the court had no power to enforce its performance, and it refused to give any judgment in the case, as it has also done in many other cases—because it could not enforce its judgment—Now I do not dissent entirely from the argument stated by Mr. Justice White, that one of the purposes of the constitution in conferring original jurisdiction upon this court was to prevent angry controversies and conflicts between the states. Still that does not militate at all against my position, that some construction must be put upon it that will accomplish this purpose, and at the same time keep the hands of the general government off the authorities of the States in the exercise of their constitutional powers, and in the discharge of their constitutional duties. The court can order the seizure of a piece of property, unless it is public property, without disturbing the relations between the States, or the relations between the States and the general government. It can seize money in a bank, if it is not held for public purposes, if found there, without disturbing the relations existing between the States or between the States and the general government; but if it undertakes to enforce a judgment for money against a State where there is no lien or trust, a plain, naked demand for money, which must be paid and sat-

isfied, either by the appropriation of the money or property of the State, or by exercising authority and control over its legislature and compelling it to act affirmatively, it is a very different thing from a proceeding where the remedy consists in restraining somebody from doing a wrong.

As I said, in the case of a controversy about boundaries, when a line has been established by this court and a survey has been made and marked, then all the courts of the country, all the political authorities of the State that has lost the county, as well as all the political authorities of the United States, regard the territory as consituting a part of the State to which it has been awarded. Congress will include it in the congressional districts of that State, and in the judicial districts of that State. The Executive Department of the United States, in exercising its duties with regard to the relations between the general government and the States, would treat it as a part of that State, and there is no power anywhere that can undo what this court has done.

In cases like *Kansas vs. Colorado*, and *Missouri vs. Illinois*, the Court has jurisdiction, not because it can compel the State authorities to act affirmatively, but because it can restrain the agencies of the State from continuing their wrong doing. In cases involving questions of boundary, it is the duty of the State, as a State, as a political organization clothed with the power and charged with the duties of government, to protect its area from encroachments on the part of another State, and that is done by appealing to the original jurisdiction of this court to establish the boundary. It is its duty as a State to protect its people against nuisances and the trespasses and other wrongs done to them by another State or by its authority. These are duties which belong to a State because it is a State, because it is the guardian and the protector of its people and their rights, their lives, their health and their property. But when a suit is brought merely for the recovery of money, the State stands exactly like an individual so far as her rights are concerned; and she cannot recover money in a case where an individual cannot recover money under the same circumstances. If the jurisdiction is extended to that class of cases it will be going beyond the intention of the framers of the Constitution.

In the case of *United States vs. North Carolina*, which was a suit to recover the interest on bonds, the State appeared in the court, and in writing which was made part of the record, voluntarily submitted to the court the only question there was in the case. There

was no question of fact, and only one question of law. This court has held more than once that the right of a State to be exempt from a suit is a personal right which may be waived, and North Carolina did waive it in the case referred to. In the case of *United States vs. State of Michigan*, the court found, after an examination of the statutes, that the State of Michigan held certain funds and certain tools and implements appertaining to the St. Mary's River Canal in trust for the United States, and so it decided that it could enforce the trust.

MR. CONRAD: That was not by law, it was by legal action.

MR. CARLISLE: The court decided there was a trust, and said that, under the act of Congress providing for the construction of the canal, the State became a trustee for the United States in the expenditure of the money for the purchase of the property. In the case of *South Dakota vs. North Carolina*, which is the next case relied on, there was a lien. This court held—it was decided by a divided court—that it had original jurisdiction to entertain that suit, to the extent of enforcing the lien at least, and it enforced the lien by decree, and ordered a sale of the stock; but it expressly reserved the question as to whether it could render a judgment for the deficiency. His Honor, Mr. Justice Brewer, delivered the opinion, and he cited various cases which showed the difficulty of proceeding in such a matter as that, and reserved the question. It was never decided by the court, because the parties settled the case between themselves; so that, to say the very least, this question is still open in this court. It is a question which the court, if it entertains jurisdiction, will have to decide in this case if it holds that it will not regard the compact between the parties; and if it regards the compact, it will have to compel the legislature of West Virginia to adjust her proportion of the public debt and establish a sinking fund to pay it. If it decides to adjudicate the case outside of the compact, the only decree that can be rendered would be a decree for money to be enforced by the ordinary process of execution. In view of the fact that the court has considered this question so often heretofore, and that it has been so often argued in previous cases, I have attempted to do no more than state our position.

Can the court entertain this action for an account? That is the only feature in the case that gives it the least appearance of an equitable proceeding. Virginia has all the accounts, and the claim arises upon a contract, plain and simple. No discovery is asked for, and none is necessary. There are no mutual accounts, and I think

it is well settled that a court of equity will not entertain an action for an account in such a case as this, unless a discovery is necessary. If a party cannot proceed at law because he is not in possession of the information necessary to enable him to do so, and that information is in the possession of his adversary, he may appeal to a court of equity to compel his adversary to disclose the facts; and then the court, having obtained jurisdiction of the case on account of that equitable ground, will proceed to decide the whole matter between the parties. It is stated in all the elementary works, and sustained by abundant authorities, that there is no jurisdiction to orden an accounting where there is no mutual accounts between the parties, unless a discovery is necessary, except in cases of trusts, partnerships and a few others. Story says that when, in such a case, a discovery is asked for and is not granted, the court will not order an accounting.

No discovery is required here, and an action at law can be brought for contribution, and a judgment at law for the recovery of the amount due would be just as effectual as a decree in equity. This court has held that the mere fact that the evidence is complicated or tedious constitutes no ground for proceeding in equity on a legal cause of action.

I have not said anything concerning the two Virginia statutes passed in 1863 under which claims were made in the bill, and I do not think it really necessary to do so, because that question has been fully discussed by my associates and by me in the briefs. I will say, however, that the act of February 4, 1863, simply appropriated to West Virginia certain money, which, as the court will see from the act itself, had been previously collected from the counties which constituted that State; and the act contains no provision requiring West Virginia to account for the money, or any part of it. It would have been absurd to ask that West Virginia should account for it, because it was her money. The other act transferred to West Virginia certain public properties located within the boundaries of the proposed new state, and declared that it should be accounted for by West Virginia "in the settlement hereafter to be made with West Virginia." What settlement was meant? Undoubtedly the act referred to the settlement to be made under the compact, for that was the only one that had been provided for. In that settlement West Virginia was to be charged with the money expended within her limits during the time the debt had existed, and with her just proportion of the ordinary expenses and credited with the money

paid into the treasury of the State of Virginia during the same period. Now the settlement which Virginia contemplated by the act of February 3, 1863, was the settlement which was to be thereafter made with West Virginia under this compact; and in that settlement West Virginia was to be charged with the money which was expended by Virginia in procuring this very property which the act turned over to her. Virginia now claims that West Virginia should be required to pay her just proportion of the public debt, which includes, of course, the money expended for this public property, and should pay for the property besides, thus imposing a double liability upon that state.

There is another claim for $25,000,000, including interest at six per cent., set up in the bill, which, as is shown by the bill, was a part of the debt contracted before January 1, 1861, and is therefore a part of the same $33,000,000 of indebtedness mentioned in the first part of the bill. It is a part of the debt which West Virginia was to assume her just proportion of, and it is nowhere alleged in the bill that Virginia has paid that $25,000,000, or a single dollar of it, in excess of her own just share. It is not even alleged that she has actually paid it, or any part of it. The allegation is simply that she "has paid or retired it."

It appears, as the court will see when it examines the act of March 6, 1900, under which this suit is brought, that the Attorney General of Virginia was authorized to use the name of the State only for one purpose. This court decided, in the case of *Texas vs. White*, that the Governor of a State might authorize a suit to be brought in its name, but that was an action in which the State, as a State, was interested, not as a trustee, but in her own right exclusively. While that may be the general rule, it does not apply here, because the legislature itself, which is the supreme power in a State, has taken charge of this subject, and has expressly declared for what purpose the suit shall be brought, and has limited the authority which it gave to its officers to that particular purpose; that is, to the institution of a suit to secure a settlement of the claims of the holders of the certificates. That is plain on the face of the act. Ordinarily this objection should be taken by a plea in abatement, but it appears on the face of the bill, and of course in that case it cannot be necessary to file a plea. For instance, in a case where diverse citizenship is necessary to confer jurisdiction, if it appears by the bill of complaint that the litigants are citizens of the same State, or, if it does not appear that they are citizens of

different States, the objection can be taken by demurrer. We submit to the court that the only authority given for the use of the name of the State of Virginia was authority to use it as trustee, and that as trustee she cannot maintain an original action in this court.

As there are only a very few minutes of my time remaining, I will not attempt to present or discuss any other question in the case.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Supplemental Brief of Counsel for West Virginia.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL NO. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

SUPPLEMENTAL BRIEF ON THE DEMURRER.

The evident purpose of the Virginia funding act of March 30, 1871, was to settle with the creditors for the full amount which the State had decided was her just share of the old public debt, and every creditor who surrendered his original bond for cancellation under the provisions of that act understood that he was being paid in the new bond all that the State recognized her obligation to pay. By presenting his bond for cancellation as required by the statute, and by accepting the certificate representing the remaining one-third, he necessarily released the State from any further pecuniary liability to him; for all the State agreed to do—if the language of the certificate constitutes an agreement—was, that the unfunded one-third "will be provided for in accordance with such "settlement as shall hereafter be had between the States of Virgin-"ia and West Virginia in regard to the public debt of the State of "Virginia at the time of its dismemberment." Both the act and the certificate issued under it provided that the State should hold the cancelled bonds in trust for the owners of the certificate (Record, pp. 15; 47-48).

The settlement referred to was to be made between the two States

alone, and the essence of the agreement was that if anything should be received from West Virginia the holders of the certificates should have the benefit of it to the extent of their ratable shares. If Virginia had been suable, no action could have been thereafter maintained against her on this agreement unless she had actually received money in a settlement with West Virginia. Money so received would have been held in trust by the State for the certificate holders; and she now sues in that capacity for their exclusive benefit.

Unless Virginia has a valid claim in her own right against West Virginia for contribution independently of her transactions with the creditors, she cannot maintain this action. It certainly cannot be said that the issue of certificates to which West Virginia was not a party could confer upon Virginia a greater or more perfect right with respect to the unfunded one-third than she would have otherwise possessed; and, in fact, it is conceded by counsel that the liability of West Virginia is in no way affected by the issuance of the certificates. Although counsel insist that Virginia was not released from pecuniary liability under the act of 1871, yet the Attorney General, in his reply brief, says:

> "While the creditor, as the result of this arrangement, took "the risk of such a settlement ever being made, it was none "the less the duty of Virginia to do all that she could, or all "that could be reasonable and fairly expected of her, to "bring about and effect such a setlement; and, her repeated "efforts to that end having proved abortive by reason of the "failure of West Virginia to meet her overtures, this suit has "become necessary."

The next funding act was passed March 28, 1879. It provided for the surrender and cancellation of the outstanding bonds and for the issue of certificates, and expressly declared that "The accept- "ance of said certificates for West Virginia's one-third issued under "this act shall be taken and held as a *full and absolute release* of "the State of Virginia for all liability on account of said cer- "tificates" (Record, p. 19). Notwithstanding this plain provision of the act, it is contended in one of the reply briefs that Virginia was not released from liability for the sums represented by the certificates issued under it. Of course, it was not necessary to provide that the State should be released from any part of the old bonds, because they had all been surrendered to her and cancelled, and no longer constituted, even apparently, an obligation upon her part.

The next act, which was passed February 14, 1882, also provided

for the surrender and cancellation of the outstanding bonds, and for the issue of certificates for the unfunded one-third, to be ac- "counted for by the State of West Virginia without recourse upon "this commonwealth" (Record, pp. 28-29).

The next and last funding act was passed February 20, 1892, and it also required the surrender and cancellation of the outstanding bonds and the issue of certificates for the unfunded portion "to be accounted for to the holder of this certificate by the State of "West Virginia without recourse upon this commonwealth" (Record, p. 30).

The foregoing references to the statutes show the relation which the State of Virginia bore to the unfunded part of the debt when the joint resolution of March 6, 1894, was passed constituting a commission to negotiate with West Virginia, upon the express condition, however, that it should "in no event enter into any ne- "gotiations thereunder except upon the basis that Virginia is bound "only for two-thirds of the debt of the original State, which she "has already provided for as her equitable proportion thereof." (Record, p. 40).

This was followed by the act of March 6, 1900, which authorized the commission to take the certificates on deposit "upon an agree- "ment and contract on the part of the holders of said certificates "that if the said commission would secure a settlement with West "Virginia with respect to said certificates, the holders of said cer- "tificates so deposited will accept the amount realized on such set- "tlement from West Virginia on said certificates as a full settle- "ment of all their claims thereunder" (Record, p. 42). And it was further provided that the commission, with the advice and approval of the Attorney General, might take such action and institute such proceedings "on behalf of the State" as might in their judgment be needful and proper to "bring about and carry into "effect a settlement as aforesaid;" but it was expressly provided that the owners of the certificates should defray all the expenses involved in connection with the proceedings "and the State shall "not be subject to any expense on that account" (Record., p. 42).

The contracts exhibited with the bill, which are set forth in full in our original brief, show that the holders of the certificates which were deposited with the commission agreed to all the terms and conditions of the acts last referred to; and the record shows that before the institution of this suit certificates to the amount of $13,173,- 435.41 had been deposited with the commission. Of this amount

$10,851,294.09 were issued under the act of 1871 (Record, p. 89). Certificates held by the State of Virginia or by the commissioners of the sinking fund and literary fund amounting to $2,745,462.01 have not been deposited, of which $2,578,518.68 were issued under the act of 1871 (Record, p. 90). If Virginia owes any part of the debt represented by these certificates, she owes it to herself on account of the obligations created for her own exclusive benefit, and West Virginia could in no event be responsible for any part of it.

The dissenting opinion of Judge Staples in the case of *Antoni* vs. *Wright*, 22 Grattan (62 Va.), p. 838, and the cases of *Higginbotham* vs. *Commonwealth*, 25 Grattan (66 Va.), p. 628, and *Greenhow* vs. *Vashon*, 81 Va., 341 are cited by counsel in support of their contention that Virginia was not released by the act of 1871 from the obligation to pay the unfunded one-third of the debt. But an examination of the cases shows that no such question was involved, or could have been involved, in either of them.

In *Antoni* vs. *Wright*, decided in 1872, the question was as to the constitutionality of the Virginia act of 1872, repealing the provision of the act of March 30, 1871, which made the coupons receivable for taxes. The court, in a very able opinion, held that the repealing act as unconstitutional. Anderson, *J.*, in delivering a concurring opinion, said:

> "It matters not whether the State is released from the one-
> "third of the debt or not; if a new bond had been given for the
> "whole of the debt, it would have been a valid obligation for
> "a valuable consideration. Whether the State is released or
> "not for one-third of the debt, it is very clear that in this
> "transaction she has only assumed to pay two-thirds of it.
> "And I could not say that she is bound for any more. That
> "question, though one of great interest to the State, is not
> "involved in this case" (p. 873).

We call the attention of the court also to what was said by the court on page 840 of the report.

In *Higginbotham* vs. *Commonwealth*, decided in 1874, the question was whether the State was bound under certain acts of the legislature to pay dividends on the stock of the James River & Kanawha Company. It was contended by the Attorney General for the State that the two States were bound ratably to the stockholders for the dividends agreed to be paid, and that Virginia was, therefore, released from one-third of it by the dismemberment. The court expressed the opinion that they were bound ratably, but that Virginia was not released, and, speaking of the State's attitude, said:

"By the payment of the whole debt, an equity at once "arises in her favor to demand contribution from the other "State which she may enforce in the United States Courts; "a right secured to States but denied to individuals. She can "not suffer, therefore, by doing right. Virginia has not lost "her identity by the loss of forty-eight counties and the in- "habitants thereof."

In the course of its opinion, the court further said:

"It is scarcely necessary to add that in what has been said "above it had not been my purpose to express or intimate any "opinion as to the respective rights and liabilities of the State "and those of her creditors who have accepted the provisions "of the act of March 30, 1871, commonly called the funding "act. That question is not before us, even incidentally, and "no opinion is expressed thereon" (p. 636.)

There has been no adjustment between the State and the stockholders who sued in that action, as there had been with the holders of the old public debt, and therefore there was no foundation for the claim that the State had been released from any part of the liability for dividends. The position assumed by the court that West Virginia was liable directly to the creditors for her just proportion of the debt is not insisted upon by counsel in this case. On the contrary, it is conceded that if West Virginia is liable for contribution, it is to Virginia alone.

In 1886, when the case of *Greenhow vs. Vashon* was decided, the entire personnel of the court had been changed as a result of the controversy over the readjustment of the public debt. It was a proceeding to compel the treasurer of the State to receive coupons in payment of taxes, and the court held that he could not be compelled to do so because the funding act of March 30, 1871, was unconstitutional and void!

We think it is clear that Virginia has been released by the provisions contained in the various funding acts, by the surrender and cancellation of the bonds, by the acceptance of certificates under the acts, and by the contracts entered into between the creditors and the commissions; but, even if there had been no formal or voluntary release, the State has repeatedly declared in the funding acts and in the joint resolution of March 6, 1894, and the act of March 6, 1900, under which this action is brought, that she is not liable for the unfunded one-third of the debt. These declarations amount to a positive refusal to pay, or to fund, that part of the debt, and are

therefore equivalent to a direct repudiation of the State's obligation to that extent.

Under these circumstances, what possible pecuniary interest can the State have in the claims alleged against West Virginia? But, no matter whether Virginia has been released or not, and no matter whether she has repudiated the one-third or not, she sues in this action for contribution, and no such suit can be maintained until she has actually paid, or in some way settled, more than her share of what her counsel call the "common indebtedness." She has decided for herself, with the consent of her creditors, what her just share was, and she has neither paid nor extended anything in addition. No authority has been cited, and we are not aware that any exists, showing that one co-obligor—and the States are not co-obligors—can maintain an action against another, either at law or in equity, for contribution, before he has paid more than his own just proportion of the joint indebtedness. The only authority relied upon by counsel on the other side in support of their contention on this point is *1 Spence, Equity Jurisprudence, p. 662:* but that citation has no bearing upon the question.

Speaking of the right to sue for contribution, the author says:

> "If one of several sureties paid the whole or more than his "proportion of the debt, he might compel his co-surety to "contribute proportionately to the amount so paid. So if "the original debtor, or one of the parties liable, becomes in-"solvent, each of the solvent parties was made to contribute "to the obligation thrown upon them."

He then states what the Roman law was upon the subject of contribution, and, still speaking of that law, he makes the following statement, which is the only quotation made by counsel on their brief:

> "It *was* not necessary to wait till some one was damnified "by having paid or having claim made against him for the "whole; a bill might be filed to settle the amount due from "each individual of a body liable to a common burden, and "to compel the payment by each, of his share." (*Original "brief*, p. 18.)

We have said that there are no co-obligors in this case, and that is conceded by counsel on the other side. The bill is not framed upon the theory that West Virginia was ever bound to the holders of the old bonds, or that she is now bound to the holders of the certificates issued by the State of Virginia, either as a co-obligor or otherwise. The claim is made against her by Virginia alone, and it

has been argued throughout the case that the indebtedness is to her. If the old bonds had been secured by a lien upon the public property situated in the new State, or by a pledge of the revenues to be derived from the people or territory embraced in the new State, it might have been contended that there was a direct liability to the creditors upon the part of West Virginia; but such was not the case. The bonds of a State, as this court has often said, are secured only by a pledge of its honor and good faith; and Virginia is still the same State that issued and sold the bonds. It cannot be necessary to make an argument to show that neither this court nor any other has power to exonerate her from any part of her liability. Even if such a power existed in any court, the creditors whose claims would be extinguished by the exoneration would be indispensible parties.

It is now contended by counsel for the plaintiff that there never was a compact between the two States with reference to the old public debt, and that no consent to the formation of the new State was ever given by the legislature of Virginia; and it is said that the question as to the existence of the compact cannot be relied upon by the defendant State in this argument because it is not specifically stated as one of the grounds of demurrer. The compact is set forth in the bill (pp. 4-6), and one of the separate grounds of demurrer is that the court has no jurisdiction to hear and determine the cause, which necessarily requires it to ascertain the foundation and character of the claim asserted and the nature and extent of the remedy sought by the plaintiff. The office of a demurrer is to present to the court the legal and equitable questions arising upon the face of the pleading—not to argue them—and one of the questions presented by the demurrer in this case is whether, if the compact is valid, the court has power to enforce it according to its terms.

We do not propose to reargue the question as to the existence of the compact or to discuss the validity of the Virginia act of May 13, 1862, consenting to the formation of the new State and asking its admission into the union under the constitution which had then been framed. The compact itself was entered into by the sovereignty conventions of the two States and consented to by Congress in accordance with the provisions of Clause 3 of Section 10 of Art. 1 of the constitution of the United States, and all that was required of the legislature of Virginia by Clause 1 of Section 3 of Art. 10 of the constitution was that it should give its consent, not to the compact, but to the formation of the new State out of a part of the territory of the old State.

Counsel claim in the reply briefs that the ordinance of the Wheeling Convention requiring West Virginia to assume a just proportion of the debt and prescribing the method of ascertaining it is binding upon that State, but deny that the conditions upon which the proposition was accepted are binding upon Virginia (Mr. Conrad's brief, pp. 22-23). We insist that the compact is binding as a whole or it is not binding at all, and that the act of the Virginia legislature, passed May 13, 1862, while it was not necessary to the validity of the compact, constituted a ratification of it by that body. Without this act the State of West Virginia could not have been constitutionally formed or admitted into the union, whether there was a compact or not.

Congress never passed but one act providing for the admission of the State into the union, and when it was afterwards actually admitted by the proclamation of the President, the constitution which Congress had already approved had not been altered in the slightest respect so far as it related to the compact between the two States. The only change that had been made, or that was required to be made, by Congress, was in relation to the institution of slavery.

But it is now argued that the compact between the two States has been abrogated by the omission of the State of West Virginia to include in the constitution of 1872 the same provision in regard to the old public debt that was contained in the constitution of 1862 under which the State was admitted into the union; but, notwithstanding this contention, it is still insisted by counsel that West Virginia became liable and is now liable for a just proportion of the debt as provided in the Wheeling ordinance, and which it is claimed constituted a part of the compact. The entire compact was that the new State should take upon itself a just proportion of the public debt, to be ascertained by charging to it all the State expenditures within its limits, and a just proportion of the ordinary expenses of the State Government since any part of the debt was contracted, and deducting therefrom the moneys paid into the treasury of Virginia from the counties included within the new State during that period, and that the legislature of West Virginia should ascertain the same as soon as practicable and provide for its liquidation by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years.

This compact was entered into by the sovereignty conventions of the two States. In one the proposition was made in the form of an ordinance, and in the other it was accepted in the form of a con-

stitutional provision; and then it was consented to by Congress, and thus became an absolute and permanent obligation of the two States, which neither of them could thereafter abrogate or alter. It was not necessary for West Virginia to repeat in a subsequent constitution the terms upon which she had accepted Virginia's proposition, and upon which the compact had been concluded with the consent of Congress. The compact itself provides that the new State shall assume a just and equitable proportion of the debt, and that the Legislature of that State shall ascertain what that proportion is, and establish a sinking fund sufficient to pay the interest and redeem the principal in thirty-four years. The latter part of the compact is as binding upon the two States now as it ever was. The legisture of West Virginia has not been abolished; it still exists and possesses full power to provide for the ascertainment and payment of the State's just proportion of the debt in accordance with the stipulations of the compact between the parties. The State of Virginia has not heretofore supposed that West Virginia had extinguished her obligation to assume and pay a just proportion of the debt, or that she could do so; but if the argument now made is sound, she has done so by merely omitting a part of the compact from her constitution.

The act of Congress admitting the State into the union and thereby, as this court has held, giving the consent of that body to the compact, is a law of the United States enacted in pursuance of the constitution, and is therefore the supreme law of the land; and the compact itself constitutes a part of that law. *Penna.* vs. *Wheeling Bridge Co., 13 How. 185.* No State can abolish it or change it, even by an affirmative act, much less by a mere omission to repeat it in her constitution or statutes.

It is true, as stated in one of the reply briefs, that nearly forty-four years have passed since the compact was made, but it is also true that Virginia has repudiated it ever since 1871; and, although she has in her own exclusive possession all the accounts and vouchers necessary to effect a settlement, she has never presented to West Virginia any account, or even part of an account, which would enable the Legislature of that State to take any action in accordance with the Wheeling ordinance. It will be time enough for Virginia to make complaint against West Virginia when she has furnished that State with such an account or statement as will enable her Legislature, or a commission appointed by it, to ascertain the amount

claimed, in the manner prescribed by the Wheeling ordinance, which was Virginia's own chosen method of adjustment.

The reference to the fact that this court entertains jurisdiction of appeals from the Court of Claims involving demands for money, and renders judgment in such cases, is of no consequence in this discussion, because Congress has by statute not only consented that the United States might be sued on such claims, but has expressly authorized judgments to be rendered and directed their payment by the Secretary of the Treasury out of the general appropriations.

Act of March 3, 1863, Ch. 92, sec. 7; 12th, Stat. 766; Act of September 30, 1890, Ch. 1126, sec. 1.

The case of *Carter* vs. *State*, *42 La. Ann., 930*, quoted from in the original brief of counsel for plaintiff, is not at all in conflict with our contention in the case at bar. That was a proceeding to subject money belonging to the State to the satisfaction of a judgment previously obtained, and the court decided that it had no power to do so, although the legislature had authorized the institution of the action in which the judgment was rendered. In the course of its opinion, the court said:

> "The incidents and appurtenances of ordinary jurisdiction "have no application to a case like this. Undoubtedly juris- "diction granted to render judgments between parties sub- "ject to judicial power and control implies power to execute "such judgment. But the sovereign is not subject to judicial "power and control except just so far as is consented thereto; "the moment the limit of that consent is reached, the judi- "ciary must instantly halt."

But it is said by counsel that this court can afford adequate relief because it can ascertain and declare West Virginia's proportion of the debt, and that this will operate to exonerate Virginia from any further liability on account of the indebtedness. The adjudication would have no such effect; on the contrary, if Virginia is now liable, as her counsel contend, the effect of such adjudication would be simply to fix the amount of her liability, but with no judgment or decree for its payment. How that could afford any relief to Virginia in any respect, or to her creditors, we are unable to see.

While we do not consider it necessary to add anything to the argument heretofore made on that part of the demurrer which raises the question of multifariousness, it is proper to say that we do not controvert any of the propositions stated in Hogg's Eq. Proc., which is relied upon by counsel for plaintiff. They are in accord with the authorities cited by us.

Counsel quote from Mitford's Pl., p. 399, to show that there can be no misjoinder unless the parties have, or may have, conflicting interests in the suit, or unless some of them have no interest in the suit. What the author says, is:

> "If the plaintiffs actually have, or may have, conflicting "interests in regard to the object of the suit, or if any or "either of them have no interest in the subject-matter of the "suit, there is a misjoinder. But to be free from the objec- "tion of misjoinder it is not necessary that a co-plaintiff "should have an identity of interest."

They also refer to Daniels' Chancery, pp. 301-2, to show that an auctioneer may be joined with the vendor in a suit against a purchaser, but they omit to state, or quote, the reason given by the author, which is —

> "because the auctioneer has an interest in the contract, and "may bring an action upon it; he is also interested in being "protected against the legal liability he has incurred in an "action by the purchaser to recover the deposit" (pp. 301-2).

He then says:

> "Upon a similar principle in cases where all the plaintiffs "have an interest in the subject of the suit but their inter- "ests are distinct and several, they will not be allowed to sue "together as co-plaintiffs" (p. 302).

It is not usual to embody the speech of an advocate in a bill in chancery, and thus require the defendant to admit on demurrer the truth of the statements contained in it; yet that course has been pursued in the present case, and the counsel on the other side quote from the speech of Mr. Harrison to show that the ultimatum contained in the joint resolution of March 6, 1894, had been abandoned by Virginia in 1900. All that we can say in response to this is that the gentleman who made the speech had no authority from the State of Virginia to propose or agree to any settlement except upon the basis that the share of the State was only two-thirds of the debt. An examination of the act of March 6, 1900, will show that its preamble reaffirms the position which the State of Virginia had previously taken with respect to the extent of West Virginia's obligation for one-third of the debt, and that it does not repeal or modify any part of the joint resolution of March 4, 1894, but mere-

ly authorizes the commission to receive the certificates on deposit and to "take such action and institute such proceedings on behalf of the State as may in the judgment of the Commission and the Attorney General be needful and proper to protect the interests of the State and bring about and carry into effect a settlement as aforesaid." Under this act the commission had no power to settle by negotiation except upon the basis that Virginia had paid her full share—two-thirds—but it was authorized to sue for a settlement for the benefit of the certificate holders, and, of course, if less than one-third should be recovered from West Virginia in the suit, they had the power to receive it for distribution among the beneficiaries under the contract made with them.

J. G. CARLISLE,
For West Virginia.

Counsel:
CLARKE W. MAY.
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CHAS. E. HOGG.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Reply Brief of Counsel for Virginia.

[MEMORANDUM.—Because the time allowed them was scant, the counsel for the Commonwealth agreed to apportion certain portions of this reply brief between themselves. Hence it appears as one brief, though in two parts.]

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Original No. 7.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

REPLY BRIEF OF COUNSEL FOR VIRGINIA UPON THE DEMURRERS TO THE BILL.

I.

The bill is not demurrable on the ground of multifariousness, either because of uniting any two or more distinct and separate matters or grounds for equitable jurisdiction, or upon the alleged ground that it blends in the same bill two causes of action, one of which is of equitable and the other of legal cognizance.

(1) None of the grounds for equitable relief shown by the bill are distinct and separate and independent of the other grounds assigned in the bill for the relief prayed. All of the demands for relief shown by the bill are intimately connected with each other and are properly to be considered in stating any account and making any settlement between the two States.

It cannot be fairly contended that any item of charge against West Virginia suggested by the bill is not a proper item to be brought into any statement which shall fairly ascertain the true state of accounts between the parties and the amount which the plaintiff is equitably entitled to recover from the defendant.

It is manifest that the equity for contribution and the equity for exoneration, to which the bill plainly shows that the plaintiff is entitled, are, for the purposes and with reference to all the legitimate objects of this suit, so associated together and so connected with each other that it would be impossible for the court to give complete relief, and to ascertain the amount for which the plaintiff has a just claim against West Virginia without bringing all of these matters into the account.

It would be impossible fairly and justly to state the account between these parties without bringing into it the sums with which West Virginia is justly chargable on account of the moneys and property constituting integral parts of the assets of the undivided State which West Virginia has received under the acts of the restored government of Virginia passed in 1863.

(2) But if, applying rigidly an extreme technical rule of pleading, it could be claimed that the demand which Virginia has a right, as shown by paragraph VIII of her bill, to make of the defendant imports of legal cause of action, and could not for any reason be properly cognizable by a court of chancery in making a final settlement between the parties to this cause, then, according to the rule of common sense and common justice, well settled by the authorities, the averment of such a cause of action in the bill will not be fatal to the maintenance of the suit, but will be treated as surplusage by a court of equity, and either ignored in its consideration of the case or will be by amendment stricken from the bill without prejudice.

We are saved any necessity for any further discussion of this phase of the argument of defendant's counsel by the admirable statement of the law governing this subject, accurately expressed in the work upon "Equity Procedure" of which the learned counsel,

Mr. Charles E. Hogg, who opened the oral argument for West Virginia and is upon her brief, is the author.

The principles governing this subject, as stated in Hogg's Equity Procedure, edition of 1903, vol. 1, sec. 136, furnish a conclusive answer to the elaborate argument of the counsel for the defendant upon this branch of the case and are as follows:

> "SEC. 136. Courts of equity have declined to announce a general rule applicable to all cases of multifariousness, *being guided by considerations of convenience in each particular case rather than by any absolute rule.* But there are certain cardinal principles which have been established by repeated and numberless decisions in the court of equity, and if borne in mind it will seldom if ever be found difficult to determine whether multifariousness exists in the particular case.
>
> "As to what these particulars are, all the adjudged cases agree.
>
> "From the numerous decisions relating to this matter, a few of which are cited in the foot-notes, the following principles may be safely declared to govern in questions of this character:
>
> "1. A bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite in his answer and defense different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delay might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matters not ready for hearing.
>
> "2. It will be treated as multifarious where there is a demand of several matters of a wholly distinct and independent nature, in the same bill, rendering the proceedings oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendant or defendants with which he has no connection.
>
> "3. A bill against two or more defendants will be regarded as multifarious which also embodies a separate and distinct claim against one of the defendants only.
>
> "4. A bill will not usually be regarded as multifarious when the matters joined in the bill, though distinct, are not absolutely independent of each other, and it will be more convenient to dispose of them in one suit.
>
> "5. A blending of two causes of action in the same bill, one of which is of equitable cognizance and the other legal, will not render a bill multifarious, *as the latter will be treated*

as mere surplusage and stricken from the bill and the cause retained as to the equitable ground of the suit." (Italics, here and elsewhere, ours.)

These propositions are amply supported by the authorities cited by the learned author and by the following:

Story's Eq. Pl., secs. 271-278, 280, 284, 531, 532.

Mitf., Eq. Pl., by Jeremy, 181, 182, notes *a* and *b*.

Atty. Gen. *vs.* Merchant Tailors Company (1883), 1 Milne and Keene's Chy. R., 189, 191, 194.

Campbell vs. Mackey, 1 Mylne & Craig Chy. R., 622.

II.

The next ground of objection to the bill urged by defendant's counsel, which I will notice, is that the plaintiff has, as they allege, no interest in the subject matter of the controversy and asks no substantive relief for herself.

This position of opposing counsel is based upon an extraordinary misapprehension of the bill.

(*a*) The bill shows that the plaintiff has a very large direct claim against the defendant because of the fact that the plaintiff has paid off and satisfied in full obligations and evidences of indebtedness of the undivided State, including interest from the dates of payment of the several items constituting said demand, considerably in excess of $25,000,000, and that for this Virginia has a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

See paragraph XVI, page 9 of the bill.

(*b*) *The bill shows that it is not true in fact,* as counsel argued, that Virginia has been released in respect to the unfunded portion of the bonds of the original State deposited with her under the act of 1871 and amounting, as appears from the exhibits printed at pages 73 and 90 of the bill, to $12,703,451.79, with interest on the principal sum thereof from July 1, 1871. As to this portion of the old debt of the State, Virginia has never been released, and her own highest court, in Greenhow *vs.* Vashon, 81 Va., 342-343, has so declared. In that case Judge Richardson, delivering the opinion of the court, quoting with approval the dictum of Judge Staples in Antoni *vs.* Wright, 22 Gratt., 864-5, says:

"It is said that the creditor has released one-third of his

> debt. I do not so understand it, and I will hazard the assertion the creditor does not so construe the law. If this was the intention of the framers of the act they have adopted an obscure and equivocal mode of expressing a plain and simple agreement. The creditor surrenders his bond and obtains a new one for two-thirds of his debt, and coupons for the interest. For the remaining one-third the bond is held in trust by the State, and a certificate is given him stating that payment will be provided for in accordance with such settlement as may be made with West Virginia. If that State is faithful to the obligations resting upon her the creditor will receive the other two-thirds also. On the other hand, if she repudiates these obligations there is no agreement or understanding absolving the State from the payment of the whole debt as before the passage of the funding bill."

And the Supreme Court of Appeals of Virginia, in Higginbotham *vs.* The Commonwealth, 25 Gratt., 627, expressed substantially the same opinion. This ought to be conclusive of this particular question for the purposes of this demurrer.

But, independently of said decisions, we assert with absolute confidence in the unquestionable correctness of the proposition, that it is impossible to read the act of March 30, 1871, and particularly section 3 of said act, found at pages 14 and 15 of the bill, without seeing not only that Virginia is not released, but that she has solemnly contracted that payment of said unfunded one-third, with the interest due thereon, "will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment."

* * * * * * * *

The manifest effect of the transaction was to continue in full force the liability upon the unfunded third of each of the bonds so deposited, both as against Virginia and against West Virginia, the only concession that the creditor made being that payment could not be expected or required of Virginia until a settlement should be had between the two States.

While the creditor, as the result of this arrangement, took the risk of such a settlement ever being made, it was none the less the duty of Virginia to do all that could be reasonably and fairly expected of her to bring about and effect such a settlement; and, her repeated efforts to that end having proved abortive by reason of the failure of West Virginia to meet her overtures, this suit has become necessary.

Her equity to maintain this suit in respect to the $12,700,000 of unfunded bonds deposited with her under the act of 1871 is based upon her right to exoneration to the extent of West Virginia's liability upon the indebtedness represented by those bonds.

By reason of the contract which her creditors have made with her, she has a further interest in maintaining this suit, viz., to obtain COMPLETE exoneration in respect to those unfunded bonds as to which she has been in no sense *released*, but can only be released by an adjudication of this court against West Virginia ascertaining West Virginia's aliquot liability on account of the said indebtedness.

(*c*) Nor is it true in any sense that Virginia has in any degree impaired her right to maintain this suit because she has agreed to turn over to her creditors entitled thereto the ratable proportion of any amount which she may obtain from West Virginia assignable to the holders of the unsatisfied obligations of the undivided State.

It cannot in any court of conscience impair a plaintiff's right to equity because her bill shows that it is her purpose to do equity.

Any recovery from West Virginia will, by the terms of Virginia's contract with the representatives of the creditors of the undivided State be ratably apportioned among all of the holders of the antebellum obligations of the original State, including Virginia as now constituted. The creditors other than Virginia will receive their *pro rata* share of such recovery in entire exoneration of Virginia, and Virginia will receive or retain the *pro rata* share of such recovery assignable to the obligations and evidences of indebtedness of the original State which she has paid in full, by way of equitable contribution to her.

It will be apparent from an examination of the contract between Virginia and the committee representing the certificates which she has issued, and which in turn represent the unsatisfied obligations of the undivided State, that, while the arrangements which Virginia has made with the common creditors or their representatives for her protection, and for their protection, with a view to their payment, and to her payment, and to her exoneration, enure alike to her benefit and to the benefit of the common creditors, West Virginia is not in the slightest degree prejudiced, nor are her interests or rights to any extent impaired by reason of any of these arrangements.

There were different stipulations in the certificates issued under the act of 1879, 1882, and 1892, in reference to the settlement of the

public debt of Virginia, but they do not impair Virginia's right to maintain this suit.

III.

With strange persistency counsel for West Virginia insist that jurisdiction has not been conferred upon this court by the judiciary clauses of the Federal Constitution over controversies between two or more States involving directly or indirectly a demand for the payment of money.

Their contention is that—

Jurisdiction imports power not only to decide, but to grant adequate relief, and—

That this court is powerless to give adequate relief to the plaintiff upon the case stated by her, and—

That therefore this court can have no jurisdiction of this cause.

We have shown in our brief, already filed, for the plaintiff that this question has been repeatedly adjudicated in this court, against defendant's contention, in cases so analogous to the case at bar that it is impossible to distinguish them upon any ground of principle as to this particular question.

But we have a further sufficient reply to make to this contention.

The proposition of opposing counsel rests upon the assumption that this court cannot give adequate relief.

That is not true. The court can give all the relief that is in the nature of things appropriate to the case and all that is prayed for by the bill.

It can cause the account between the two States to be stated and an ascertainment and an adjudication of the equitable proportion of the public ante-bellum debt of Virginia to be borne by West Virginia to be had, and upon confirming the report made by its master in chancery can, and will, adjudge and decree the amount which West Virginia is equitably bound to pay on account of the common indebtedness of the original State.

This, as is shown by the bill and pointed out in our former brief, not only will give Virginia adequate, but will accord her complete, relief, because it will operate to exonerate her from any further liability on acount of that indebtedness to the extent already plainly shown.

In further reply to this branch of argument of defendant's counsel, I beg leave to add to what has already been said upon that subject, that it has never been held by this court that no execution or

process could under any circumstances be issued upon any judgment against a State upon any pecuniary demand.

Whether strictly private property of West Virginia, property owned for profit and charged with no public trusts or uses, property owned for some commercial purpose, or owned just as an individual might own such property, would be liable to levy, attachment, or sale under an execution issued under a decree of this court, is a question which we hope will never arise and can never arise unless West Virginia shall fail or refuse to respect a decree of this court and to comply with its terms.

It will be time enough then for this court to decide what further action, if any, shall be taken in enforcement of its decree.

We frankly say that we at present know of no property of defendant which would be liable to levy or sale under any execution issued by this court, but it is not very difficult to conceive of a condition of things in which West Virginia might own property within the jurisdiction of this court which would be liable to be subjected for the satisfaction of a decree in this case. I fully concede that only such property as was not held by that State for governmental purposes and not charged with any public trust could be subjected for the satisfaction of a decree of this court; but there may be circumstances under which property charged with a special trust for the satisfaction of the very debt claimed here, or property not charged with any public trust, belonging to the State of West Virginia and held by her, just as a private individual might hold such property, might be liable to be attached for the satisfaction of a decree of this court in this cause.

Tried by the same principles which have controlled this court and the State courts in respect to judgments entered against municipal corporations, there can be no question that the fact that an effective execution cannot be issued upon the judgment does not invalidate the judgment.

2 Dill., Munic. Corp., 4 ed., sec. 576.
2 Dill., Munic. Corp., sec. 856.
Tiedman, Munic. Corp., sec. 212.

The execution is in no sense and under no circumstances an essential part of the judgment.

Freeman on Judgments, sec. 2, and cases cited.

Whether a defendant has or has not any property on which a

lawful execution could be validly levied does not at all affect the validity, though it may affect the value, of a judgment against him.

III.

I come now to consider the ground upon which Mr. Carlisle, the distinguished counsel for West Virginia who closed the oral argument of the case, seems in his brief and in his oral argument to mainly rely in his advocacy of the demurrers, though it is a ground not mentioned or suggested in either of the demurrers.

His contention is that by reason of the provisions of the alleged act of the General Assembly of Virginia, passed May 13, 1862, which were as follows:

> "That the consent of the legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, according to the boundaries and upon the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed proposed by the convention which assembled at Wheeling, on the twenty-sixth day of November, eighteen hundred and sixty-one."

and of the provisions of section 8 of article VIII of the constitution of West Virginia, which is in the following words:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

a compact was created by which the legislature of West Virginia was constituted the sole tribunal to ascertain, adjudicate, and finally decide what was the equitable proportion of the public debt of the undivided State which West Virginia should assume and pay.

Upon this extraordinary contention counsel for the defendant seem now mainly to rest their case.

(*a*) We deny that the fact of such an alleged compact, not mentioned or suggested in the bill, can be relied on as ground of demurrer.

(*b*) We challenge the averment that any such act as the alleged

act of May 13, 1862, was ever passed by any legislature of the Commonwealth of Virginia, and we crave oyer of the act, if it is to be relied on.

(*c*) If the meaning and effect contended for by the counsel for the defendant could be fairly given to the terms of section 1 of the said alleged act of May 13, 1862, then Virginia has a right to insist, and does insist, that said act shall be at least reasonably, if not strictly, construed.

Under no fair construction of that act can it possibly have any such legal effect, even upon the violent hypothesis of counsel for the defendant, for the reason that the alleged consent and agreement of the Commonwealth of Virginia, as therein expressed, was predicated upon the admission of West Virginia into the Union under the provisions of the constitution for the State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, eighteen hundred and sixty-one, while the fact is that West Virginia never was admitted into the Union under that constitution, but was admitted under an amended constitution submitted to the people of West Virginia by an ordinance adopted by a convention thereof on the sixteenth of February, eighteen hundred and sixty-three, and pursuant to a further ordinance adopted by the said convention, entitled "An ordinance to provide for the organization of the State of West Virginia," passed February nineteenth, eighteen hundred and sixty-three, as will appear from the said constitution and ordinances of the State of West Virginia, published in the volume entitled "Constitution and Statutes of Virginia and West Virginia," printed pursuant to the act of the legislature of West Virginia passed February, twenty-sixth, eighteen hundred and sixty-six.

Non constat but that the consent of the legislature of Virginia would never have been given in manner and form as expressed in the alleged act of February thirteenth, eighteen hundred and sixty-two, if predicated upon the amended constitution, which was subsequently submitted to the people of West Virginia and received their sanction at the polls. This is by no means so strained a construction as that which counsel for the defendant would feign give to this act.

(*d*) But we deny utterly that by any fair or reasonable construction of the language of the first section of said act of May thirteenth, eighteen hundred and sixty-two, taken in connection with the provisions of the constitution proposed for the State of West Virginia by

the convention which met in the city of Wheeling on the 26th of November, eighteen hundred and sixty-one, the language of that section was ever by any possibility intended by the legislature of Virginia or understood by the convention or by the people of West Virginia, or by any rational human being, to be, or to operate as, a SUBMISSION to the legislature of West Virginia of the question of the amount and proportion of the common debt of the original State which it was equitable and just for West Virginia to assume and pay; or that that enactment was ever intended by Virginia, or understood by West Virginia, or by any one, to bind Virginia to accept and abide by such determination of that matter as might be made by the legislature of West Virginia, however capricious or unjust its judgment might be; or was ever intended or understood by either of the parties, or by anybody, to constitute the legislature of one of the parties to the present controversy a tribunal with plenary power and exclusive jurisdiction to determine and decide anything in respect to the common *ante-bellum* debt of Virginia which would be binding upon Virginia; and yet such is the contention of the learned counsel, unless we misapprehend the language of their briefs.

All that could be reasonably inferred from the language used in said act of May thirteenth, eighteen hundred and sixty-two, taken in connection with the proposed constitution of West Virginia, was that Virginia gave her consent to the creation of the State of West Virginia out of her territory under that constitution and that section 8 of article VIII of the proposed constitution was designed not to create any new contractual relation or obligation between Virginia and West Virginia, but to be, and operate as, a mandate from the people of West Virginia to the legislature of West Virginia, requiring that legislature to assume an equitable proportion of the public debt of the original State, and as soon as practicable to ascertain the same and to provide for its liquidation by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years, and that Virginia was willing that West Virgina should become a State of the Union under a constitution which contained those provisions and the other provisions expressed in the constitution as formulated and proposed prior to May thirteenth, eighteen hundred and sixty-two.

Reasonably construed, the purpose and effect of section 8 of article VIII was to place upon the new State an equitable proportion of the public debt of the old State and to require, and make it the

duty of, the legislature of the new State to provide for the payment of West Virginia's equitable proportion of that debt, so that the entire amount, interest and principal, should be extinguished and paid off within the period of thirty-four years.

Nearly forty-four years have elapsed, and yet West Virginia has done nothing; has paid not one cent of the interest or the principal of the debt; but, on the contrary, has repudiated every obligation imposed upon her by the stipulations of the Wheeling ordinance which constituted the essential condition of her political existence.

(*e*) But the entire conception and theory of opposing counsel upon this subject have been demolished by the fact that West Virginia has repealed and abrogated the constitution under which she was admitted into the Union, by the adoption of a new constitution in eighteen hundred and seventy-two, which new constitution contains no provision whatever requiring that State to assume an equitable proportion, or any other proportion, of the *ante-bellum* debt of Virginia, or requiring the legislature of that State to provide for the payment of any portion of that debt.

> See West Virginia Constitution, adopted in 1872; Code of West Virginia, 1887.

By her present constitution West Virginia ignores her obligation to pay any part of the debt, and if it had ever been true that anybody had ever attempted to constitute, or dreamed of constituting, the legislature of that State the supreme and ultimate arbiter between the two States as to the amount of the common debt which West Virginia should bear, West Virginia has not only failed and refused to discharge the duty as arbitrator, but she has actually abdicated any such function, duty, or power by repealing the constitution which counsel claim conferred such exclusive, supreme, and irreviewable jurisdiction upon her legislature.

IV.

The other points discussed in the briefs of defendant's counsel have been already anticipated and sufficiently met by the brief of counsel for Virginia already filed. A singular misapprehension of the language of the bill, and of the exhibits which constitute important parts thereof, has led counsel for the defendant into several errors of fact, two of which I deem it proper to notice. One is their contention that Virginia has ever made it a condition of any settle-

ment or negotiation with West Virginia that that State should assume one-third of the *ante-bellum* debt of Virginia.

It was a condition of the negotiation and settlement authorized to be made by the resolution adopted by the General Assembly of Virginia on the 6th of March, eighteen hundred and ninety-four (pp. 39-40 of the bill), that Virginia was not to be charged with or assume more than two-thirds of the debt of the original State already assumed and provided for by her as her equitable proportion thereof.

But even under that resolution there was no condition whatever as to what West Virginia was to pay. That was left wide open as a matter for negotiation and adjustment.

And by the act of March sixth, nineteen hundred, pages 41 and 42 of bill, beyond the shadow of a doubt, plenary power was conferred upon that commission, with the approval of the Attorney General, to make any settlement and adjustment with the State of West Virginia which it might be practicable to make, and which the commission and the Attorney General might approve, provided the creditors, as defined in the act, agreed to accept such amount as might be recovered from West Virginia as a full settlement of all their claims against the State of Virginia.

Another inaccuracy of statement by opposing counsel, founded upon a like misapprehension, is that Virginia has submitted *any ultimatum* to West Virgina, or has made as a condition of an amicable adjustment with West Virginia, or of a negotiation or accounting with West Virginia looking to such amicable adjustment, any condition that West Virginia should assume and undertake to pay any particular portion of the common debt or any sum whatever and particularly are the counsel for the defendant in error upon this point as to the last effort made by Virginia to bring about an amicable settlement, as will be seen from an examination of the address of Mr. Randolph Harrison, made on behalf of the Virginia Debt Commission before the joint committees on finance of the West Virgina legislature on the first of Feruary, nineteen hundred and five, and printed on pages 66-80 of the bill.

Among other things of interest to this cause and to the questions now submitted to the court which will be found in that admirable address, Mr. Harrison, on page 76 of the bill, said:

> "We do not ask that West Virginia shall commit herself as liable in any specific amount. We make no claim against her for any definite sum. We do not know what a statement of

the account will show; if it shows that West Virginia is not liable for any amount, that will end the matter. We only ask that your State will, through the proper authorities, unite with Virginia in stating the account between the two States in order that the question of her liability, if any, may be authoritatively ascertained. The work of your commission will, of course, be subject to such action as West Virginia might deem proper in the premises."

I beg leave to commend the statement of Virginia's case, as made in that address, to the attention and consideration of the court. Its perusal will most conclusively demonstate to this court the rightfulness and righteousness of the cause of action stated in the bill.

Respectfully submitted.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

MARCH 14, 1907.

THE COMMONWEALTH OF VIRGINIA
vs.
THE STATE OF WEST VIRGINIA.

REPLY BRIEF TO THE BRIEFS OF DEFENDANTS ON THE DEMURRER.

In the brief of Mr. Carlisle there appears, for the first time, the suggestion that this court cannot take jurisdiction of this case, because of a COMPACT alleged to have been entered into between the two States of Virginia and West Virginia, by which the question of the liability of West Virginia to Virginia on account of the public debt of the parent Commonwealth of Virginia was submitted to the arbitrament and award of the legislature of West Virginia.

The facts which it is claimed constitute such compact are as follows, viz.:

(1) That the constitution under which the State of West Virginia was admitted into the Union on June 20, 1863, contained the following provision:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and *the legislature shall ascertain the same as soon as may be practicable* and provide for

the liquidation thereof by a sinking fund to pay the accruing interest and redeem the principal within thirty-four years."

(2) That on May 13, 1862, the legislature of (restored) Virginia passed an act entitled "An act giving the consent of the legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State;" that by said act the consent of the legislature was given to the erection of the proposed new State "according to the boundaries *and under the provisions set forth in the constitution for the said State of West Virginia*, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861."

(3) That the State of West Virginia was admitted into the Union on the 20th day of June, 1863, under the constitution framed by its convention, approved by the State of Virginia and the Congress of the United States. "And thus the consent of that body was given to all the provisions of the agreement and it became a legal and constitutional compact between the two States."

(Mr. Carlisle's Brief, page 36.)

To this suggestion of a "compact" between the two States we have to say in reply:

1. That this is not among the grounds assigned in the formal demurrer heretofore filed in this cause, but is set up for the first time in the brief of Mr. Carlisle, and is again relied on in the brief of the Attorney General of West Virginia, subsequently filed.

2. That it is not a ground proper to be considered on demurrer, because it involves alleged facts which do not form any part of the case stated in the bill, viz., the fact that on May 13, 1862, the legislature of Virginia, by an act regularly passed, by a legislature duly assembled, consented to the erection of the new State of West Virginia "within the jurisdiction of this State." Not only is this alleged act not stated or admitted in the allegations of the bill, but it nowhere appears in the record of the case, nor is it set forth even in the briefs of counsel.

3. That the Commonwealth does not admit, but is prepared to deny, when opportunity is afforded it, that any such valid, constitutional act was ever passed by the legislature of Virginia, but that a demurrer affords no such opportunity to complainant to traverse the allegation of the existence of such act or of showing its non-existence.

4. That the existence and consequent effect of such an act should be asserted by a plea, to which replication might be made, or by answer, to which denial might be opposed, and thus an issue presented to which proper proof might be directed.

5. That from the official publications of the acts of assembly of the (restored) State of Virginia it distinctly appears that the regular session of that body adjourned *sine die* on February 13, 1863; that the constitution of the (restored) State of Virginia provides that extra sessions of the legislature may be convened only upon a proclamation of the governor of the Commonwealth calling the same; that while it does appear that the members of the General Assembly did assemble and were in session on the 13th of May, 1863, it does not appear from the proceedings of that body in the officially published journals of its proceedings that it had been called to meet by the proclamation of the governor.

6. That the constitution adopted by the convention of West Virginia, which assembled at Wheeling on the 26th of November, 1861, was not the constitution which was approved by Congress and under which the State of West Virginia was admitted into the Union, but, that that Congress did refuse to admit the State into the Union under that constitution until the same was amended in certain indicated particulars, and the said constitution was accordingly so amended.

7. That even assuming all the facts relied on as constituting such a compact to be established, yet the conclusion deduced therefrom is fallacious and unsound, in this, viz., that the provision of the constitution of West Virginia that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, *shall be assumed* by this State, *and the legislature shall ascertain the same* as soon as practicable, and provide for the liquidation thereof," &c., does not import or mean that there was conferred upon the legislature power to adjudicate the fact or the amount of such "equitable proportion," or that there was lodged in the legislature any discretion whatever in the matter of such ascertainment.

In construing this provision of a constitution we must have regard to the subject-matter and the policy and purpose of the framers as disclosed by the instrument in all its parts. Here was a new State, about to be formed within the jurisdiction of an old State. That old State had, on August 20, 1861, just three months before,

by an ordinance, provided "for the formation of a new State out of the portion of the territory of this State," and it had by the same ordinance declared that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of this debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the new State during said period."

It is impossible to suppose that the new State should not have had this in mind when it framed its own constitution, and that when it provided that its legislature "shall ascertain the same as soon as practicable" it referred to the method of ascertainment prescribed by the Virginia convention in the very ordinance which provided for the creation of the new State. It seems to be at least reasonable to recognize that the ordinance of the Virginia convention and the provision of the West Virginia constitution should be taken as being *in pari materia* and construed together. It would then follow that what was meant by the expression the legislature "shall ascertain" was that the legislature should learn as soon as practicable the result of the method prescribed by the Wheeling ordinance, and then provide for the liquidation of the amount so ascertained.

It is simply preposterous to suppose that Virginia ever agreed to submit the matter of West Virginia's indebtedness to the arbitrament and award of West Virginia herself.

It should be enought to utterly repel this suggestion of a "compact" to inquire why, if such "compact" ever existed, in all the forty-three years that have elapsed since it was entered into, West Virginia has never, through her succession of governors, legislatures, and attorneys general, indicated and announced that it was upon such "compact" that she stood, and that to its terms and provisions she would hold Virginia, and why, through that long period, no step has ever been taken by West Virginia, through her legislature, to enter upon the performance of the duty which such "compact" imposed, or to notify Virginia that she stood ready and willing to enter upon such duty.

The suggestion that the case of Virginia *vs.* West Virginia, decided by this court thirty-six years ago, had restrained her from so

doing is scarcely creditable to the intelligence of the inventor of that excuse.

Again, it is suggested in the briefs of demurrants, and was urged in oral argument, that Virginia had been released from all liability on account of the public debt of the old Commonwealth, evidenced by her bonds outstanding on January 1, 1861.

The grounds relied on to support this suggestion were indicated as follows, viz:

(1) That by the terms and provisions of the act of the General Assembly of Virginia of March 30, 1871, entitled "An act to provide for the funding and payment of the public debt" (Record, p. 13), and the acceptance thereof by the holders of the bonds of the Commonwealth, such holders released Virginia from all liability to them on account of the original public debt existing on January 1, 1861, and for which West Virginia was bound with Virginia, and they created with Virginia a new debt, evidenced by the new bnds of Virginia, for two thirds of the amount of the old bonds, and accepted from Virginia a certificate showing that for the remaining one-third of such amount they would look for their payment only to such funds as might thereafter be obtained from West Virginia in satisfaction of her contributive share of the old public debt.

For reply to this ground we refer to the act itself. Its preamble fully recites its purpose. Its terms and provisions are contrived to strictly carry that purpose into effect. The third section of the act (Record, p. 14) shows that the bonds surrendered by the holders were not surrendered for cancellation and extinguishment of the obligations, save as to two-thirds of the amount of each bond so surrendered, and that as to the remaining one-third, which was estimated to be the amount of West Virginia's just and equitable proportion of the common debt, "the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees." The bonds, as to such one-third, could not be "canceled" and at the same time "held in trust for the holder of his assignees." Virginia, by giving her new bond to take the place of the old bond, cannot be held to have paid her debt, but only to have substituted one security or evidence for another. A creditor, by surrendering an old bond and accepting a new one for the same debt from the debtor, has not received payment or satisfaction of the debt, unless such was the plain intention of the parties. The act itself as well as the certificate issued under it (Record, p. 72) show that such was not the intention.

(2). That by the act of the General Assembly of Virginia of March 28, 1879 (Record, p. 16), it was expressly provided, in the seventh section (Record, p. 19), "The acceptance of the said certificates for West Virginia's one-third, *issued under this act*, shall be taken and held as a full and absolute release of the State of Virginia from all liability *on account of the said certificates.*"

Observe, the release of Virginia is not from her liability on account of the old bonds surrendered by the holder. These old bonds still are to remain, so far as the unfunded one-third of their amount, held in trust for the holder, but the release here provided for is expressly "on account of these certificates," by which was plainly meant that Virginia would not recognize these certificates as creating any distinct and substantive evidence of indebtedness on her part. They should not be construed to be causes of action against her. The holder, by surrendering his bond to be held in trust for him by Virginia did thereby agree to await the result of Virginia's efforts to obtain from West Virginia the amount of her "just and equitable proportion of the public debt," which amount Virginia solemnly dedicated to the satisfaction *pro rata* of the one-third for which the bonds were held in trust by her. This provision in the seventh section of the act was designed to preclude the idea that these certificates created a new and distinct liability of Virginia. The previous language of the seventh section is—

> "The owners of all classes of bonds mentioned in this act, and who shall not yet have received certificates representing the remaining one-third of their principal and interest, due and payable by the State of West Virginia, *shall receive certificates of a like character to those issued under the act of March 30, 1871, when they make such exchange,*" &c.

We have seen that the certificates issued under the act of March 30, 1871, declared on their face (Record, p. 72) that "the State of Virginia holds said bonds so far as unfunded in trust for the holder thereof or his assignees, and these certificates, issued under this act of 1879, were to be of "like character." It is manifest, then, that under the act of 1879 there was no release by the bondholders of the liability of Virginia on the bonds surrendered to Virginia and held by her in trust for the holder as to the one-third.

(3) That under the act of February 14, 1882, entitled "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds

covering the same, and the regular and prompt payment of interest thereon" (Record, p. 21 *et seq.*), Virginia obtained a release of liability from the bondholders.

This was the act passed by the repudiating legislature, under the malign influence of the Mahone-Riddleburger reactionaries. This act was the fruitful source of all the litigation that so long disturbed the patience of this court, from Hartman *vs.* Greenhow, 102 U. S., 877, down through many years. By section 6 of this act (Record, p. 28) the form of a certificate was prescribed, which recites that "Virginia has this day discharged her equitable share of the — bond, * * * leaving a balance of — dollars * * * to be accounted for by the State of West Virginia, without recourse upon this Commonwealth."

Now this certificate does not even purport to be a contract on the part of the bondholder, nor does the act itself purport to alter, amend, or repeal the former acts. It was a mischievous attempt, conceived in wicked folly and wrought out in ignorance, to repudiate the public debt. It could operate only prospectively, and but few of the bonds remained at the date of its enactment on which it could operate. Whatever its purpose and intent were, it could have no sort of effect on the relations then existing between Virginia and West Virginia nor between Virginia and those of her creditors who had already surrendered their bonds and received the certificates.

That by the act of February 20, 1892, entitled "An act to provide for the settlement of the public debt of Virginia not funded under the provisions of" [the preceding act], Record, p. 31,) Virginia was released. This was the first of a series of acts looking to the employment of a commission or committee as an instrumentality through which an arrangement might be made with all the holders of the bonds of every description issued by Virginia, whether funded or unfunded, under which all such bonds and the certificates issued in connection therewith might be assembled and united action taken by them with and through Virginia to obtain a final settlement of West Virginia's liability for her share of the public debt, the recovery of the amount of such liability, and the payment thereof to Virginia and the distribution by Virginia of such amount among the persons entitled thereto.

This was followed by the act of March 6, 1894 (Record, p. 39), and the act of March 6, 1900 (Record, p. 41).

On page 43 of the record appears the "Report of the commission appointed and acting under the joint resolution of the General As-

sembly of Virginia approved March 6, 1894, and the act of the said General Assembly approved March 6, 1900, with respect to certain certificates issued by the State in connection with the debt of the original State of Virginia, and known as Virginia deferred certificates."

This report is contained between pages 42 and 82 of the record. It shows all that was done by the Virginia Debt Commission and the bondholders' committee in obtaining concurrent action on the part of the creditors; it shows the scrupulous and intelligent care taken by the General Assembly of Virginia in requiring that a large majority of such creditors should unite in their demands before the Commonwealth would take decided action; it required that an open, public, formal, and earnest request should be made upon West Virginia to come into a friendly settlement of these matters before any resort should be had to the courts for redress; it shows the extreme care taken by the Attorney General of Virginia to see that he was invested with full authority, and that all the conditions precedent to its exercise had been fully performed before he would institute the proceedings provided for in the acts; it shows, too, the address made by the Virginia Debt Commission to the legislature through their spokesman, Mr. Randolph Harrison (Record, p. 66), in which are the full history of the debt, the legislation had thereon, the repeated efforts made by Virginia to induce West Virginia to come into a friendly settlement, the sanction of law on which Virginia relied to support her demand, and the unpleasant consequences that must ensue in the event of West Virginia's persistent refusal to make a settlement.

The address was received with respectful silence, and it is of consequence to note that although it was heard by the assembled body of the legislative committees of West Virginia's intelligent legislature, that not then, or at any time since, as at no time in the long period that had passed, was any intimation given, or ground of refusal to the invitation urged, that West Virginia would not enter upon the proposed settlement because a COMPACT had been entered into between the two States, and which still subsisted, by which that very legislature had been chosen as the final arbitrator of the very matter as to which Virginia was asking a settlement.

HOLMES CONRAD,
Of Counsel for Virginia.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Decision Overruling the Demurrer.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL No. 7.

COMMONWEALTH OF VIRGINIA
vs.) *In Equity.*
STATE OF WEST VIRGINIA.

[May 27, 1907.]

This is a bill filed, on leave, February 26, 1906, by the Commonwealth of Virginia against the State of West Virginia.

The bill averred that—

"On the first day of January, 1861, complainant was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose; but a portion of her liabilities though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

"In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the State, as created under her laws amounting, the former to $1,462,993.00, and the latter to $1,543,669.05 as of the same date.

"The official reports and records showing the exact character and amounts of the public debt thus contracted and how the same was created, are referred to, and will be produced upon a hearing of the case.

"(2) That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture, and to some extent to grazing and manufacturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped

stores of minerals and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio River, that the Commonwealth of Virginia, in the first quarter of the Nineteenth Century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed East of the Appalachian range, as leading up to the undeveloped territory West thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed West of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio River, since the first day of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines East of said range been first constructed; and your Oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedness to be contracted was a small amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

"(3) The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvements, in a very large measure for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropri-

ations. Indeed it appears from those records that a great majority of the Acts of the legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been a fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

"4. The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local purposes. As early as the year 1816 a Board of Public Works was created by law for the State, the members of which were elected by the voters of the State at large, and this Board had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this Board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by an examination of the numerous entries in the records of this Board extending through a number of years and showing such expenditures as made from time to time.

"5. On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was intended to withdraw Virginia from the Union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the 'Restored State of Virginia,' and will be hereafter referred to in this bill as the 'Restored State.'

"6. On the 20th day of August, 1861, the Restored State of Virginia, in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to 'provide for the formation of a new State out of the portion of the territory of this State;' Section 9 of which ordinance was as follows, to-wit:

'9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the

ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the Treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.'

"7. On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein; and it was provided by this Act of Congress that whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the Act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operation on the date last named.

"8. Pending the admission of the State of West Virginia to the Union the General Assembly of the Restored State of Virginia passed February 3, 1863, the following Act:

'That all property, real, personal and mixed, owned by, or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this state, or of the said president or directors, or of the

said board of public works, or of any person or persons, for the use of this state.'

'That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government.' ''

Complainant charged "that the property which was by the operation of this Act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate, to several millions of dollars, the exact amount your Oratrix is unable at this time more definately to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this Act, the State of West Virginia realized and received into her Treasury from the sale thereof about Six Hundred Thousand Dollars; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861."

"9. And by a further act of the General Assembly of the Restored State of Virginia passed on the next day, February 4th, 1863, it was enacted:

'1. That the sum of One Hundred and Fifty Thousand Dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

'2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys [illegible] up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State.'

"And this last named sum of One Hundred and Fifty Thousand Dollars, together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

"10. The Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union, contained the following provisions:

"By Section 5 of Article VIII. of said Constitution it was provided:

'5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability to the State, to suppress insurrection, repel invasion, or defend the State in time of War.'

"And by section 7 of Article VIII. it was provided:

'7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.'

"And by section 8 of Article VIII. it was provided:

'8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.'

"At the time the Constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any 'public debt' or 'previous liability,' except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State of Virginia above set forth. By the provisions of Section 8 of Article VIII., above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By Section 5 of the same Article VIII., above set forth, her Constitution forbade the creation of any debt 'except to meet casual deficits in the revenue, to redeem a previous liability of the State,' &c., and there was not and could not have been any such 'previous liability,' except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State. And Section 7 of the same Article of her Constitution, above cited, authorized the sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks, except those acquired, as above stated, from the original State. This section of her constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

"11. After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virgina and the State of West Virginia, respectively,

to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settlement of any kind was ever had between the two States in regard to this debt.

"12. The efforts looking to a settlement by the concurrent action of the two States having proved abortive and your Oratrix being anxious to adjust the portion of the common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

"The first of these was made by the General Assembly which was chosen at the close of the period of 'destruction and reconstruction,' which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

"The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay to the utmost every dollar which her most exacting creditor could demand of her, was expressed in the Act of her General Assembly, approved March 30, 1871.

"By the terms of settlement embodied in this Act, your Oratrix undertook to give her obligations bearing 6% interest for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest, which accrued interest to the extent of nearly $8,000,000, had been funded after the War in new bonds of Virginia, thus capitalizing at 6% not only the interest, but interest upon that interest.

"It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the State debt were attempted by the Acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892. Your Oratrix will file copies of each of the Acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

"13. As farther indicating the great burden which your Oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your Honors that, since January 1st, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over Seventy-one Million Dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as Exhibit Number 7.

"It is proper in this connection to call attention to the fact that, while your Oratrix has made this large contribution toward the

settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a number of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your Oratrix in reference thereto.

"It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several Acts above recited.

"A question may be raised as to whether such was the effect of the language used in the Act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this Court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the Act of March 30, 1871, which it was the purpose of your Oratrix that it should have.

"14. By each of the Acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your Oratrix, should be surrendered to and held by your Oratrix, who either by the express terms of the settlement provided for by said Acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your Oratrix to each creditor whose old Virginia bond was so surrendered to her.

"Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obligations of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

"Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your Oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your Oratrix and to all of her people.

"15. All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph 1 of this bill,

except a comparatively insignificant sum, not amounting to one per cent of the aggregate of those liabilities, have been taken up and are now actually held by your Oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto. They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your Oratrix, will, when it shall be proper to do so, be exhibited to the Master, who shall take the accounts hereinafter prayed for.

"16. Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your Oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding Acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of $25,000,000, by far the greater part of it being now, of course, on account of the interest computed thereon, at the rate of 6% per annum, the then legal rate in both States.

"For all of these obligations taken up and payments made on account of the common debt, your Oratrix has in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

"17. In addition to the above bonds there were outstanding on the 1st day of January, 1861, certain obligations of the State of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your Oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereafter prayed for to be taken between the two states; and in such accounts your Oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend throughout a period of so many years' duration that it is impossible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your Oratrix thereon ascertained, under the supervision of a Court of Equity.

"18. Your Oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

'First. The area of the territory now known as the State of West Virginia formed about one-third of the territory of the Com-

monwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

'Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

'Third. The State of West Virginia has further, by the repeated enactments and joint resolutions of her legislature, recognized her liability for a just proportion of this debt.

'Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property amounting in value to many millions of dollars, and held and enjoyed the same, but upon express condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

'Fifth. While the transfer of this property; real and personal, and also certain moneys of the Commonwealth of Virginia, purport to have been made to the State of West Virginia by the Act of 'The Restored Government of Virginia,' there were in fact represented in said 'Restored Government' and in the legislature thereof no other people and no other territory than that which then, as now, constitute the State of West Virginia.'

"19. The General Assembly of Virginia being anxious to effect a settlement of the portion of the common debt of the undivided State which remained unadjusted, and if possible to bring this about with the friendly co-operation and concurrence of West Virginia, adopted: 'A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of West Virginia to the payment of those found to be entitled to the same,' approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

"Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

"The efforts made by this Commission, acting under the above

resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the Commission, with the active co-operation of the Honorable Charles T. O'Ferral, the then governor of the Commonwealth made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the Act approved March 6, 1900, entitled 'An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises,' the purpose of which Act is sufficiently set forth in its title, and a copy of the act will also be hereinafter shown as one of the exhibits herewith filed.

"20. The Commission acting under said last mentioned act made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this Honorable Court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said Commission, and in strict conformity with the provisions of the said Act of March 6, 1900, all of which will be more fully and completely shown by the Report of the said Commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which Report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this Bill."

21. Enumerates exhibits attached to the bill and prayed to be regarded as part thereof.

22. The bill prayed: "Forasmuch, therefore, as your Oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your Oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this Court by such Auditor or Master as may by the Court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this Court; that the State of West Virginia may be required to produce before such Auditor or Master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between

the two States; that this Court will adjudicate and determine the amount due your Oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto your Oratrix in the premises as the nature of her case may require or to equity may seem meet."

Attached to the bill were the numerous exhibits referred to.

The State of West Virginia demurred and assigned special causes as follows:

"First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

"Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

"Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

"Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

"Fifth. That it does not appear by said bill that the Attorney General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

"Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

"Seventh. That the allegations in the said bill are not sufficient

to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

"Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

Hearing on the demurrer was had March 11, 12, 1907.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The State of West Virginia was admitted into the Union June 20, 1863, under the proclamation of the President of the United States of April 20, 1863, in pursuance of the act of Congress approved December 31, 1862, upon the terms and conditions prescribed by the Commonwealth of Virginia in ordinances adopted in convention and in acts passed by the General Assembly of the Restored Government of the Commonwealth, giving her consent to the formation of a new State out of her territory, with a constitution adopted for the new State by the people thereof. The ninth section of the ordinance adopted by the people of the Restored State of Virginia in convention assembled in the city of Wheeling, Virginia, on August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," provided as follows:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia. . ."

The consent of the Commonwealth of Virginia was given to the formation of a new State on this condition. February 3 and 4, 1863, the General Assembly of the Restored State of Virginia enacted two statutes in pursuance of the provisions of which money and property amounting to and of the value of several millions of dollars were, after the admission of the new State, paid over and transferred to West Virginia. The Constitution of the State of West Virginia when admitted contained these provisions, being sections 5, 7 and 8 of Article VIII thereof, as follows:

"5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

"7. The legislature may at any time direct a sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt and hereafter the State shall not become a stockholder in any bank." . . .

"8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

The "public debt" and the "previous liability" manifestly referred to a portion of the original debt of the original State of Virginia and liability for the money and property of the original State, which had been received by West Virginia under the acts of the General Assembly above cited, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia, though one may be involved in the other; while the provisions of sections 7 and 8 were obviously framed in compliance with the conditions on which the consent of Virginia was given to the creation of the State of West Virginia, and the money and property were transferred. From 1865 to 1905 various efforts were made by Virginia through its constituted authorities to effect an adjustment and settlement with West Virginia for an equitable proportion of the public debt of the undivided State, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it is charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia.

The original jurisdiction of this court was, therefore, invoked by Virginia to procure a decree for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts, the adjudication and determination of the amount due Virginia by West Virginia in the premises.

But it is objected that this court has no jurisdiction because the matters set forth in the bill do not constitute such a controversy or such controversies as can be heard and determined in this court, and because the court has no power to enforce and therefore none to

render any final judgment or decree herein. We think these objections are disposed of by many decisions of this court. *Cohens* v. *Virginia,* 6 Wheat. 264, 378, 406; *Kansas* v. *Colorado,* 185 U. S. 125; *Kansas* v. *Colorado,* May 13, 1907, 206 U. S. p. ; *Missouri* v. *Illinois,* 180 U. S. 208; *Same case,* 200 U. S. 496; *Georgia* v. *Copper Company,* May 13, 1907, 206 U. S. p. ; *United States* v. *Texas,* 143 U. S. 621;. *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *Michigan,* 190 U. S. 379.

In *Cohens* v. *Virginia,* the Chief Justice said: "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and the citizens of another State,' 'and between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

And, referring to the Eleventh Amendment, it was further said:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was no reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

By the cases cited, and there are many more, it is established that, in the exercise of original jurisdiction as between States, this court necessarily in such a case as this has jurisdiction.

United States v. *North Carolina* and *United States* v. *Michigan*, *supra*, were controversies arising upon pecuniary demands, and jurisdiction was exercised in those cases just as in those for the prevention of the flow of polluted water from one State along the borders of another State, or of the diminution in the natural flow of rivers by the State in which they have their sources through and across another State or States, or of the discharge of noxious gases from works in one State over the territory of another.

The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that State to Virginia, and when this court has ascertained and adjudged the proportion of the debt of the original State which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced. Consent to be sued was given when West Virginia was admitted into the Union, and it must be assumed that the Legislature of West Virginia would in the natural course make provision for the satisfaction of any decree that may be rendered.

It is, however, further insisted that this court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of Virginia to West Virginia was submitted to the arbitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the Constitution of West Virginia when admitted into the Union contained the provision: "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by the State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years." And it is said that, on May 13, 1862, the Legislature of Virginia passed an act entitled "An act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State," by which consent was given to the creation of the proposed new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling

on the twenty-sixth day of November, 1861;" and that by the act of Congress the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two States. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided "for the formation of a new State out of the territory of this State," and declared therein that "the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its Legislature should "ascertain the same as soon as practicable," it referred to the method of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the "Legislature shall ascertain" was that the Legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained. And it may well be inquired why, in the forty-three years that have elapsed since the alleged compact was entered into, Wast Virginia has never indicated that she stood upon such a compact, and, if so, why no step has ever been taken by West Virginia to enter upon the performance of the duty which such "compact" imposed, and to notify Virginia that she was ready and willing to discharge such duty.

It is also urged that Virginia had no interest in the subject-matter of the controversy because she had been released from all liability on account of the public debt of the old Commonwealth, evidenced by her bonds outstanding on the first day of January, 1861. This relates to the acts of the General Assembly of Virginia of March 30, 1871, March 28, 1879, February 14, 1882, February 20, 1892, March 6, 1894, and March 6, 1900. According to the bill, Virginia by the act of March 30, 1871, and subsequent acts, in an attempt to provide for the funding and payment of the public debt, having estimated that the liability of West Virginia was for one-third of the amount of the old bonds, provided for the issue of new bonds to the amount of two-thirds of the total, and for the issue of certificates for the other third, which showed that Virginia held the old bonds so far as unfunded in trust for the holders or their

assignees to be paid by the funds expected to be obtained from West Virginia as her "just and equitable proportion of the public debt." The legislation resulted in the surrender of most of the old bonds to Virginia, satisfied as to two-thirds, and held as security for the creditors as to one-third. We do not care to take up and discuss this legislation. We are satisfied that as we have jurisdiction, these questions ought not to be passed upon on demurrer. *Kansas* v. *Colorado*, 185 U. S. 125, 144, 145. And this also furnishes sufficient ground for not considering at length the objection of multifariousness. The observations of Lord Cottenham, in *Campbell* v. *Mackey*, 1 Mylne & Craig, 603, that it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must be left where the authorities leave it, to the sound discretion of the court, have been often affirmed in this court. *Oliver* v. *Piatt*, 3 How. 333, 411; *Gaines* v. *Relf*, 2 How. 619, 642. But we do not mean to rule that the bill is multifarious. It is true that the prayer contains, among other things, the request, "that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix in her own right and as trustee aforesaid," but it also prays that the court "will adjudicate and determine the amount due to your Oratrix by the State of West Virginia in the premises." And we understand the reference to holding in trust to be in the interest of mere convenience, and that the bill cannot properly be regarded as seeking in chief anything more than a decree for "an equitable proportion of the public debt of the Commonwealth of Virginia on the first day of January, 1861." The objections of misjoinder of parties and misjoinder of causes of action may be treated as resting on matter of surplusage merely, and at all events further consideration thereof may wisely be postponed to final hearing. *Florida* v. *Georgia*, 17 How. 491, 492; *California* v. *Southern Pacific Company*, 157 U. S. 249.

The order will be—

Demurrer overruled without prejudice to any question, and leave to answer by the first Monday of next term.

APPENDIX.

A convention of the people of Virginia met in the City of Wheeling on Thursday, June 13th, 1861, and on the 20th day of August, 1861, this convention adopted an ordinance entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State."

This ordinance provided for an election by the voters of certain counties therein named upon the question whether the new state should be formed or not and also for the selection of delegates to a constitutional convention which was to be held, if a majority of the votes cast therein was in favor of the new State. The ninth and tenth sections of this ordinance are as follows:

"9. The new state shall take upon itself a just proportion of the public debt of the commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period. All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the state of Virginia.

"The lands within the proposed state, of non-resident proprietors, shall not in any case be taxed higher than the lands of residents therein. No grants of lands or land warrants, issued by the proposed state, shall interefere with any warrant issued from the land office of Virginia prior to the 17th day of April last, which shall be located on lands within the proposed state now liable thereto."

"10. When the general assembly shall give its consent to the formation of such new state, it shall forward to the congress of the United States such consent, together with an

official copy of such constitution, with the request that the said new state may be admitted in the union of states."

CONSTITUTIONAL CONVENTION.

The election provided for in the ordinance of the 20th of August, 1861, was had and a majority of the people voted for the formation of the new State and elected delegates to a constitutional convention, which met in Wheeling in November, 1861. This convention adopted a constitution, and the following are sections five, seven and eight of article eight of that instrument:

"5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

"7. The Legislature may at any time direct a sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt; and hereafter the State shall not become a stockholder in any bank. If the State become a stockholder in any association or corporation for purposes of internal improvement, such stock shall be paid for at the time of subscribing, or a tax shall be levied for the ensuing year, sufficient to pay the subscription in full."

"8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

An ACT giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State.

Passed May 13, 1862.

1. Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio, Marshall, Wetzel, Marion, Monongalia, Preston, Taylor, Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood,

Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Upshur, Randolph, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell, Wayne, Boone, Logan, Wyoming, Mercer, McDowell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, Pendleton, Hardy, Hampshire and Morgan, according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling, on the twenty-sixth day of November, eighteen hundred and sixty-one.

2. Be it further enacted, That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of Berkeley, Jefferson and Frederick, shall be included in and form part of the State of West Virginia whenever the voters of said counties shall ratify and assent to the said constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

3. Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this commonwealth in congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union.

4. This act shall be in force from and after its passage.

An Act for the Admission of the State of West Virginia into the Union, and for other purposes.

Whereas the people inhabiting that portion of Virginia known as West Virginia did, by a convention assembled in the city of Wheeling on the twenty-sixth of November, eighteen hundred and sixty-one, frame for themselves a constitution with a view of becoming a separate and independent State; and whereas at a general election held in the counties composing the territory aforesaid on the third day of May last, the said constitution was approved and adopted by the qualified voters of the proposed State; and whereas the Legislature of Virginia, by an act passed on the thirteenth day of May, eighteen hundred and sixty-two, did give its consent to the formation of a new state within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia, and to embrace the following named counties, to-wit: Hancock, Brooke, Ohio, Marshall, Wetzel, Marion, Monongalia, Preston, Taylor,

Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood, Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Upshur, Randolph, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell, Wayne, Boone, Logan, Wyoming, Mercer, McDowell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, Pendleton, Hardy, Hampshire, and Morgan; and whereas both the convention and the Legislature aforesaid have requested that the new State should be admitted into the Union, and the constitution aforesaid being republican in form, Congress doth hereby consent that the said forty-eight counties may be formed into a separate and independent State. Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of West Virginia be, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever, and until the next general census shall be entitled to three members in the House of Representatives of the United States: *Provided, always*, That this act shall not take effect until after the proclamation of the President of the United States hereinafter provided for.

It being represented to Congress that since the convention of the twenty-sixth of November, eighteen hundred and sixty-one, that framed and proposed the constitution for the said State of West Virginia, the people thereof have expressed a wish to change the seventh section of the eleventh article of said constitution by striking out the same and inserting the following in its place, namely: "The children of slaves born within the limits of this State after the fourth day of July, eighteen hundred and sixty-three, shall be free; and that all slaves within the said State who shall, at the time aforesaid, be under the age of ten years, shall be free when they arrive at the age of twenty-one years; and all slaves over ten and under twenty-one years shall be free when they arrive at the age of twenty-five years; and no slave shall be permitted to come into the State for permanent residence therein:" Therefore

SEC. 2. *Be it further enacted*, That whenever the people of West Virginia shall, through their said convention, and by a vote to be taken at an election to be held within the limits of the said State, at such time as the convention may provide, make, and ratify the change aforesaid, and properly certify the same under the hand of the president of the convention, it shall be lawful for the President of the United States to issue his proclamation stating the

fact, and thereupon this act shall take effect and be in force from and after sixty days from the date of said proclamation.

APPROVED, December 31, 1862.

AN ACT transferring to the proposed State of West Virginia, when the same shall become one of the United States, all this State's interest in property, unpaid and uncollected taxes, fines, forfeitures, penalties and judgments, in counties embraced within the boundaries of the proposed State aforesaid.

Passed February 3, 1863.

1. Be it enacted by the General Assembly of Virginia, That all property, real, personal and mixed, owned by or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the state of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof situated within the said boundaries, and now vested in this state, or the president and directors of the board of the literaty fund, or the board of public works thereof, or in any person or persons, for the use of the state to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within the said boundaries; and all stocks of any other company or corporation, the principal office or place of business whereof is located within the said boundaries standing in the name of this state or the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state.

2. Be it further enacted, That all unpaid and uncollected arrearages of taxes on lands, town lots, property tax, capitation tax, license tax, militia fines, fines imposed by courts, forfeitures and penalties, belonging to the state in the hands of sheriffs, collectors or individuals, in any or all of the counties embraced within the boundaries of the proposed state of West Virginia, as also all bonuses on the capital stock of any bank, taxes on the dividends declared by any bank, savings institution or insurance company; dividends on stock owned by the state, or by the board of public

works, or the president and directors of the board of the literary fund, in any bank, bridge or other corporation in any one of the counties aforesaid; also taxes on seals, deeds, wills, writs and other legal processes due from the clerks of the courts, notaries public or the secretary of the commonwealth; taxes on passengers and tonnage due from railroad companies, taxes on bank notes or other property transported by express companies within the counties aforesaid; also all fines, forfeitures and penalties incurred by railroads, express companies or other parties or persons within the counties aforesaid; also all judgments, decrees or penalties incurred by officers of the state, railroad or express companies, or other persons before or since the reorganization of the state government at the city of Wheeling; also all suits and their results now pending in the name of the board of public works, or of the president and directors of the board of the literary fund in any court of any of the counties aforesaid; also all taxes on lands, town lots, property tax, capitation tax, license tax, assessed in the counties aforesaid, and due the state for the year eighteen hundred and sixty-three, in the hands of officers of the state or individuals, together with all the rights of the state, or of the board of public works, or of the president and directors of the board of the literary fund to any and all moneys and claims in the counties aforesaid that may not be specifically mentioned in this act, but that rightfully belong to the state or corporations for the use of the state, shall be the property of the State of West Virginia, when the same shall become one of the United States.

3. It shall be the duty of all sheriffs or collectors of the public revenue, also of the presidents or other officers of railroad, express, bridge or internal improvement companies, presidents and other officers of banks, savings banks and insurance companies, clerks of courts, notaries public, the secretary of the commonwealth, and of individuals owing or having money in their hands due the state, or the board of public works, or the president and directors of the board of the literary fund, in any of the counties aforesaid, to pay the same into the treasury of the state of West Virgina, when the same shall become one of the United States.

4. Be it further enacted, For the purpose of carrying this act into effect, that suits may be brought in the name of the commonwealth for the use of the state of West Virginia, when it becomes

one of the United States on any bond or claim which shall pass to or become the property of the state of West Virginia by virtue of this act.

5. Be it further enacted, That if the appropriations and transfers of property, stocks and credits provided for by this act take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state: provided that no such property, stocks and credits shall have been obtained since the reorganization of the state government.

6. It shall be the duty of the auditor of public accounts, the secretary of state, the treasurer and the adjutant general of this commonwealth to procure fit and proper blank books for the purpose, and cause to be transcribed therein true copies of all such records, official acts, orders, minutes and memoranda, and like copies of original papers upon which any such official action was based, which from its locality or general state interest appertains to and will be useful and advantageous to the state of West Virginia; and the officers aforesaid shall severally certify to the governor of this commonwealth the correctness of their respective copies; and it shall be the duty of the governor to certify to all whom it may concern, the official character of such officers so certifying under the great seal of this commonwealth, and deliver all such copies to the governor of West Virginia, when his election is officially declared, for the use of said state of West Virginia.

7. This act shall take effect when the proposed state of West Virgina shall become one of the United States.

An ACT making an appropriation to the proposed new State of West Virginia when the same shall become one of the United States.

Passed February 4, 1863.

1. Be it enacted by the General Assembly of Virginia, That the sum of one hundred and fifty thousand dollars, be, and is hereby appropriated to the state of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the states of the United States.

2. Be it further enacted, That there shall be, and hereby is ap-

propriated to the said state of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said state of West Virginia shall become one of the United States; provided, however, that when the said state of West Virginia shall become one of the United States, it shall be the duty of the auditor of this state, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said state of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this state.

3. Be it further enacted, That the act passed May fourteenth, eighteen hundred and sixty-two, making an appropriation of one hundred thousand dollars to the State of West Virginia, be, and the same is hereby repealed.

4. This act shall be in force from passage.

Legislature of 1867.

On the 25th day of January, 1867, Governor Arthur I. Boreman sent to the legislature a communication, dated on January 20, 1867, from Governor F. H. Pierpoint, of Virginia, together with a certain joint resolution adopted by the General Assembly of Virginia on the 28th day of February, 1866, in reference to the re-union of the States of Virginia and West Virginia and the adjustment of the public debt, and appointing Mr. A. H. H. Stuart, Mr. William Martin and Mr. John Janny as commissioners to proceed to the seat of government of West Virginia and giving them authority to treat with the authorities of West Virginia on both subjects. On the 28th day of February, 1867, the legislature of West Virginia adopted the following joint resolution, to-wit:

Senate Joint Resolution No. 19, "To provide Commissioners to treat with the authorities of Virginia in regard to the public debt of that State:"

Whereas, the General Assembly of Virginia, on the twenty-eighth day of February, 1866, adopted a series of resolutions deeply lamenting the dismemberment of the "Old State," and declaring a

sincere desire to establish and perpetuate the reunion of the States of Virginia and West Virginia, and appealing to their brethren of West Virginia, to concur with them in the adoption of suitable measures of co-operation in restoration of the ancient Commonwealth of Virginia, with all her people and up to her former boundaries, and further providing for the appointment of three Commissioners with authority to treat on the subject of the restoration of the State of Virginia to its ancient jurisdiction and boundaries, and further empowering said Commissioners to treat with the authorities of the State of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State;

And whereas, Commissioners have been appointed on the part of the State of Virginia pursuant to, and for the purpose named in the resolutions aforesaid;

And whereas, the citizens of West Virginia deeply regret the civil strife, (for which they are in no way responsible) in the midst of which they secured their State organization, yet they regard their separate State existence of the most vital importance to them, and have no purpose or intention whatever, of reuniting with the State of Virginia;

And whereas, the citizens of this State are not only willing but deeply anxious that a prompt and equitable settlement should be made between the State of Virginia and West Virginia, and they greatly regret that the State of Virginia has interposed a difficulty by the institution of a suit against this State, to recover jurisdiction over the counties of Berkeley and Jefferson, which they fear will delay such settlement; Therefore,

Resolved by the Legislature of West Virginia:

1. That the people of this State are unalterably opposed to a reunion of this State with the State of Virginia, and will not entertain any proposition looking to that end.

2. That so soon as the suit of Virginia against this State, now pending in the Supreme Court of the United States, to recover jurisdiction over the counties of Berkeley and Jefferson has been finally disposed of, the Governor of this State appoint three Commissioners on the part of this State to treat with the Commissioners appointed by the State of Virginia upon the adjustment of the public debt of said State as provided in Section IX of "An ordinance to provide for the formation of a new State," adopted by a

convention of the people of Virginia on the 20th day of August, 1861, and in Section VIII, of Article VIII of the Constitution of West Virginia, and report their action to the Governor, to be by him communicated to the Legislature of this State for their approval or disapproval.

Legislature of 1870.

Governor William E. Stevenson in his message on the 18th of January, 1870, called attention to the resolution of February 28th, 1867.

On the 24th day of February, 1870, Gov. William E. Stevenson transmitted to the Legislature of West Virginia, then in session at Wheeling, a communication from Gilbert C. Walker, then Governor of the Commonwealth of Virginia, enclosing an act entitled "An Act for the adjustment of the public debt with the State of West Virginia," which had been passed by the General Assembly of Virginia on the 18th day of February, 1870.

On the 28th day of February, 1870, the Governor of West Virginia transmitted to the Legislature of West Virginia a communication from Messrs. William J. Robertson, W. T. Sutherlin and P. H. Aylett, commissioners appointed on the part of Virginia with reference to the settlement of the public debt of Virginia.

On the 1st day of March, 1870, the Legislature adopted the following joint resolution:

Joint Resolution raising a Joint Committee to confer with the Commissioners appointed by the State of Virginia, to adjust the Public Debt with the State of West Virginia.

WHEREAS, The State of Virginia, by act approved February the eighteenth, eighteen hundred and seventy, provided for the appointment of three commissioners to treat with the authorities of the state of West Virginia upon the subject of a proper adjustment of the public debt of the state of Virginia; and

WHEREAS, The governor by a communication dated February twenty-fourth, eighteen hundred and seventy, notified the legislature of the passage of the above recited act; and

WHEREAS, The governor on the twenty-eighth of February, eighteen hundred and seventy, notified the legislature that said commissioners, on the part of Virginia, had been appointed, and are now in the city of Wheeling for the purpose of carrying said act, above recited, into effect, therefore,

Resolved by the Legislature of West Virginia, That a joint committee of two upon the part of the Senate and three upon the part of the House of Delegates, be appointed by the presiding officers of their respective bodies, to confer with said commissioners, and report to this legislature the result of said conference.

2. All communications connected with said commission are hereby referred to said committee.

On the part of the Senate, Henry G. Davis and William I. Boreman were appointed.

On the part of the House, John J. Davis, Henry Brannon and Francis H. Pierpoint were appointed.

Joint Resolution adding two members to the joint special committee to confer with the Virginia commissioners.

Resolved by the Legislature of West Virginia, That Daniel Lamb, on the part of the house, and one member on the part of the senate, be added to the joint special committee, to confer with the commissioners of Virginia, in relation to the Virginia state debt.

ADOPTED March 1, 1870.

The additional member on the part of the senate was J. D. Ramsdell.

So far as the journals of the House and Senate of the session of 1870 show, no report was made by this committee.

On the 3rd of March, 1870, the following resolution was adopted:

Joint Resolution relating to the adjustment of the public debt with the commissioners appointed for the purpose by the State of Virginia.

Resolved by the Legislature of West Virginia, That the governor appoint three resident citizens of this state, one from each congressional district, to treat with the authorities of the state of Virginia on the subject of a proper adjustment of the public debt of that state, due or incurred prior to the first day of January, eighteen hundred and sixty-one, and a fair division of the property belonging to that state on that day; and make report thereof to this legislature for its approval or disapproval at its next regular session, with the facts and documents upon which their report is founded. Provided, that nothing herein contained shall be construed as waiving or impairing in any way the rights of this state to jurisdiction over the counties of Berkeley and Jefferson.

2. The commissioners so to be appointed shall proceed without

delay in the execution of their duties, and as compensation for their services, shall receive six dollars per day for the time actually employed therein, and the same mileage as that allowed to members of the legislature.

Legislature of 1871.

Gov. William E. Stevenson in his message to the Legislature of 1871 discussed at length the Virginia debt proposition and explained the reasons why no report was made under the above resolution and submitted the matter again to this Legislature.

On the 15th day of February, 1871, the Legislature adopted the following joint resolution:

Joint Resolution authorizing the appointment of commissioners to treat with the state of Virginia on the subject of the state debt.

Resolved by the Legislature of West Virginia:

1. That the governor, on or after the fifteenth day of March, 1871, appoint three disinterested citizens of this state to treat with the authorities of the state of Virginia on the subject of a proposed adjustment of the public debt of that state prior to the first day of January, 1861, and make report thereof to the governor, to be printed and communicated by him to the legislature, at the commencement of its next session, for approval or disapproval.

2. The commissioners so to be appointed are further directed to ascertain and report the amount of said debt then held by persons other than the state of Virginia, and what said debt was incurred for, and what amount of this state debt was then held by the commissioners of the sinking fund and by the board of the library fund; that they ascertain and report the amount of all investments then held by the state, their respective amounts and character, and what portions thereof were then productive, and the dividends therefrom, and whether any of such investments then so held by said state have since been donated, changed, converted or disposed of by the authorities of said state, and if so, the amount and how disposed of; that they ascertain and report the revenue derived for the fiscal year ending on the thirtieth of September, 1860, from all sources, by the state of Virginia, within the present territory of Virginia, and the amount derived from all sources from the territory now composing the state of West Virginia; and that they report any other relevant matter deemed proper by them.

3. The commissioners so to be appointed shall proceed without

delay in the execution of their duties, and as a compensation for their services shall each receive six dollars per day for the time they or any one or more of them may be actually employed therein, and the same mileage as that allowed to the members of the legislature, and may employ such accountant or clerk, at a reasonable compensation, as they may deem necessary: and the governor shall have the power to remove any one or more of the commissioners, and fill any vacancy that may occur from removal, death or failure to act.

4. Nothing herein contained shall be construed as waiving or impairing in any way the rights of this state to jurisdiction over the counties of Berkeley and Jefferson.

5. That the foregoing resolutions be communicated by the governor to the governor of Virginia.

ADOPTED, February 15, 1871.

On the 15th day of February, 1871, the Legislature adopted the following joint resolution:

STATE OF WEST VIRGINIA,
EXECUTIVE DEPARTMENT
Charleston, February 17, 1871.

Gentlemen of the Senate:

I have the honor herewith to transmit a certified copy of a Joint Resolution, adopted by the General Assembly of Virginia, and approved February 11, 1871, tendering to West Virginia an arbitration for the apportionment of the public debt, which I this day received from His Excellency the Governor of Virginia. The resolution is accompanied by a letter from His Excellency, addressed to the Governor and Legislature of West Virginia, which I also respectfully communicate.

W. E. STEVENSON,
Governor.

COMMONWEALTH OF VIRGINIA,
EXECUTIVE CHAMBERS,
Richmond, February 10, 1871.

To His Excellency, the Governor, and General Assembly of West Virginia:

In pursuance of the authority vested in the Governor by a Joint Resolution passed by our General Assembly, and approved on the fourteenth day of February instant, entitled "Joint Resolution

tendering to West Virginia an arbitration for the apportionment of the public debt," an authenticated copy of which is hereto attached, I, Gilbert C. Walker, Governor of the Commonwealth of Virginia, on behalf of said Commonwealth, do hereby tender to the State of West Virginia "an arbitration of all matters touching a full and fair apportionment between said States, of the said public debt, contracted by the State of Virginia prior to January 1, 1861," upon the conditions in said Joint Resolution specified, viz: Each State to select two arbitrators, not residents thereof, and the four thus selected to appoint an umpire, if they shall deem it advisable, and the arbitrators and umpire thus chosen, to proceed, as soon as practicable, to adjust, award and decide upon fair, just and equitable principles what proportion of said public debt should be paid by West Virginia, and what part thereof should be paid by the State of Virginia: each State being represented by counsel if desired. The sole duty of the arbitrators and umpire will be to ascertain the amount of the public debt which each State ought justly to assume and pay.

It is earnestly hoped that the State of West Virginia will promptly accept this fair and equitable mode of adjustment of the public debt, to the end that the question involved may be speedily, satisfactorily and finally settled.

I have the honor to be, very respectfully, your obedient servant,

G. C. WALKER,
Governor of the Commonwealth of Virginia.

JOINT RESOLUTION.

Tendering to West Virginia an arbitration for the apportionment of the public debt.

(Approved February 11th, 1871.)

WHEREAS, The constitution of both Virginia and West Virginia impose upon the respective legislatures of said States the duty to provide by law, for the adjusting between them the proportion of the public debt, contracted prior to the first of January, 1861, proper to be borne by each of said States; and

WHEREAS, It is essential to the financial interests of Virginia

that said settlement should be obtained as soon as practicable, therefore

Be it Resolved by the General Assembly of Virginia:

That the Governor of this Commonwealth be, and he is hereby, authorized to tender to the State of West Virginia an arbitration of all matters touching a full and fair apportionment between said States of the public debt, and in the event of the acceptance of such offer of arbitration by West Virginia, then the Governor, Lieutenant Governor, President of the Court of Appeals, Auditor of Public Accounts and the Secretary of the Commonwealth shall appoint two arbitrators on the part of this State, who shall not be citizens of this State, to meet any two arbitrators selected by West Virginia, not citizens of said State.

The arbitrators so appointed shall, if they deem it advisable, appoint an umpire. Said arbitrators and umpire shall, as soon as practicable, proceed to adjust, award and decide upon fair, just and equitable principles what proportion of said public debt shall be paid by West Virginia, and what part thereof shall be paid by this State. Said apportionment, when ascertained and made, to be reported by said arbitrators to the Legislatures of said States, to enable them to carry out such award or apportionment by appropriate legislation.

Each State may be represented by counsel, and the board hereby directed to appoint the arbitrators for Virginia shall be, and are hereby, authorized to draw on the Treasury of the State of Virginia, out of any money not otherwise appropriated, a sum sufficient to defray the necessary expenses of this arbitration on the part of Virginia.

A copy.

(Signed) J. BELL BIGGER,

Clerk of House of Delegates and Keeper of the Rolls of Virginia, February 11, 1871.

On the same day the Legislature adopted the following joint resolution:

"Senate Joint Resolution No. 19, 'Raising a Joint Special Committee to consider the communication from the Governor of Virginia, concerning the proposed arbitration of the debt between Virginia and West Virginia.' "

"*Resolved by the Legislature of West Virginia:*

"That a Joint Special Committee of three on the part of the House of Delegates, and two on the part of the Senate, be appointed to consider and report on the communication from the Governor of Virginia, concerning the proposed arbitration of the public debt between Virginia and West Virginia."

On the part of the Senate, Mr. Henry G. Davis and Mr. George Koonce were appointed as members of such committee, and on the part of the House, Mr. James M. Jackson, Mr. James H. Ferguson and Mr. George C. Sturgiss were appointed as members of such committee.

On the 20th day of February, 1871, this special committee made the following report:

"*To the Legislature of West Virginia:*

"The Joint Special Committee, to whom was referred the special message of the Governor of the State, enclosing a Joint Resolution of the General Assembly of Virginia and the communication of the Governor of said State, tendering to West Virginia an arbitration for the apportionment of the public debt of Virginia contracted prior to the first of January, 1861, have had the same under consideration and submit the following

REPORT:

"The Legislature, by Joint Resolution No. 21, passed February fifteenth instant, having conferred upon the Governor authority, and instructed him to appoint three disinterested citizens of this State to treat with the authorities of the State of Virginia, on the subject of a proper adjustment of the public debt of that State, prior to the first day of January, 1861, and the authorities of the State of West Virginia having ever evinced a sincere desire to adjust and settle at the earliest practicable moment, the proportion of said debt proper to be borne by each of said States, and the Committee believing that the citizens of the respective States would of necessity be more familiar with the circumstances attending the creation of said debt and the many intricate questions connected therewith, and upon the proper comprehension of which must depend the equitable adjustment and apportionment of the same between said States, recommend that said tender of arbitration by arbitrators and umpire not citizens of either State, be respectfully

declined; and that the said State of Virginia be invited to appoint three disinterested citizens of that Commonwealth as Commissioners, with authority to treat with like Commissioners to be appointed under said Joint Resolution No. 21, on behalf of this State, with power to adjust, award and decide upon fair, just and equitable principles, what proportion of said debt should be paid by each of said States, subject to the ratification and approval of the General Assembly of Virginia and the Legislature of West Virginia; and to carry out the objects herein stated; the Committee recommend the adoption of the following:

"Senate Joint Resolution No. 21, 'Providing for the settlement of the debt between Virginia and West Virginia.' "

"WHEREAS, The Legislature of West Virginia in discharge of the duty imposed by the Constitution of the State, to 'ascertain as soon as may be practicable' the equitable proportion of the public debt of the Commonwealth of Virginia to be assumed and liquidated by this State, has authorized and directed by Joint Resolution passed on the fifteenth day of February, 1871, the appointment by the Governor of 'three disinterested citizens of this State to treat with the authorities of the State of Virginia on the subject of a proper adjustment of the public debt of that State, prior the first day of January, 1861;' " and

"WHEREAS, The Governor of the Commonwealth of Virginia, by authority conferred by a Joint Resolution of the General Assembly of said Commonwealth, passed February 11th, 1871, has tendered on behalf of said Commonwealth to the State of West Virginia, 'an arbitration of all matters touching a full and fair apportionment between said States, of the said public debt' by arbitrators, not citizens of either of said States, and not subject to the ratification of the legislative departments of said States; and

"WHEREAS, Any adjustment of the said debt should be subject to such ratification; and

"WHEREAS, Citizen commissioners would of necessity be more familiar with the circumstances attending the creation of said debt, and the many intricate questions connected therewith, and upon the proper comprehension of which must depend the equitable apportionment and adjustment of the same between said States; therefore,

"*Resolved by the Legislature of West Virginia:*

"1. That the tender of an arbitration made by the Governor of the Commonwealth of Virginia to this State for the adjustment of the public debt of said Commonwealth, having been anticipated

by the action of the Legislature of this State, authorizing the appointment of Commissioners to treat upon said subject, the said tender is respectfully declined, and the Commonwealth of Virginia is invited to appoint three disinterested citizens as Commissioners with authority to treat with like Commissioners heretofore authorized on the part of this State. And said Commissioners on behalf of this State in addition to the powers heretofore conferred, are hereby further empowered to proceed, as soon as practicable, to adjust, award, and determine, upon fair, just and equitable principles, what proportion of said public debt of Virginia should, in their opinion, be paid by West Virginia, and what part thereof should be paid by Virginia, subject, however, to the approval and ratification of the Legislature of West Virginia and the General Assembly of Virginia.

"2. The governor of this State is hereby directed to communicate to the Governor of the Commonwealth of Virginia, without delay, certified copies of this preamble and Joint Resolution.

Respectfully submitted.

JAMES M. JACKSON,
JAMES H. FERGUSON,
GEORGE C. STURGISS,
H. G. DAVIS,
GEORGE KOONCE,
Committee."

"February 20, 1871."

This report was signed by all the members of the Committee and the resolution therein set out was on the 24th day of February, 1871, adopted by the Legislature.

Under the resolutions of February 15th and 24th Governor J. J. Jacob appointed Mr. John J. Jackson, Mr. J. M. Bennett and Mr. A. W. Campbell.

REPORT

OF THE

Virginia Debt Commissioners of 1871.

REPORT

OF THE

VIRGINIA DEBT COMMISSIONERS OF 1871.

To His Excellency,
J. J. JACOB,
Governor of West Virginia:

SIR: Under the joint resolutions passed by the West Virginia Legislature on the 15th and 24th days of February, last, the undersigned were appointed Commissioners by you "to treat with the authorities of Virginia on the subject of a proposed adjustment of the public debt of that State prior to the first day of January, 1861," and were directed by the legislature "to make report thereof to the Governor," which we have the honor to do as follows:

On the 9th day of August last the Commissioners met in Parkersburg to confer together upon the subject matter of their appointment and to organize a programme of procedure in respect thereof. They addressed a letter to your Excellency notifying you of their meeting and organization, and also the following letter to Governor Walker, of Virginia:

PARKERSBURG, W. VA., }
AUGUST 9, 1871. }

To His Excellency, the Governor of Virginia:

SIR: The undersigned have the honor to inform you that under the joint resolutions passed by the legislature of West Virginia on the 15th and 24th days of February last, they have been appointed Commissioners by the Governor of West Virginia to treat with Virginia in regard to the debt as it stood on the first day of January, 1861."

Also, that they met in this city to-day for the purpose of entering upon the discharge of their duties, and to this end have designated General John J. Jackson as their chairman, through whom they propose to receive such communications as your Excellency may be pleased to submit.

Will your Excellency be pleased to indicate at your earliest convenience what action, if any, has been or is likely to be taken by Virginia in the matter of appointing Commissioners, or, in the event of no such appointments, what channel of communication will be open to us.

We have the honor to be
Your Excellency's most ob't servants,
JOHN J. JACKSON,
J. M. BENNETT,
A. W. CAMPBELL.

After forwarding this letter, together with the one to your Excellency, the Commissioners adjourned to meet in Richmond on a day to be agreed upon later in the season, there to confer with the authorities of Virginia, and to make such examination of public documents as might enable them to carry out the objects of their appointment.

Meanwhile they received from the Governor of Virginia in answer to their letter of August 9th, a letter dated September 7th, the same purporting to be a copy of a letter addressed to your Excellency, and which is as follows:

EXECUTIVE CHAMBERS,
RICHMOND, Sept. 7, 1871.

His Excellency,
J. J. JACOB,
Governor of West Virginia:

SIR: I have the honor to acknowledge the receipt of your communication of the 17th ulto., notifying me of the appointment of Messrs. Bennett, Jackson and Campbell as Commissioners on behalf of the State of West Virginia to treat with the authorities of this State upon the subject of the State debt. I have also received a certified copy of the joint resolutions empowering you to make these appointments. Absence from the capital has prevented an earlier response to these several communications.

On the 18th of February, 1870, an act was passed by the Legislature of this State, and approved by me, authorizing the Governor to appoint three Commissioners on behalf of this State to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, and a fair division of the public property.

Commissioners were promptly appointed under this act, and notice of their appointment, together with an authenticated copy of the act, were at once forwarded to the Governor of West Vir-

ginia. No response whatever to my communication was made by the Governor of West Virginia, but I learned through other sources that the matter was promptly submitted to the Legislature then in session, by which, either by act or resolution, the Governor was authorized to appoint Commissioners to meet and confer with those appointed from Virginia. I have never been informed, however, of the appointment of any Commissioners under the authority thus conferred.

A history of these proceedings, together with a statement of my own views upon the subject, was submitted to our Legislature in my annual message of December last, a copy of which I herewith enclose. The Legislature, acting upon the suggestion of the message, on the 11th day of February last, by a joint resolution, authorized the Governor to tender to the State of West Virginia "an arbitration of all matters touching a full and fair apportionment between said States of the said public debt," an authenticated copy of which joint resolution, together with the tender of an arbitration as therein authorized, was promptly forwarded to the Governor of West Virginia.

This joint resolution, while it does not in terms repeal the act of February 18th, 1870, was intended to *supercede* it, and therefore I do not feel authorized to appoint Commissioners. Our tender of an arbitration has not been withdrawn, and I regret exceedingly that the authorities of West Virginia declined to accept it. I cannot understand what reasonable objection can be raised to this fair and equitable mode of adjustment so frequently resorted to by individuals and nations, and I trust that West Virginia will reconsider her action and accept the more speedy and satisfactory mode of settlement proposed by Virginia, to the end that prompt justice may be done to the creditors of the old State, and that harmony and good feeling may prevail between the people of the two States.

Very respectfully,

Your Excellency's ob't servant,

G. C. WALKER
Governor of Virginia.

(P. S.—Accompanying the above.) "The foregoing is a copy of the original letter mailed to Governor Jacob."

From this letter we at once understood that so far as a conference with Commissioners or other persons authorized to represent Virginia in that capacity was concerned, our mission was at an end. But the joint resolution under which we were acting, copies of which you had forwarded for our guidance, directed that we should "ascertain and report the amount of the debt of Virginia on the first day of January, 1861, and what said debt was incurred for, and what amount of this State debt was then held by the Com-

missioners of the Sinking Fund, and by the Board of the Library Fund." Also that we should "ascertain and report the amount of all investments then held by the State, their respective amounts and character, and what portion thereof were then productive, and the dividends therefrom, and whether any of such investments then held by said State have since been donated, changed, converted or disposed of by the authorities of said State, and, if so, the amount and how disposed of." Also that we should "ascertain and report the revenue derived from the fiscal year ending on the 30th of September, 1860, from all sources by the State of Virginia within the present territory of Virginia and the amount derived from all sources from the territory now comprising the State of West Virginia;" and also that we "report any other relevant matter deemed proper" by us.

In addition to the foregoing duties thus devolved upon us by the terms of the joint resolution passed on the 15th day of February, we "were further empowered," in the language of the additional joint resolution passed on the 24th of the same month, "to proceed as soon as practicable to adjust, award and determine upon fair, just and equitable principles what proportion of said public debt of Virginia should in their opinion be paid by West Virginia, and what part thereof should be paid by Virginia, subject, however, to the approval and ratification of the Legislature of West Virginia and the General Assembly of Virginia."

Under this authority and direction, thus minutely specified to us, we felt called upon to take substantially the same steps after the receipt of Governor Walker's letter of September 7th as we would have taken had we expected to meet Commissioners representing Virginia, viz: to go to Richmond and endeavor to gather the information expected and required under the terms of our appointment.

Accordingly we met in that city on the 9th of November last and after spending several days in the examination of such public documents as were available to us at the Capitol, and realizing the necessity for further and more explicit and official information than we could gather of ourselves unassisted from said documents, we addressed the following note to the Second Auditor of Virginia:

RICHMOND, November 14th, 1871.

To the Second Auditor of Virginia:

SIR: I am directed by the Commissioners representing West Virginia in the matter of the public debt of Virginia prior to the

first of January, 1861, to procure from your office such information as can be furnished upon the following points, viz:

1. The actual amount of the public debt of Virginia on the first of January, 1861. And under this head the amounts of said debt owned by the Sinking Fund, the amount owned by the Literary Fund, and the amount owned by the Library Fund.

2. What portion of the bonded debt was invested, and how invested on the first of January, 1861. Also what portion of the investment was productive, what were the dividends or profits arising therefrom for the year 1860, and whether any such investments have since been donated, changed, converted or otherwise disposed of.

3. What portion of the appropriations expended in West Virginia for public improvements came from the sales of State bonds and what portion from the revenues or taxes of Virginia.

4. A copy of the advertisement for the redemption of a portion of the public debt on the first of January, 1861.

5. A statement of the amount of public debt actually redeemed on the first of January, 1861, pursuant to said advertisement.

Upon these points the Commissioners desire to hear from you at your earliest convenience.

Very respectfully, your obedient servant,

A. W. CAMPBELL,
Secretary.

In reply to the foregoing communication we received the following note at 5 o'clock on the evening of the 16th of November, after a lapse of two and a half days, and after we had abandoned all hope of the assistance asked for in our letter, and after, in fact, we were on the eve of our departure for home:

SECOND AUDITOR'S OFFICE,
RICHMOND, Nov. 16, 1871.

A. W. Cambell, Esq., Secretary, &c.:

DEAR SIR:—Yours of the 14th was received. You ask me for a report upon a variety of questions connected with our public debt, the transactions of the Board of Public Works in regard to it, and the financial affairs of the State, which it is understood, of course, you propose to use in the contemplated adjustment of the portion to be paid by West Virginia of the debt.

To answer the questions propounded would involve an amount of labor which we could not bestow on the subject.

But, apart from this, I presume at an early day this office will be called upon by the Executive or the General Assembly of Virginia for detailed reports of all the matters referred to, which will be available to you.

The books and records of this office are open to your inspection.

I trust that in failing to respond to your inquiries you will not regard me as in any wise wanting in official courtesy to you or your associates. None, certainly, is intended.

I have the honor to be,

Most respectfully yours,

ASA ROGERS.

With the reception of this note the Commissioners closed their labors in Richmond, finding that a further stay was not likely to add to the scant information already gleaned by them from the public documents.

It is proper to say in connection with the Second Auditor's communication that we, in delivering our own communication to him, caused it to be verbally understood that we were ready and willing to pay for the services of an expert, competent to obtain for us the information requested, and that we did not desire or intend to trench upon the services of any one with whose duties the labor required might seriously conflict.

After this termination of their visit to Richmond, the Commissioners agreed to meet again on the 12th of December following, at Parkersburg, there to prepare and transmit to your Excellency such information as they had been able to obtain, and such as they might still further obtain, and along with it such an expression of opinion as is called for in the joint resolution of February 24th.

Accordingly we met in Parkersburg at the date named, and after nearly two weeks of examination and comparison of all the sources of information accessible to us, agreed upon and drew up the facts and statements hereinafter presented.

Previous to this meeting we had just received copies of the Richmond papers of December 7th, containing Governor Walker's message to the General Assembly of Virginia at its meeting on the 6th, in which we observed that among other allusions to the debt question pending between the two States, and after a reference to our correspondence with him of August last and his answer there-

to, as already quoted, he proceeds to arraign the good faith of the authorities of this State as follows:

"Now, if the authorities of West Virginia entertained an earnest desire to make a speedy and final settlement of this matter, why did they not accept our tender of arbitration? A mode of settlement of such controversies universally recognized by both nations and individuals as right and appropriate. Suppose an equal number of Commissioners appointed by each State, and that they should meet and disagree upon any or all points involved, who is to decide between them? And yet, beyond a doubt, they would radically disagree upon the first or chief point to be settled, viz: the basis or principle upon which the settlement should be made. But suppose that the Commissioners should finally agree, does any one suppose that their finding would be ratified by the legislatures of the two States, disagreeing as the people do radically upon the merits of the question at issue? Of course not."

This quotation from Governor Walker's message fairly exhibits the spirit in which he has seemed to view not only our own efforts to carry out the objects of our appointment but likewise the sincerity and good faith of the Legislature of West Virginia in providing for the appointment of such a commission by your Excellency. And yet while this is the case it is not to be forgotten that Virginia herself initiated this method of attempting to adjust the debt question. And the language of the Governor would seem to be all the more gratuitous in such a connection from the fact that in his annual message of December 7th, 1870, he considered it worth while to allude to the political change that had taken place in this State at the preceding October election, and bespoke in so many words for the "new administration" an "opportunity of manifesting its intentions and its appreciation of honesty and fair dealing." And yet notwithstanding this language by himself thus voluntarily employed on our behalf, and notwithstanding also the fact that one of the early acts of the "new administration" was to respond to the policy that Virginia herself had initiated, and before it was known in this State that she had changed that policy, and while the appointees under the response were in Richmond seeking in vain from the proper authority of Virginia for such information as every debtor is entitled in law to receive from his creditor, saying nothing of that spirit of "fair dealing" that was so conspicuously spoken on our behalf, Governor Walker proceeds in his late message to asperse the good faith of the State of West Virginia after the manner and in the words that we have quoted.

The authorities of West Virginia have never assumed to themselves any right of precedence in the matter of a policy for adjusting the difficulties surrounding the debt question. But in the joint resolution passed on the 24th of February last they did assume the modest right of adhering to the policy already inaugurated

by the State of Virginia, and by her so freely tendered heretofore for their acceptance, and therefore they respectfully declined to adopt a new and different proposition from her until they could test the merits of the one already adopted.

Apparently the present Executive of Virginia, from an enforced familiarity with the workings of "personal government," which he so much deplores, has acquired ideas as to the right of the initiative between equal contracting parties that are scarcely consistent with the delicacy of the issue pending between this State and his own. For instance, in his letter of September the 7th, he tells us that the legislature of Virginia, upon his suggestion, has tendered an arbitration to this State, and he trusts "that West Virginia will reconsider her action and accept the more speedy and satisfactory mode of settlement proposed by Virginia." And again, in his late message, he says that "the better course to be pursued is for the two States to submit the whole question to arbitration," and West Virginia is arraigned, as heretofore shown, for not concurring in his opinions. Apparently it did not occur to the Governor that since Virginia had proposed both modes of settlement to this State, the latter might make her choice between them without subjecting her motives to imputation. And yet all that she had assumed to do is simply to chose between two policies initiated by Virginia. Unless, therefore, it can be shown that it is the prerogative of that State to prescribe the terms upon which the debt shall be adjusted the question should hereafter be discussed in a spirit better calculated to allay all sectional irritation.

But we pass from this incidental reference to Governor Walker's strictures upon the attitude of this State towards the debt question to the action of the Virginia legislature upon the same question as embodied in the act approved on the 30th of March last, and known as the Funding bill. This act is in keeping with the initiatory legislation in regard to the debt to which we have just referred. It assumes to apportion the debt of that State arbitrarily, notwithstanding her authorities had six weeks before the passage of the act received notice of the joint resolution of the West Virginia Legislature providing for the appointment of Commissioners. It assumes, also, to apportion the debt, not as it stood on the first day of January, 1861, but as it would stand on the first day of July, 1871, after the interest had been twice compounded, once in 1866, and again at the date last named; and to apportion it, too, upon the basis of territory and population, and without any reference to the equities that should always govern an assignment of debt between sections that were so notorious in our own case. In other words it assumes to apportion to West Virginia one-third of the debt as it now stands, simply on the ground that she has one-third of the territory and population formerly belonging to Virginia,

and without reference at all to the question of resources and values. This is apparently the practical result which Governor Walker hoped to reach when he urged upon us the "more speedy and satisfactory mode of settlement proposed by Virginia," inasmuch as he tells us in his late message that this is the "plan for a reorganization of the State debt," which he "had recommended twelve months before."

But without reference to the authorship of this or any other "plan" for adjusting the debt question, we propose to consider as briefly as possible the real cause now pending between Virginia and West Virginia as we understand it.

The tables or statements which we annex as part of our report show, among other things, the following facts:

That the funded debt of Virginia on the first day of January, 1861, was $31,778,867.32, after all reductions.

That all, or nearly all, of this debt was incurred for and actually expended in works of public improvements, such as canals, railroads, turnpikes, plank roads and bridges.

That this vast sum, upwards of $30,000,000 was expended for improvements in the present State of Virginia, and only about two and a half millions in the present State of West Virginia.

That the present State of Virginia contains 41,352 square miles and West Virginia only 20,000 square miles, or less than one-third.

That the counties composing what is now Virginia contained by the census of 1860 a population of 1,220,829, and those composing West Virginia only a population of 374,985, or less than one-fourth.

To these exhibits we append others, under our instructions from the legislature, but they are such as do not enter into our argument here, which is to show that no just apportionment of the debt can be made upon the basis of population and territory alone, which is the basis upon which the Virginia Funding bill is confessedly predicated.

This theory of apportionment is apparently quite current among the people of that State, and is defended with ability by Judge Meredith, of Richmond, in a carefully prepared paper on the subject. His position is that West Virginia should pay one-third of the debt because, as he says, it is a principle of international law governing the division of nations that "the obligations which had accrued to the whole before the division are, unless they are the subject of special agreement, ratably binding upon the different

parts." This he gives as a quotation from Phillimore. Two inquiries present themselves in connection with it. First, was Virginia a nation in the sense intended by Phillimore? and, second, what are we to understand by a ratable part of a debt? We presume that it will not be contended that the general rights and obligations of a nation, as defined by international law, belonged to Virginia prior to the division of the State, and therefore we cannot admit the applicability of the quotation in that particular. Neither can we admit Judge Meredith's construction of the word ratable. He applies it exclusively to territory and population and excludes everything in the shape of resources and value, such as public works, buildings and institutions, which, as we all know, vitally affect the equity of a division of territory.

Judge Meredith next adduces the following quotation from Chancellor Kent to sustain his position:

"If a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement those rights are to be enjoyed and those obligations fulfilled by all the parts in common."

This quotation is much more intelligible and just, and we think will tend to sustain the conclusions we have reached, as hereinafter stated.

In addition to the two quotations already given, Judge Meredith cites other authorities to sustain his position that West Virginia is chargeable with one-third of the debt, but we do not regard them as applicable to the case under consideration. First, because Virginia is not a nation. Second, because in all the cases referred to in the authorities quoted, treaty stipulations had more or less to do with the question. Third, because the debts were war debts, the benefits of which, if any, accrued to each individual, and the obligations of which therefore rested upon each. In no instance was the debt created for internal improvements which necessarily confer partial and local benefits that in most cases exceed the general benefit to the State at large. We, therefore, fail to see the proper analogy that should exist to make these citations precedents for the case of Virginia and West Virginia.

Judge Meredith winds up these references to various authorities, by two general deductions of his own, as follows:

1. "That the public debt of a State is not affected by a change in the form of its government, nor by the partition of its territory into two States, but remains in full force and must be discharged."

2. "That if a State be divided into two or more States, the debts

which had been contracted by the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts in proportion to territory and population."

The first deduction it is not necessary to consider, as West Virginia, in her ordinance of separation from Virginia, as also in her constitution, agreed to pay an equitable proportion of the public debt. What that equitable proportion is we are now considering.

In reference to the second deduction we have to remark that Judge Meredith draws a conclusion from his authorities which they do not sustain. Phillimore, for instance, says that "if a nation be divided into various distinct societies, the obligations which had accrued to the whole before the division are ratably binding upon the different parts." Here Phillimore and the authorities stop. But this does not suffice for the Virginia side of the question, and Judge Meredith adds after the word "parts" the words "in proportion to territory and population." These words are not found in any of the authorities, so far as we are advised, and certainly not in any of the quotations adduced by the Judge.

A moment's consideration will show that a division of debt according to population and territory would not only be impracticable but would conflict with common sense. It would be impracticable because it does not determine the relative value of each one of the two elements of population and territory. Suppose the population to be twice as much as the territory, or suppose the territory to be three times as great as the population, which element has the greater value in determining the result?

Without pursuing this thought further it is manifest that nothing is settled by such a rule. You must fix the relative value of the two elements before you can reach a conclusion. It is, therefore, plain why the books do not give the rule as stated by Judge Meredith. Because of its indefiniteness, but mainly because of its injustice. Would any sane man lay down a rule for the division of a State which would ignore the great cities, public improvements, public works, institutions of all kinds, great commercial advantages, such as rivers and harbors and the great advantage of fertility of soil; all of which, and many other elements of wealth, property and power, might be found in one division and be wholly absent in the other. Hence we say that such a rule is repugnant to common sense.

A public debt is mainly a charge upon the wealth and resources of a people. It is represented by taxes, and taxes are imposed not on numbers or square miles but on resources and values. How much stronger is the case when the very debt under consideration

was created in developing and enriching one portion of the State almost exclusively. Nay, more, when that division of the State is in possession of and enjoying, giving away and selling at auction and otherwise disposing of the very subjects for which the debt was created.

These considerations afford abundant reason why no authority would say, in the absence of a compact (unless there was perfect homogeneity) that it would be just to divide a "nation" any more than an individual estate by population and territory. We doubt not that Judge Meredith himself would scout the idea of dividing an estate on such a basis and without reference to the quality of the land and the improvements made. Why then would he ignore such considerations in apportioning a public debt between two divisions of a State? Chancellor Kent, whom he has quoted, does not sustain him in so doing. The quotation already given from that author says that "if a State should be divided in respect to territory its rights and obligations are not impaired; and if they have not been apportioned by agreement, those rights are to be enjoyed and those obligations fulfilled by all the parts in common." Not a word in this quotation about a division ratably according to population and territory. According to this authority the State of Virginia was only a tenant in common with West Virginia in all the public works, improvements and property of the original undivided State, and had no authority to alienate, sell, give away, or dispose of any of the public works, and being in possession and holding them for her own exclusive use and benefit, by ousting West Virginia, she would be bound to account to the latter for her share. This would seem to be the legitimate conclusion from the authorities relied on by Judge Meredith, even admitting their applicability to the case under consideration, which we do not concede by any means; and, therefore, with this reference we pass them by.

We think we take a more practicable view of the subject, and one which will attain all the ends of justice. The table accompanying this report shows that the bonded debt of Virginia on the first day of January, 1861, represented money borrowed and expended in improving the State by canals, railroads, turnpikes, plank roads and bridges. All these expenditures conferred a local and special benefit, were expended, not only by the outlay of the money in creating a market and stimulating enterprise and trade, but in otherwise developing the resources of particular localities to an extent quite equal to the general benefit of the State at large. And this local and general development is the sum of the value of the improvements to the section where located, and gives them an inestimable and abiding value to that section. This value is progressive and not susceptible of being fixed. So certainly is this the case that it is probable, if it were practicable to utterly ex-

tinguish these improvements, and thereby extinguish the debt, that the State where they are located would not listen to such a proposition.

It may be assumed then that the public works for which the debt was created are worth what they cost. Virginia, by selling, donating, and disposing of these works as her own property, without regard to the rule laid down by Chancellor Kent, and without consulting West Virginia, must be taken to have accepted them on that basis, and is therefore chargeable with them on that basis.

When the tables are consulted they will show an expenditure of over thirty millions in Virginia and about two and a half millions in West Virginia. Much of this latter was expended at comparatively recent dates, whereas the expenditures in Virginia range through a period of fifty years, with benefits accruing more or less throughout that period. In the light of such facts, we submit that no intelligent mind, wishing only to do justice, can doubt for a moment that the benefits conferred, and not the territory and population, should be the principal, if not the only basis of an adjustment of the debt. The Governor of Virginia, in his message of 1870, and again in 1871, and the Legislature of that State, by its funding bill, seem, however, to have entirely overlooked the foregoing considerations, and to have jumped to the conclusion that West Virginia should pay one-third of the debt.

We see the case differently. On the one hand, for instance, we see rich cities, commercial marts of all kinds, navigable rivers, fine harbors, a highly improved and productive territory, wealthy capitalists and a well to do people, public institutions, such as a State Capitol and extensive public grounds, an Executive Mansion, a Penitentiary, Armory, University, two Lunatic Asylums, a Military Institute, a Blind Asylum, a valuable miscellaneous and law library, a large literary fund and the United States deposit of surplus revenue. All these resources in addition to the vast millions invested in canals and railroads and other avenues of inland commerce.

On the other hand we see set in the balance against these rich resources the territory of West Virginia, less than one-third of the old State, much of it broken into barren mountains and hills, no navagable streams penetrating it in every direction, no railroad but the Baltimore & Ohio, no public works or institutions, her lands mostly covered with unbroken forests and rewarding industry but grudgingly, no outlets in the interior for the little surplus existing, the people poor and subsisting by rough work in the woods and fields, possessed of no capital wherewith either to develop their localities or ameliorate their own condition in life in fact, their only wealth being for the most part their poor soil, their untiring perseverance and their indomitable love of liberty.

And yet, notwithstanding this great discrepancy between the condition and resources of the two States, Virginia assigns one-third of her funded and compounded debt to West Virginia to pay, simply because the latter has one-third of the territory and one-fourth the population formerly belonging to the whole State. And this, too, notwithstanding her papers have often proclaimed that West Virginia was a foster child of the old State, and as such dependent upon her bounty. This opinion we shall not stop to discuss, and we only refer to it as showing the inconsistency between the theory and practice of our Virginia friends. Supposing it to be correct, the explanation as to how it came about can never be made creditable to those who lavished all their favors on one section of the State, and witheld them from the other, and the vindication of the step taken by West Virginia during the war in separating from the old State consists largely of this traditional discrimination against her. And in this connection it may not be out of place to notice that the increase of population in West Virginia during the decade from 1860 to 1870 was of a character to still further vindicate the step taken, it being about thirty per cent. This large increase illustrates her onward march since her separation from her former foster parent, and tends to suggest how far in advance of her present position she really might have been had she received in the past anything more than "the crumbs that fell from the rich man's table."

We come now to the conclusion of our report. Having given our reasons why we dissent entirely from the position of Virginia in reference to the debt, we proceed to state our own conclusions in regard to it as follows:

Statement A, as annexed to our report, shows that the bonded debt of Virginia, on the first of January, 1861, after all deductions, was $31,779,067.32.

The same statement also shows that all of said debt was expended within the present State of Virginia, with the exception of $2,784,329.29.

Statement E, shows that $328,706.22 was collected from counties in West Virginia after January 1st, 1861.

Statement F, shows that the amount of expenditures for all purposes in West Virginia was $3,343,929.29.

We are not able to say certainly what part of this expenditure was from the proceeds of State bonds, (and, therefore, a part of the State debt) and what part was appropriated from the regular receipts of the treasury. We have had access to no data that could determine the question. Our letter to the Second Auditor at

Richmond sought information on this point in vain. But we have given Virginia the benefit of it all as a credit on her side of the account, although the resolutions under which we are acting contemplate nothing on the part of West Virginia but an assumption of her proportion of the bonded debt, inasmuch as both sections and particularly Virginia, received appropriations out of the ordinary receipts of the treasury.

We have charged West Virginia with all that we have found expended within her limits, viz: The amount of the funded debt created for improvements within her territory, the amount invested in her banks, the amount expended on the Lunatic Asylum at Weston, and the estimated value of the property known as the Lewisburg Law Library.

On the other hand we have credited her with her share of the estimated value of the public property and assets of Virginia, other than the property represented in the bonded indebtedness. This latter equalizes itself, and therefore does not enter into the account. Virginia has the property and owes the debt which it represents. We refer only to the public buildings, institutions, and other assets as given in statement G. As to West Virginia's share in these we can only venture an approximate estimate. The public buildings, the common property of the two States, paid for out of the general revenue, we have estimated at $3,875,000, as per statement G, and it would be reasonable we think to estimate West Virginia's interest in them at one-fourth on the basis of population.

The same statement shows that the surplus revenue of the United States deposited with the State under the act of Congress, June 23, 1836, gave Virginia $2,937,237.34, of which sum she appears to have received at least $1,932,809.33. This act assigned to each State its share of deposits on the basis of its representation in Congress, and Virginia having, in 1860, thirteen representatives, three of whom were from West Virginia, it would seem that three-thirteenths of that fund belonged to the latter.

To this share of the deposits, and her interest in the public property, we add, as per statement, her proportion of the Literary Fund. This fund at the date quoted in statement G, amounted to $1,509,583.16: As it was apportioned throughout the State on the basis of the white population, we follow that rule in assigning to West Virginia three-sevenths of it, that being her ratio of white population in 1860.

Upon the data thus ascertained and explained, we summarize the account between the two States as follows:

WEST VIRGINIA TO THE STATE OF VIRGINIA.

Dr.	For the amounts expended and invested in her territory as set forth in statement F	$3,343,929.29
Cr.	By one-fourth of the estimated value	

of the public buildings and other assets, as given in statenent G....	$968,750.00	
" By three-thirteenths of the United " States surplus fund as per same statement	446,032.92	
" By three-sevenths of the Literary fund as per same	647,079.92	
" By the amount collected in West Virginia after January 1, 1861, as per statement E	328,706.22	2,390,569.06
Balance due Virginia		$ 953,360.23

This is the balance as we find it after a protracted examination of such sources of information as were available to us. And the ascertainment of it naturally brings our labors to a conclusion We commend our investigations o Your Excellency's favorable consideration. From the beginning we realized that the results arrived at must necessarily be only proximate in their character, inasmuch as our sources of infomation were limited. Subsequent inquiry, under more favorable circumstances, may change the general result a few thousands for or against either State, but such a contingency is of course unimportant. The principle upon which the debt should be adjusted is the important point to settle. And it is to this point, as set forth in these pages, that we beg leave, through Your Excellency, to call the attention of the Legislature.

Very respectfully,

Your Excellency's most obedient servants,

J. J. JACKSON,
J. M. BENNETT,
A. W. CAMPBELL.

STATEMENT A.

Showing the Amount of the Public Debt of Virginia on the First Day of January, 1861, and the Amounts Thereof Held by that State. Also the Amount Thereof Incurred for Public Improvements in West Virginia.

The debt of Virginia on the first day of January, 1861, as per the Auditor's report to the extra session of the Legisature on the 10th of December preceding, was as follows:		
Debt of January 1, 1852	$10,508,815 30	
Debt created since that time	23,379,946 33	
Total		$33,888,791 63
Less the amount redeemed on 31st December, 1860	$ 237,731 31	
Less amount in the Sinking Fund	1,402,993 00	
Less amount in the Literary Fund	248,000 00	
Less amount in the Library Fund	16,000 00	
Less Bonds lost on Steamship Arctic	145,000 00	$ 2,109,724 31
Net amount of the debt January 1, 1861		$31,779,067 32
This debt as will be seen by Statement B was mainly incurred for works of public improvement.		
*Statement F shows that only $2,784,329.29 of it was incurred for improvements in West Virginia. Said improvements are as follows:		
Joint Stock Turnpike	$ 906,196 32	
Roads on State Account	1,145,619 07	
Bridge Companies	76,612 50	
Navigation Companies	207,840 00	
Railroads	500,040 00	
Lunatic Asylum at Weston	125,000 00	
Deduct Virginia's pro rata for improvements lying in both States		$ 2,961,267 89 176,938 60
		$ 2,784,329.29

*The statement shows as total expenditure in West Virginia of $3,343,929.29, but only the above amount for public improvement.

STATEMENT B.

Showing the amount and character of the investments held by the State of Virginia on the first of January, 1861, together with those that have since been donated or otherwise changed, as per Governor Walker's message to the Virginia Legislature of March 8, 1870.

Alexandria, Loudon and Hampshire Railroad	$ 50,862 00	
Blue Ridge Railroad	1,744,723 00	
Chesapeake & Ohio Railroad	2,484,134 00	
Norfolk and Petersburg Railroad	1,341,341 00	
Orange and Alexandria Railroad	1,151,207 00	
Richmond and Danville Railroad	1,847,585 00	
Richmond and Petersburg Railroad	385,600 00	
Richmond and York River Railroad	490,999 00	
South Side Railroad	1,883,500 00	
Virginia and Kentucky Railroad	103,348 00	
Virginia and Tennessee Railroad	3,755,000 00	
Marietta and Cincinnati Railroad	202,611 00	
James River and Kanawha Canal	10,400,000 00	
Other Navigation Companies	1,192,616 00	
Plank Roads, Turnpikes and Bridges	4,761,564 00	
Chesapeake and Ohio Canal	900,000 00	
Selden, Withers & Co	436,000 00	
Total		$33,131,090 00
To this amount add, as per Governor Walker's message of March 8, 1870, for amounts "lost, abandoned, or surrendered and released," the following sums, viz:		
Subscription paid to Covington & Ohio Railroad Co	$ 3,206,461 83	
Subscription paid to Fredericksburg & Gordonsville Railroad Company	163,209 00	
Subscription paid to City Point Railroad Company	110,000 00	
Subscription paid to Blue Ridge Railroad Company	1,100,000 00	
Subscription paid to Manassas Gap Railroad Company	2,280,000 90	
Subscription paid to Portsmouth & Roanoke Railroad Company	406,650 00	
Subscription paid to Roanoke Valley Railroad Company	307,402 00	
Subscription paid to Winchester & Potomic Railroad Company	270,000 00	
Subscription paid to Alexandria, Hampshire and Louden Railroad Company	1,017,248 00	
Subscription paid to Navigation and other companies	298,032 05	
Loss by Selden, Withers & Co., and Chesapeake & Ohio Canal Company	580,000 00	
*Total		9,739,092 88
Grand Total		$42,870,182 88

*We add these amounts simply because we find them given by the Governor as addenda to the $33,131,090.00, and not because we find them in any official record to which we have had access.

STATEMENT C.

Showing the amount of revenue contributed by the counties composing the State of West Virginia to the Treasury of Virginia for the fiscal year ending September 30, 1860, together with the amount in the aggregate contributed by the present State of Virginia.

COUNTIES.		COUNTIES.	
Barbour	$ 11,402 86	Monongalia	$ 22,116 00
Berkeley	31,819 72	Morgan	6,111 98
Boone	4,481 95	Nicholas	6,156 59
Braxton	6,968 90	Ohio	48,710 29
Brooke	9,112 34	Pleasants	5,981 46
Cabell	14,353 52	Preston	15,084 36
Calhoun	2,105 50	Pocahontas	8,380 89
Clay	1,820 82	Putnam	8,465 10
Doddridge	5,765 73	Pendleton	8,588 99
Fayette	6,642 01	Randolph	8,537 30
Gilmer	4,875 78	Ritchie	8,778 51
Greenbrier	30,863 02	Raleigh	3,979 31
Hancock	6,068 57	Roane	4,930 46
Harrison	27,117 22	Taylor	10,330 33
Hampshire	26,856 45	Tyler	7,213 93
Hardy	12,986 40	Tucker	2,257 74
Jackson	11,357 91	Upshur	9,461 71
Jefferson	47,263 59	Wayne	8,156 39
Kanawha	26,927 46	Webster	534 35
Lewis	12,004 97	Wetzel	6,450 94
Logan	4,444 96	Wirt	3,915 52
Marion	19,985 80	Wood	22,114 67
Marshall	15,057 33	Wyoming	2,304 99
Mason	20,257 22		
Mercer	5,936 80	Total	$ 626,351 97
Monroe	25,343 32		

Add for taxes on bank dividends	$	10,214 99
Bank dividends themselves		10,513 00
	$	647,079 96
Total revenue of Virginia for the fiscal year ending September 30, 1860	$	4,182,510 27
Less the amount borrowed that year		245,636 71
Revenue proper	$	3,936,873 56
Deducting amount paid by West Virginia		647,079 96
Leaves the amount paid by Virginia as	$	3,289,793 60
By this Virginia would pay of the public debt	$	26,547,582 22
West Virginia would pay of the same		5,231,485 10

*The taxation on dividends of branches of Virginia banks in West Virginia is not included, because not ascertained.

STATEMENT D.

Showing the population of West Virginia, by counties in 1860, also the area in square miles as given by Boye's map of the counties existing at date of its publication. Also, the years in which said counties were formed.

NOTE—There is a discrepancy of several thousand square miles between Boye's map and Mitchell's. The former gives the area of Virginia at 65,624 and the latter at 61,352*.

COUNTIES.	Population.	Square Miles.	Formation of County.	COUNTIES.	Population	Square Miles.	Formation of County.
Barbour	8,959	308	1772	Monroe	10,759	614	1799
Berkeley	12,525	202	1796	Morgan	2,731	271	1820
Boone	4,840	1,033	1809	Nicholas	4,636	1,431	1813
Braxton	4,992	....	....	Ohio	22,432	375	1776
Brooke	5,424	....	....	Pendleton	6,165	999	1718
Cabell	8,020	....	....	Pleasants	2,945	....	....
Calhoun	2,502	....	....	Pocahontas	3,958	794	1821
Doddridge	5,203	....	....	Preston	13,312	601	1818
Fayette	5,997	....	....	Putnam	6,301	....	....
Gilmer	3,759	....	....	Raleigh	3,367	....	....
Greenbrier	12,210	1,409	1778	Randolph	4,990	2,061	1787
Hamp-shire	13,913	989	1754	Ritchie	6,847	....	....
Hancock	4,445	....	....	Roane	5,382	....	....
Hardy	9,864	1,156	1786	Taylor	7,463	....	....
Harrison	13,790	1,095	1784	Tucker	1,428	....	....
Jackson	8,306	....	....	Tyler	6,517	855	1814
Jefferson	14,575	225	1801	Upshur	7,392	....	....
Kanawha	16,150	2,000	1789	Wayne	6,747	....	....
Lewis	8,029	1,754	1816	Webster	1,553	....	....
Logan	4,938	2,960	1824	Wetzel	6,703	....	....
Marion	12,721	....	....	Wirt	3,751	....	....
Marshall	13,001	....	....	Wood	11,046	1,223	1799
Mason	9,185	904	1804	Wyoming	2,861	....	....
McDowell	1,535	....	....				
Mercer	6,818	....	....	Totals	374,987	24,040	
Monongalia	13,048	721	1776				

NOTE—On a debt of $31,779,967.32 divided equally between a population of 1,594,291, (which was the whole population of Virginia in 1860 would be nearly $19.93 3-7-100 mills each, and would impose a debt on the above population of 374,087, amounting to $7,474,642.46.

*No complete survey of the State has ever been made, and in consequence of the irregular exterior lines no reliable estmate of the State's area appears to have been attained. By Herman Boye's map, made in 1825, the area is as above. By L. Von Bucholtz's map by authority of Virginia in 1860, the mean length of the State is given at 360 miles, and the mean breadth at 200 miles, giving a horizontal area of 61,352 miles, which is the same as given in Mitchell's map.

STATEMENT D.—Continued.

A Table Showing the Appropriate Number of Square Miles in Virginia and West Virginia.

By Boye's map, the number of square miles in Virginia prior to the division was 65,624, or 41,999,360 acres.

By the Auditor's report for 1861, the number of Square miles in the State was reported at 81,549, or 52,191,360 acres.

There appears to be not only a wide discrepancy in these respective authorities, but likewise an error in reducing the square miles to acres. These errors are no doubt to be accounted for by the notorious fact, that under the Virginia system of patenting lands the same lands are on the Commissioner's books several times.

By Mitchell's General Atlas for 1868, the area of Virginia is given at 41,352 square miles, and that of West Virginia at 20,000, which would give to West Virginia something less than one-third of the joint territory.

There being no map that gives the area of the counties of West Virginia separately, we have assumed that the statement given by Mitchell is approximately correct.

STATEMENT E.

Showing the Revenue paid into the Treasury of Virginia since the first day of January, 1861, from counties now included within West Virginia.

Amounts marked with a † were collected by judgments or executions in the year named, but for what particular year is uncertain.

Where it was plain that any collections were arrears for 1860, they have not been brought into this statement. †

COUNTIES.	1861	1862	1863	1864	1865	Total.
Barbour	$ 726 14	$	$	$	$	$ 726 14
Braxton	797 50	.....	.....	† 1,000 00	.....	1,797 50
Boone	381 02	† 2 00	.....	.....	.....	383 02
Cabell	739 08	.....	.....	.....	.....	739 08
Calhoun	.....	.....	.....	† 2,307 82	.....	2,307 82
Fayette	391 35	.....	.....	† 84 57	.....	391 35
Gilmer	.....	.....	.....	.....	.....	84 57
Greenbrier	26,945 81	44,084 83	79,227 26	.....	.....	150,257 90
Hardy	16,508 10	.....	.....	.....	.....	16,508 10
Jackson	800 00	.....	.....	.....	.....	800 00
Jefferson	32,269 06	.....	.....	.....	.....	32,269 06
Kanawha	1,590 76	† 1,694 33	† 2,738 00	† 3,467 00	.....	9,490 09
Lewis	946 10	.....	.....	.....	.....	946 10
Logan	472 52	.....	† 25 63	† 1,410 08	.....	1,908 23
Marshall	107 95	.....	.....	.....	.....	107 95
Mason	675 66	.....	.....	.....	.....	675 66
Mercer	.....	.....	† 1,111 91	.....	.....	1,111 91
Mc Dowell	.....	.....	1,200 00	.....	.....	1,200 00
Monroe	22,415 34	33,470 48	.....	.....	.....	55,885 82
Morgan	615 00	.....	.....	.....	.....	615 00
Nicholas	.....	.....	5,000 00	.....	.....	5,000 00
Pleasants	365 00	.....	.....	.....	.....	365 00
Pendleton	8,006 61	6,000 00	16,900 00	.....	.....	30,906 61
Pocahontas	7,714 00	.....	.....	.....	.....	7,714 00
Putnam	746 10	.....	.....	.....	.....	746 10
Raleigh	.....	.....	† 600 00	.....	.....	600 00
Ritchie	21 12	.....	.....	.....	.....	21 12
Roane	.....	.....	† 3,487 81	.....	.....	3,487 81
Upshur	660 75	.....	.....	.....	.....	660 75
Wayne	354 74	.....	.....	.....	.....	354 74
Webster	20 00	.....	.....	.....	.....	20 00
Wyoming	.....	.....	.....	.....	† 624 97	624 97
						$ 328,706 22

†On the exclusion from this statement of taxes levied in 1860 and collected in 1861, the Commissioners were not unanimous. For it was maintained that the taxes of 1860 were levied and collected chiefly to pay interest falling due January 1 and July 1, 1861. One-fourth of the taxes especially designed to pay the July interest was not payable into the treasury until about the 15th of February, 1861. The taxes were collected off of the people who had assumed the burden of the debt and ought to be applied to their relief.

STATEMENT F.—West Virginia's Indebtedness to the State of Virginia.

Showing (approximately) the amount of the public debt of Virginia that was incurred for works of improvement in the territory now included within the State of West Virginia, and such other sums as West Virginia is chargeable with.

These improvements consist of works in which Virginia was a joint stockholder with private companies, and of works constructed wholly on her own account, and certain miscellaneous expenditures.

Date of the several acts authorizing these expenditures is given as far as ascertained.

These expenditures are classified as follows: (1.) Joint Stock Companies. (2.) Roads Constructed on State account. (3.) Bridge Companies. (4.) Navigation Turnpike. (5.) Railroads. (6.) Miscellaneous.

Date of Act.	Class 1—Joint Stock Turnpikes.	Amount of the Appropriations.	Amount Expended.	Amount Unexpended.	Miles Length
.....	Back Creek Valley Turnpike	$ 1,500 00	$ 1,140 00	$ 360 00	.....
.....	Berkeley and Hampshire Turnpikes	21,600 00	16,750 00	4,850 00	.....
1849, March 15	Buckhannon and Little Kanawha	7,773 00	7,773 00	.....	24
.....	Brandonville, Kingwood and Evansville	6,000 00	3,193 46	2,806 54	.....
1848, Febr'y 9	Clarksburg and Buckhannon	32,000 00	28,514 49	3,485 51	27¾
1849, March 13	" " Philippi	6,000 00	5,446 25	553 75	32
1850, Febr'y 10	Cranberry Summit and Brandonville	4,815 00	4,120 11	694 89	18¾
1850, " 2	Clarksburg and Wheeling	10,200 00	4,195 35	6,004 65	18
1838, April 3	Cacapon and North Branch	12,000 00	12,000 00	.....	45
1835, Jan'y 22	Charleston and Point Pleasant	31,260 00	31,260 00	.....	56
1860, March 9	Charleston, Ripley and Ravenswood	30,000 00	27,519 41	2,480 59	.....
.....	Dunkard Creek	6,000 00	6,000 00	.....	.....
.....	Elk River	37,000 00	116 00	36,884 00	.....
.....	Franklin and Circleville	2,400 00	2,175 00	225 00	.....
1833, March 30	Fish Creek Road	6,000 00	6,000 90	.....	25
.....	Gnatty Creek and West Union	10,800 00	5,700 55	5,099 45	.....

STATEMENT F.—Continued.

Date of Act.	Class 1—Joint Stock Turnpike.	Amount of the Appropriation	Amount Expended.	Amount Unexpended	Miles Length
1850. March 21	Grave Creek and Pennsylvania State Line	$ 4,800 00	$ 1,800 00	$ 3,000 00	4¾
1853, " 29	Gilmer and Braxton	7,200 00	6,699 80	500 20	26¼
1850, " 19	Gilmer, Ripley and Ohio	30,000 00	29,974 80	25 20	61
1837, " 1	Giles, Fayette and Kanawha	45,000 00	44,990 60	8 40	.....
1849, " 15	Hardy and Winchester	23,400 00	23,400 00	.....	70
1849, " 15	Hampshire and Morgan	6,600 00	6,510 00	90 00	18
.....	Hardy and Randolph	18,000 00	7,134 78	10,865 22	.....
1848, March 28	Harrisville	8,100 00	6,000 00	2,100 00	20¾
1850, Feb'y 9	Hudgesville and Potomac	6,000 00	6,000 00	.....	20¾
1849, March 9	Hillsborough and Harper's Ferry	6,000 00	6,000 00	.....	8
1838, " 2	Holiday's Cove	15,000 00	10,650 00	4,350 00	6
1832, " 30	Huntersville and Warm Springs	10,359 24	6,159 24	4,200 00	26¼
1851, " 29	Holiday's Cove and New Cumberland	2,400 00	2,400 00	.....	8
1837, " 30	Ice's Ferry Road	1,358 00	1,358 00	.....	5¼
1846, Febr'y 2	Kanawha and Logan	5,000 00	5,000 00	.....	52
1848, " 25	Kingwood and West Union	40,000 00	34,083 18	5,916 87	31
.....	Leuart's Falls and New Columbia	21,000 00	2,950 00	18,050 00	.....
1834. March 12	Lewisburg and Blue Sulphur	4,950 00	4,950 00	.....	15¼
.....	Lending Creek and Buffalo	9,600 00	5,847 84	3,752 16	.....
.....	Logan, Raleigh and Monroe	27,600 00	7,320 24	20,278 76	.....
1848, Febr'y 11	Marshall and Ohio	12,000 00	11,948 75	56 25	9¼
1849, March 17	Martinsburg and Potomac	18,000 00	15,290 00	2,710 00	12½
1849, Jan'ry 20	Martinsburg and Winchester	27,000 00	27,000 00	.....	22¼

STATEMENT F.—Continued.

Date of Act.	CLASS 1—Joint Stock Turnpike.	Amount of the Appropriations.	Amount Expended.	Amount Unexpended.	Miles Length
1854, Feb'y 18	Middleway and Gerardstown	$ 12,000 00	$ 11,943 75	$ 56 25	12
1848, March 24	Milwood and Berryville	9,000 00	9,000 00	.....	6½
.....	Moorefield and North Branch	39,300 00	28,137 75	11,162 25	.....
1849, March 15	Moorefield and Alleghany	10,200 00	8,779 78	1,420 22	27½
1849, " 15	Morgantown and Bridgeport	27,600 00	10,687 40	16,912 60	36
.....	Morgantown and Beverly	7,999 96	2,999 96	5,000 00	.....
1851, Feb'y 25	Morgan and Frederick	9,000 00	8,005 00	995 00	20
1851, March 28	Newark	3,600 00	3,000 00	600 00	10
1850, Feb'y 25	New Creek and Hardy	6,000 00	5,431 24	568 76	20½
1848, April 4	New Manchester	2,000 00	2,000 00	.....	6
1850, March 11	Patterson's Creek Valley	9,300 00	9,000 00	.....	37¾
1851, Feb'y 17	North River	5,400 00	5,400 00	.....	24½
1850, March 11	Parkersburg and Elizabethtown	4,800 00	4,800 00	.....	21⅜
1853, " 30	Pleasant Valley and Tunnelton	6,000 00	4,078 45	1,921 55	28
1851, " 4	Potomac	2,700 00	2,489 70	210 30	9½
1850, Feb'y 18	Ravenswood and Reedy Creek	9,000 00	9,000 00	.....	35
1851, March 21	Reedy and Harrisville	7,200 00	1,751 87	5,448 13	44¾
1836, Jan'y 13	Red and Blue Sulphur Springs	8,856 00	8,856 66	.....	32¾
1851, March 12	Ritchie and Gilmer	9,000 00	8,891 18	108 82	51
1854, Feb'y 28	Raleigh and Boone	1,800 00	1,800 00	.....	39
.....	Raleigh and Wythe Line	4,800 00	2,800 00	2,000 00	.....
1851, March 10	Salem and Harrisville	7,200 00	3,817 92	3,382 08	39
1851, " 31	Sandy	3,000 00	3,000 00	.....	24

STATEMENT F.—Continued.

Date of Act.	Class 1—Joint Stock Turnpikes.	Amount of the Appropriations.	Amount Expended.	Amount Unexpended.	Miles Length
1851, March 24	St. Marys	$ 6,000 00	$ 6,000 00	$	24
1816, Jan'y 31	Shepherdstown and Smithfield	18,575 00	18,575 00	.....	13 3/4
1849, March 15	Sweet and Salt Sulphur Springs	10,200 00	10,104 00	96 00	29
1847, Feb'y 1	Sistersville and Salem	20,000 00	20,000 00	.....	26 1/2
1850, " 7	Shinston	13,302 26	13,302 26	.....	33 1/8
1830, " 18	Smithfield, Charlestown and Harper's Ferry	14,000 00	14,000 00	.....	14
.....	Walnut Gap Road	1,800 00	1,305 37	494 63	.....
1846, March 9	Weston and Fairmont	98,000 00	97,962 50	37 50	40 3/4
1848, " 25	Weston and Gauley Bridge	66,000 00	64,098 31	1,901 69	106
1850, " 7	West Milford and New Salem	13,800 00	10,526 32	3,273 68	29 1/4
1847, " 20	Wheeling, West Liberty and Bethany	21,000 00	21,000 00	.....	15 1/2
1822, " 2	Wellsburg and Washington	7,071 01	7,071 01	.....	6
1849, " 15	Wellsburg and Bethany	16,200 00	12,590 22	3,609 78	6
.....	Weston and West Union	8,400 00	5,538 21	2,861 79	.....
.....	West Union	3,200 00	3,054 00	146 00	.....
1849, March 15	Williamsport	6,000 00	5,130 65	869 35	15 1/2
1831, Jan'y 8	White and Salt Sulphur	4,000 00	4,000 00	.....	20 1/2
	Total	$ 1,108,620 14	$ 906,196 32	$ 202,428 82	

STATEMENT F.—Continued.

Date of Act.	Roads Constructed Wholly on State Account.	Amount of the Appropriations.	Amount Expended.	Amount Unexpended.	Miles Length
.....	Allegheny and Huntersville	$ 11,600 00	$ 11,462 67	$ 137 33	.....
.....	Abbs' Valley and Tug Road	5,000 00	4,450 00	550 00	.....
.....	Beverly and Fairmont	77,000 00	75,384 65	1,615 35	.....
.....	Cove Spring and White House Road	2,500 00	2,500 00	.....	.....
.....	Clear Fork Road	3,000 00	600 00	2,400 00	.....
.....	Franklin and Monterey	14,000 00	14,000 00	.....	.....
.....	Fairmont and Wheeling	31,848 85	31,848 85	.....	.....
.....	Huttonsville and Huntersville	23,168 72	23,168 72	.....	.....
.....	Huntersville and Lewisburg	20,000 00	19,976 47	23 53	.....
.....	Marlin's Bottom and Lewisburg	12,615 09	12,615 09	.....	.....
.....	Middlefork	15,000 00	14,467 34	532 66	.....
1831, March 19.	North Western Turnpike	452,579 87	452,579 87	.....	.....
.....	Ohio River and Maryland Road	95,934 37	95,934 37	.....	.....
.....	Princeton and Red Sulpher Springs	4,200 00	4,200 00	.....	.....
.....	Staunton and Parkersburg	368,277 51	355,864 30	12,413 21	234
.....	Slavin Cabin and Summersville	37,000 00	16,372 08	20,627 92	.....
.....	Wyoming Court House and Bluffs	3,000 00	1,894 66	1,105 34	.....
.....	Road from South Branch to Petersburg	900 00	900 00	.....	.....
.....	Road from South Branch to Brock's Gap	1,400 00	1,400 00	.....	.....
.....	Berryville and Charlestown	6,000 00	6,000 00	.....	.....
		$ 1,185,024 41	$ 1,145,619 07	$ 39,405 34	

STATEMENT F.—Continued.

Date of Act.	Class 3—Bridge Companies.	Amount of the Appropriations.	Amount Expended.	Amount Unexpended.
.....	Cheat River	$ 6,000 00	$ 4,612 50	$ 1,387 50
.....	Coal River	3,000 00	3,000 00	.....
.....	Fairmont and Palatine	12,000 00	12,000 00	.....
.....	Guyandotte	12,000 00	12,000 00	.....
.....	Morgantown	24,800 00	24,800 00	.....
.....	South Branch	4,200 00	4,200 00	.....
.....	Virginia and Maryland	10,000 00	10,000 00	.....
.....	Elk River	6,000 00	6,000 00	.....
	Total	$ 78,000 00	$ 76,612 50	$ 1,387 50

Date of Act.	Class 4—Navigation Companies.	Amount of the Appropriations.	Amount Expended.	Amount Unexpended.
.....	Coal River Company	$ 96,000 00	$ 96,000 00	$ .....
.....	Guyandotte River Company	120,000 00	106,800 00	13,200 00
.....	Tug Fork River Company	5,040 00	5,040 00	.....
	Total Navigation Companies	$ 221,040 00	$ 207,840 00	$ 13,200 00

STATEMENT F.—Continued.

	CLASS 5—Railroads.		
	There is but one item of expenditure under this head, viz: the appropriation for the Covington & Ohio Railroad, say		$ 500,000 00

	CLASS 6—Miscellaneous.		
	Stock of Virginia in West Virginia Banks	$ 539,600 00	
	The Lunatic Asylum at Weston	125,000 00	
	The Lewisburg Law Library	20,000 00	
			$ 684,600 00

TABLE 1.

Showing the pro rata expenditures in Virginia on account of certain of the foregoing improvements that lie in both States.

	Hardy and Winchester	$ 11,740 00	
	Hillsborough and Harper's Ferry	1,800 00	
	Martinsburg and Winchester	13,500 00	
	Millwood and Berryville	4,500 00	
	Franklin and Monterey	7,000 00	
	Northwestern Turnpike	38,102 40	
	Staunton and Parkersburg	90,246 20	
	*Berryville and Charlestown	6,000 00	
	* It is understood that this road has been sold by the State of Virginia.		$ 176,938 60

RECAPITULATION.

		Amount of the Appropriations.	Amount Expended.	Amount Unexpended.
	Total expenditures on account of Joint Stock Turnpikes	$ 1,108,620 14	$ 906,196 32	$ 202,423 82
	" " " Roads constructed on State account	1,185,024 41	1,145,619 07	39,405 34
	" " " Bridge companies	78,000 00	76,612 50	1,387 50
	" " " Navigation companies	221,040 00	207,840 00	13,200 00
	" " " Railroads	500,000 00	500,000 00	
	" " " Miscellaneous	684,600 00	684,600 00	
	Total	$ 3,777,284 55	$ 3,520,867 89	$ 256,416 66
	From these deduct on account of Virginia's pro-rata for certain expenditures as given in Table I—Statement F		176,938 60	
	Leaving a total expenditure in West Virginia of		3,343,929 29	
	Deducting from this total the stock of Virginia in West Virginia Banks, and the value of the Lewisburg Law Library, as given in Class 6, viz		559,600 00	
	And we have left as the total expenditure in West Virginia on account of Public Improvements		$ 2,784,329 29	

NOTE—It does not appear from any documents examined what exact proportion of this $3,343,929.29 enters into the bonded debt of Virginia, and what proportion was paid out of the current revenue. That matter is left open for settlement hereafter.

STATEMENT G.

Showing the property and other assets of the State of Virginia on the first day of January, 1861, not included in any of the foregoing tables:

Lunatic Asylum at Williamsburg		
" " Staunton		
Deaf, Dumb and Blind Asylum at Staunton		
Virginia Military Institute at Lexington		
University of Virginia at Charlottesville		
Penitentiary of Virginia at Richmond		
Armory " "		
Capitol and public grounds "		
Governor's House "		
Public miscellaneous library "		
" law " "		
Total		$ 3,875,000 00

OTHER ASSETS.

By a provision of an act of Congress of June 23, 1836, there was directed to be deposited with the State of Virginia, of the surplus revenue of United States, $2,937,237.34.

And it appears by the document number 52 of the session of 1839-40, that of the amount there was actually received by Virginia and subscribed to the stock of certain banks of the State, the following amount, say, $1,932,809.33.

Whether the residue of this sum was ever paid to Virginia, the Commissioners have not ascertained.

The Literary Fund, as given in document No. 4, Second Auditor's Report of September, 1844, is $1,509,853.16.

This fund is given as it stood many years ago. By the first of January, 1861, it had probably increased, from fines, forfeitures, and amercements, one or two hundred thousand dollars.

STATEMENT II.—BANKS.

Settlement showing the amount of stock owned by the State of Virginia in the several banks in the year 1840, and how that stock was paid for.

In What Banks.	In What Name Held.			Total Number of Shares.	Par Value of Shares.
	Commonwealth of Va.	Board of Public Works.	Literary Fund.		
(A) Bank of Virginia	$ 3,250	$ 3,365	$ 2,121	13,736	$1,373,600
(B) Farmers' Bank of Virginia	5,050	3,442	1,054	9,546	954,000
(C) Bank of the Valley of Virginia	3,700	1,000	52	4,792	479,200
(D) Northwestern Bank of Virginia	4,000	271	500	4,771	477,100
(E) Exchange Bank of Virginia	9,000	59	.....	9,059	905,900
(F) Merchants and Mechanics' Bank of Wheeling	.....	125	.....	125	12,500
	$ 25,000	$ 13,262	$ 3,727	42,029	$4,302,900

NOTES—(A) Bank of Virginia—Subscribed by the Commonwealth per act of 30th January, 1804, payable in ten annual installments, to meet which the tax on merchant's license and dividends on the stock itself was pledged. The dividends during the time amounted to ..... $ 300,000 00
Bonds and profit on sale of new stock of the bank, under act 20th January 1814 ..... 494,700 00
Purchased out of the disposable funds of the board of Public Works.. 41,800 00
Purchased out of the permanent capital of the Literary Fund..... 205,600 00
Out of undrawn school quotas in treasury 6,500 00
Subscribed and paid for out of the United States surplus revenue on deposit in the treasury 325,000 00
$1,373,600 00

(B)—Farmers' Bank of Virginia.

Bonus under act 13th February, 1812 ..... $ 333,400 00
Purchased out of permanent fund of the Board of Public Works..... 4,700 00
Out of the disposable funds of the same 6,100 00
Out of the permanent capital of the Literary Fund 105,400 00
Subscribed and paid for out of the United States surplus revenue on deposit 505,000 00
$ 954,600 00

(C)—Bank of the Valley.

Bonus under act February, 1817 ..... $ 90,000 00
Purchased out of the disposable funds of Board of Public Works..... 100,000 00
Purchased out of permanent capital of Literary Fund 9,200 00
Paid out of United States surplus revenue 370,000 00
$ 569,200 00

(D)—Northwestern Bank.

Bonus under act 5th February, 1817 ..... $ 23,100 00
Bonus under act 25th March, 1837 ..... 4,000 00
Paid out of United States surplus revenue 282,809 33
Paid for dividends of stock itself 24,908 67
Paid for State's 6 per cent scrip 92,282 00
Paid for out of permanent capital of the Literary Fund 50,000 00
$ 477,100 00

STATEMENT H—Continued.

(E)—Exchange Bank of Virginia.

Bonus under act 25th March, 1837	$ 5,000 00
Paid for out of United States revenue	450,000 00
Paid for in State's 6 per cent scrip	295,000 00
Due on subscription of $900,000 by Commonwealth, $155,000, which was subsequently paid	155,000 00
	$905,900 00

(F.)—Merchants' and Mechanics' Bank of Wheeling

Bonus under act of 7th March, 1834	12,500 00

REPORT OF THE SENATE FINANCE COMMITTEE OF 1873.

STATE OF WEST VIRGINIA,
CHARLESTON, December 22, 1873.

The attention of the Committee on Finance has been repeatedly called by resolutions introduced in the Senate and otherwise, to the subject of Virginia's public debt and the share which it is equitable for West Virginia to bear and pay. The committee under these frequent promptings have been constrained to give the subject their most earnest and careful attention as a matter fraught with more than ordinary consequence to the State, and have come to a conclusion satisfactory to themselves, and it is believed that the conclusion of the committee will be approved by the judgment of the people interested, and will receive the sanction of any tribunal before whom it may be brought for adjudication.

It is necessary to a full understanding of this subject that reference be had to the treaty stipulations or fundamental conditions, by whatsoever name they may be called, between the representatives of the people of Virginia and the people desiring separation, by the creation of a new State, which led to the formation of a constitution, its adoption by the people and its approval by Congress, and the establishment of the State of West Virginia.

The ninth section of "an ordinance to provide for the formation of a new State out of a portion of the territory of this State," [Virginia] passed August 20, 1861, provided, that "the new State shall take upon itself a just proportion of the public debt of the commonwealth of Virginia *prior to the first day of January, 1861*, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and deducting therefrom the monies paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Upon compliance with the conditions contained in the ninth section and here quoted the people within the counties now constituting West Virginia, were authorized to form a constitution to be presented to Congress for its approval and for the admission of the new State into the Union.

Accordingly a constitution was adopted by a convention of the people from the several counties now constituting the State of West Virginia and to carefully guard and secure the rights prescribed by Virginia as a condition precedent to the formation of the new State, a provision was incorporated into it to secure the exact fulfillment of the treaty stipulations as aforesaid.

By article eight, section eight of the constitution, it was provided that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and that the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation

ther of by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This subject has received a careful consideration by commissioners appointed by authority of this State, and while this committee see much to approve in the Report of the Debt Commissioners of West Virginia on this subject for their great research and the ability with which they handled the subject, considering the peculiar difficulties under which they labored, as shown in their report, and in the illustration of the many problems that may rise in the discussion of this subject, yet this committee think the controlling question has not been discussed by the Commissioners by reason of the embarrassment surrounding their action; and the Committee beg leave to refer to the report which is appended hereto and marked No. 1.

In construing the legal principles involved in this matter, it may be assumed that a private creditor of Virginia cannot sue West Virginia for contribution; for that is prohibited by the Constitution of the United States; see article eleven of amendments United States Constitution which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign State." But notwithstanding this prohibition the third article extends the judicial power of the Supreme Court to controversies between two or more States. Under this provision of the Constitution it is within the power of Virginia to institute and prosecute any suit against West Virginia touching the controversies respecting the public debt.

If the conditions precedent to our admission as a State, prescribed by Virginia herself, be accepted as a true basis of adjustment and final settlement, Virginia's claims for expenditures can very properly be offset by our contributions.

Upon this basis the whole subject is one of easy solution, containing no other items than that of creditor or debtor with balances to be struck upon agreed principles. The legislative history of Virginia establishes beyond a doubt that the first act of assembly to create a debt or issue a bond was passed in the year 1821, and the executive records show that the first bond issued by the commonwealth of Virginia was in the year 1822.

From this latter period we date the commencement of our liability under the fundamental stipulations prescribed by Virginia for our separation, which were accepted by the people of this State, approved by Congress, and the President of the United States, as the head of the executive department, and subsequently affirmed by the Supreme Court of the United States, and may at this day be accepted by the public as firmly engrafted into obligations and rights as if the same were constitutional provisions emanating from the supreme power.

The concurrent approval, binding alike upon the people of Virginia and West Virginia, lead us to the following conclusions which are the results of a mathematical demonstration, founded upon pub-

lic and official records, appropriate to determine how much of the bonded debt of Virginia existing prior to January, 1861, was expended within the limits of this State, and how much was contributed by the counties forming the same.

The report of the Debt Commissioners hereinbefore referred to shows that all State expenditures within this State prior to January, 1861, amounted to $3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.

The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions to as upon the receipts of Virginia.

The committee have therefore assumed the foregoing sum of $3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the Debt Commissioners aforesaid.

From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia, from the counties included in this State during the same period. For the sake of convenience the committee have charged to Virginia, not the whole contribution, but the surplus after deducting a just proportion of the ordinary expenses of the State government. Our total contributions from taxes to the State of Virginia in the year 1822, amounted to $63,000; and in that year the total of the expenses of the State government chargeable to us was $47,000, leaving an excess of $16,000, which would go to the liquidation of the debt created for expenditures within our midst.

This small surplus in 1822, by the process of an increased rate of taxation, and the increased value of the subjects to be taxed, the rate rising from 8 cents to 40 cents on every one hundred dollars in value, made the excess of our contributions to the treasury of Virginia in the year 1860 amount to $512,000, rejecting fractions.

Thus our contributions to the treasury of Virginia arising from taxes collected in that year amounted to $647,079.96. In the same year our proportion of the ordinary expenses of government amounted to $135,000, which left the surplus aforesaid of $512,079.96. It will be observed that the committee have referred only to the surplus in 1822 and in 1860. The surplus for the intermediate periods swell the aggregate of our contributions to $3,892,000 which is in excess of expenditures within our limits by $525,000.

It will thus be seen that our state is not indebted and the Committee confidently advance this statement, not only as containing the true basis of settlement between the two States, but it is supported by incontrovertible facts, by conditions precedent prescribed by Virginia under the restored government which government has been approved as aforesaid by Congress, by the Executive and by the Supreme Court of the United States.

Notwithstanding the satisfactory condition of our finances and our material resources, the attention of the committee has been called to the fact that "West Virginia certificates" and "West Virginia bonds" are quoted at the marketable value of from five to fifteen cents on the dollar, in money of the stock exchanges and markets of the United States. This of course has a tendency to depreciate the just credit to which this State is entitled. For it is acknowledged that the credit of a State depends upon the value of its taxable property, the amount of its indebtedness and above all upon its punctuality in meeting its engagements. These quotations imply two things: first, that we owe a debt; second, that we are either unable or unwilling to pay the debt which beget a want of confidence in the minds of the public who are uninformed with respect to the true condition of West Virginia; and operate unjustly and injuriously upon us. It would seem to be enough for us to say, and we make the assertion without the fear of contradiction, that we owe no debt, that we have issued no bonds and our Constitution forbids the creation of a liability in the nature of a public debt; and with this assurance we cannot demand more nor expect less of all honorable stock brokers and bankers than the withdrawal from the list of indebted states the name of West Virginia.

"West Virginia certificates" and "West Virginia bonds" do not exist. No bonds have ever at any time been issued by West Virginia and we are prohibited from issuing at any time hereafter any bonds on the faith of this State. The bonds or certificates referred to were issued by Virginia, and West Virginia had no agency or participation therein.

In respect to the credit which our conduct and property would imply, we might be indifferent, but we have higher aims and more ennobling ambition. We desire to invite immigration, to cultivate our forests and to develop our mineral resources; this cannot be done with success, when men of thrift and capital are deterred from immigrating to and within our borders by reason of the persistent and unjustifiable misquotations of our credit. No one could be expected to invest capital within a State which has so far absorbed the substance of the people thereof that its good faith and obligations were only worth five cents on the dollar. West Virginia owes no debt, has no bonds for sale and asks no credit.

J. M. BENNETT,
Chairman.

JOHN W. GRANTHAM,
A. E. SUMMERS,
J. T. MCCLASKEY,
R. B. SHERRARD,
ELLIOTT VAWTER.

House Joint Resolution No. 10, Concerning the Virginia Debt.

(Adopted February 7th, 1895)

Resolved by the Legislature of West Virginia:

That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution.

HOUSE JOINT RESOLUTION NO. 3.

(Adopted January 21, 1897.)

A resolution relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that West Virginia does not owe one cent of the so called "Virginia debt," and that this Legislature is opposed to any negotiations on that subject.

(H. J. R. No. 6)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1899)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this legislature declines and refuses to take any action in regard to what is known as the Virginia debt, or Virginia deferred certificates, either by considering any propositions of adjustment or settlement, so called, or by authorizing the appointment of any committee or committees having for their purpose the consideration of the same; and that it is the sense of this legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt or certificates.

(S. J. R. No. 2.)

JOINT RESOLUTION NO. 21.

(Adopted January 16, 1901.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this legislature declines and refuses to take any action in re-

gard to what is known as the Virginia Debt, or Virginia Deferred Certificates, either by considering any proposition of adjustment for settlement so called, or by authorizing the appointment of any committee, or committees, having for their purpose the consideration of the same.

And, That it is the sense of the Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt, or certificates.

(H. J. R. No. 3.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1903.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject. And, *further*, that this legislature declines, and most emphatically refuses, to take any action in regard to what is known as the Old Virginia debt, or Virginia deferred certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee or committees having for their object or purpose the consideration of same; and that it is the sense of this legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt or certificates. Nor do we owe any other state or territory in this Union.

(H. J. R. No. 7)

JOINT RESOLUTION NO. 3.

(Adopted January 20, 1905.)

Relating to the Virginia debt.

Resolved by the Legislature of West Virginia:

That it is the sense of this legislature that the state of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on that subject.

AN ACT to provide for the defense of the equity suit of the Commonwealth of Virginia against the State of West Virginia, now

pending in the supreme court of the United States, and appropriate money for such purposes.

Passed February 4, 1907.

Be it enacted by the Legislature of West Virginia:

Sec. 1. That the attorney general of West Virginia be and he is hereby authorized and directed to defend the equity cause of the Commonwealth of Virginia against the State of West Virginia now pending in the supreme court of the United States; and the board of public works is hereby authorized to employ such attorneys and agents to assist the attorney generel in the defense of such suit as in its judgment shall be necessary for the purpose.

Sec. 2. The attorney general is further authorized and directed to have made as soon as possible such searches and investigations as may be necessary to ascertain all the facts, which in his opinion, are needed for the proper defense of said suit; and the attorney general is further authorized, if in his opinion it is necessary, to request of the officers of the said Commonwealth of Virginia reasonable access to the records of said Commonwealth so far as it may be necessary for such purpose; and to cause such copies and extracts of such records made as he or his associates may deem necessary for such purpose; and the attorney general is directed to make full and complete reports of his acts hereunder to the board of public works, from time to time, as he may deem proper or as requested by said board, and to the legislature at each session thereof during the pendency of this suit.

Sec. 3. To carry out the provisions of this act, the sum of fifty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be paid out of the treasury from time to time on the requisition of the board of public works.

Compliments of

Wm. G. Conley,

Attorney General.

PROCEEDINGS

IN THE

EQUITY SUIT

OF THE

Commonwealth of Virginia

VS.

The State of West Virginia,

WITH AN APPENDIX.

VOLUME II.

COMPILED BY
WILLIAM G. CONLEY, Attorney General.



Charleston:
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UNION
LABEL

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INTRODUCTION

There will be found in this volume all of the proceedings had in the chancery cause of the Commonwealth of Virginia *versus* the State of West Virginia, now pending in the Supreme Court of the United States, since the publication of Volume I, which ended with the decree overruling the defendant's demurrer to the plaintiff's bill.

This volume begins with the defendant's answer and includes arguments of counsel, the decree of the Court referring the cause to a Master, the amendments made to said decree on the petition of the defendant, and the appointment of Congressman CHARLES E. LITTLEFIELD, of the State of Maine, as Master in said cause.

There is appended to this volume parts of the speeches of Hon. WAITMAN T. WILLEY, United States Senator, and Congressmen WM. G. BROWN and JACOB B. BLAIR, made in the Congress of the United States, on the admission of West Virginia into the Union. These speeches show some of the reasons why the counties west of the Allegheny Mountains were demanding to be separated from those counties east of said mountains. The appendix also contains Judge JOHN W. MASON's letter to Governor DAWSON, and what is commonly known as Senate Joint Resolution No. 14, but is reported in the Acts of the Extraordinary Session of the Legislature of 1908, as "Substitute for House Joint Resolution No. 25," creating a non-partisan committee of citizens and property holders to advise with the Board of Public Works as to the matters involved in said suit.

The Board of Public Works, under chapter 45, Acts of the Legislature, 1907, and since Volume I. was printed, has employed Hon. JOHN C. SPOONER, late a United States Senator from Wisconsin, as an additional associate counsel to assist in the defense of said suit. Expert accountants are also employed and are at work to ascertain the true state of accounts.

The hearing before the Master will begin in said suit at Richmond, Virginia, November 9, 1908. This date was fixed upon by

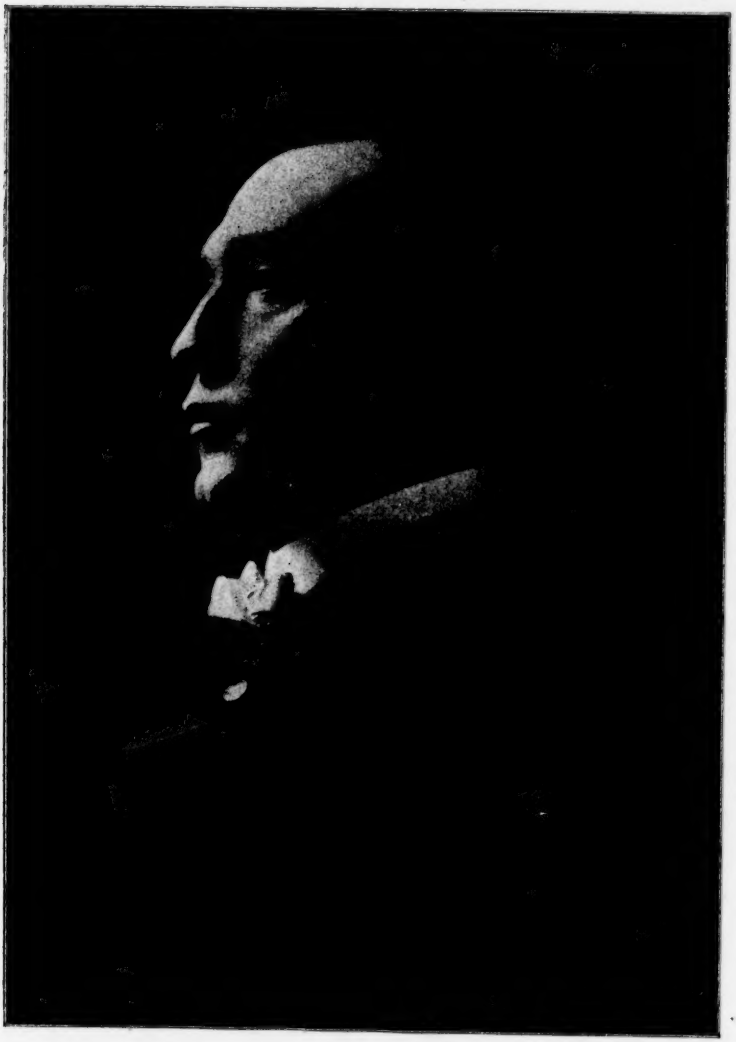
the Master that both sides might have time to properly prepare for the contest.

The best legal ability and expert accountants in the country have been employed to assist in the defense of this suit, and the people of this State may rest assured their interests therein are being efficiently and honestly protected.

Respectfully submitted,

WM. G. CONLEY,
Attorney General.

Charleston, W. Va.,
August 17, 1908.



HON. CLARKE W. MAY,
LATE ATTORNEY GENERAL OF WEST VIRGINIA.

DEATH OF GENERAL MAY.

Attorney General CLARKE W. MAY, one of the best known men in public life in West Virginia, died at 6:30 o'clock Saturday morning, April 25, 1908, at his home at Hamlin, Lincoln County, as the result of blood poisoning arising from injuries received in a runaway ten days before. Friday night, April 24th, about 9 o'clock his right leg, which sustained a compound fracture in the accident, was amputated just below the knee. General May rallied after the operation, but toward morning he took a change for the worse, and, at 6:30 o'clock, peacefully passed away.

Attorney General May was born at Griffithsville, Lincoln county, July 14, 1869. He was educated in the common schools of that county. Left on his own resources at the age of sixteen by the death of his father, he began the battle of life, having nothing to aid him but ambition and energy. In 1894 he completed the law course at the State University and began the practice of his profession in his home county. In 1896, at the age of 26, he was elected the first Republican Prosecuting Attorney of Lincoln county. In 1900 he was elected to the State Senate by over 2,500 majority. In 1903 he was the unanimous choice of his party for President of the Senate. At the Republican convention of 1904, held at Wheeling, he was nominated for Attorney General and was elected by a large majority. After his election as Attorney General, he moved to Charleston and gave to the duties of the office his entire time.

In the death of General May the State lost a man it can ill afford to lose. While an active partisan, he

was one of those royal good fellows who did not think it a crime to pass a flower over the dividing wall between political parties. He loved his fellow-man and enjoyed the social side of life. He had a strong mind and was a successful lawyer, and only a few weeks before his death fortune began to smile upon him in a financial way. By the discovery of oil near Griffithsville, on a tract which he had held for years, he realized an income which, with the drilling of other oil wells would have made him financially independent.

He was a candidate for re-election as Attorney General and it is the opinion of many of his party associates that he would have been re-nominated by his party had he lived. It seems indeed sad that with his political prospects satisfactory, his professional career most promising and financial success assured he should be cut off while yet a young man. The State needs such men and his loss is greatly felt.

During the last two years Mr. May had spent much time in untangling the old Virginia Debt skein, and it is owing altogether to his indefatigable effort and his high ability that this question has been brought to the semblance of intelligence it now assumes. Senator John C. Spooner, who was associated with General May in this suit, has this to say of him: "The death of Attorney General May is a great shock to me. I had come to regard him as a very able lawyer, zealous and watchful in safeguarding the interests of the State, and any other client with whose business he might be intrusted, and an absolutely honest man. West Virginia sustains a serious loss."

IN THE SUPREME COURT OF THE UNITED STATES.

ORIGINAL NO. 7.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ANSWER OF WEST VIRGINIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The answer of the State of West Virginia, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General, by leave of this Honorable Court, to the bill of complaint exhibited against said State of West Virginia by William A. Anderson, Attorney General, for and on behalf of the State of Virginia.

This defendant, now and at all times hereafter saving to herself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or so much thereof as this defendant is advised is material or necessary for her to make answer to, answering, says:

I

That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in "about" the sum of $33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvement within her then territory; and it may be true that the greater part of said indebt-

edness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for said purpose; and it may also be true that all her liabilities, though arising under contracts made before that date, had not then been covered by bonds issued for their payment; but as to this allegation respondent has no knowledge or information except what is derived from said bill. This respondent denies that there was in addition to the above mentioned liability to the general public any other indebtedness evidenced by bonds held by and due to the Commissioners of the Sinking Fund and Literary Fund of the said State of Virginia as created under her laws, amounting the former to $1,462,993, and the latter to $1,543,669.05, or to any other sums, as of the same date, as in the said bill is alleged, because this defendant avers that the commissioners of these two funds were and are mere State agencies, and public officials of the State, created by said State of Virginia to have the custody of and to preserve certain of her financial resources and obligations to be made available for specific purposes when necessary, and which now belong exclusively to Virginia and are held for her sole and exclusive use and benefit. Respondent denies that any of the bonds or certificates so alleged to be held by the Commissioners of the Sinking Fund and the Literary Fund were ever negotiated or sold by the State of Virginia, or that the same constituted a part of the public debt of that State on the first day of January, 1861, and denies that the certificates representing one-third of such bonds are now a part of the said public debt; and respondent avers that the State of Virginia has long since voluntarily canceled all of said bonds and the same are no longer of any force or validity.

II.

It is true as alleged that said portion of the territory which now constitutes the present State of Virginia was, prior to January 1, 1861, devoted mainly to agriculture, and, to some extent, to grazing and manufacture, which afforded its chief source of revenue at that time; but this defendant avers that the territory which now composes the State of Virginia was largely underlaid with rich and valuable minerals only awaiting the opportunity and means of development to make the said State exceedingly wealthy in varied mineral resources such as coal, iron, manganese and other valuable and marketable products, and the said State abounded at that time in large forests of valuable timber which have since developed into

a great source of revenue to the said State and its citizens. It is true that the portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in undeveloped stores of mineral and timber, and respondent avers that the same was inaccessible and of very little value on the first day of January, 1861, and during all the years prior thereto, and that it has been only within recent years that the development of said resources has been begun in the said State of West Virginia, and this required the outlay of many millions of dollars, since January 1, 1861, in the construction of railroads and other public works and the appropriation by the Congress of the United States of many more millions of dollars for the improvement of her waterways in order to afford an outlet for her mineral and other products. This respondent denies that the prime object of the State of Virginia in entering upon a system of internal improvement was to hasten and facilitate the development of the resources of wealth and revenue in West Virginia by the construction of graded roads, bridges, canals and railways extending through the then State of Virginia from tidewater toward the Ohio river, and avers that the main object of said system of internal improvements was to afford the eastern part of the State an outlet for its own products to the Ohio river on the west and to the seaboard on the east, and to afford convenient communication with those points so as to create a market for such products at points on the eastern coast of Virginia at tidewater, and thus open up and develop the resources of the territory now constituting the State of Vinginia, and not, as alleged in said bill, for the purposes of developing the resources of the western part of her territory, now constituting the State of West Virginia. This respondent further says that it is true as alleged in said bill that the larger portion of these public works was constructed east of the Appalachian range of mountains and within the present territorial limits of Virginia, and respondent avers that nearly all of the money derived from the sale of the bonds was in fact expended in the development and improvement of what now constitutes Virginia, and only a comparatively small sum was expended in developing, and improving the portion now composing West Virginia; that these expenditures in Virginia were of very little practical benefit to the people living in the western part of the State up to and including the first day of January, 1861. This respondent further says that it is true that property values within the limits of West Virginia have been largely increased since 1861, but denies

that such increase was caused by the improvements made within her present territory prior to 1861, but nearly all of the improvements and developments of resources in said State have been made within the last twenty-five years and are due to railroads and other public works constructed by her own people and by private capital brought within her territory and by appropriations made by Congress, and are almost entirely disconnected and independent of any expenditures made by Virginia prior to January 1, 1861, either by the proceeds of bonds issued and sold by her or from any other means derived from the creation of any debt by her. Respondent admits that the money appropriated and the payment of the annually accruing interest on said debt prior to January 1, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof was derived from taxes imposed upon property subject to taxation throughout the entire state, but respondent avers that the large amount thus derived from taxation to which the present State of West Virginia, then a part of Virginia, contributed her full share, was not kept intact by the State of Virginia after her ordinance of secession from the union in the year 1861, but was used by her in the administration of the so-called State Government at Richmond and for many other purposes while she claimed to be a part of the Confederate States of America, and that the part of the Sinking Fund so expended should be accounted for to this State and constitute a credit to her in the settlement of her equitable proportion of said debt; this respondent calls upon the State of Virginia to show what the aggregate amount of said Sinking Fund was on the first day of January, 1861, and of what it consisted, together with the interest thereon since accruing, and that she shall be required to give credit to this respondent for the amount contributed thereto by her prior to January, 1861, in case this court shall determine that an accounting shall be had between the said States in this action.

III.

This respondent denies that the Commonwealth of Virginia was induced to enter upon the construction of her general system of improvement, in a very large measure, for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, and thereby as alleged in said bill, ameliorating the condition of her citizens residing therein, and denies that it was with this view that she took upon herself

the alleged burden of her public debt, for which her bonds were issued, without which debt, it is alleged, said improvements could not have been undertaken. The respondent avers that Virginia appropriated to her own use, within the territory now constituting the present state of Virginia, about nine-tenths of all the money derived from the proceeds of said bonds, and that this large part of said proceeds enured to the sole benefit of the people living in what now constitutes the State of Virginia, while the territory now constituting the State of West Virginia received but a small proportional part thereof, and that all the money appropriated was expended under and by direction of the officers of the State of Virginia who were elected and controlled by the voters then living within the present limits of that State.

It may be true that a majority of the representatives residing in that part of Virginia now composing the State of West Virginia voted for the appropriations for the said public improvements, but if so, it was with the expectation and belief that an equitable proportion thereof would be expended in their section of the State which, as hereinbefore averred, was not done; and at the times when said debt was created the Legislature was in the absolute control of the very large majority of members chosen by the people living within what now constitutes the State of Virginia and they could, and actually did, control the legislation of the State.

IV.

It may be true that the development of this system of public improvements was, from its character and extent, progressive, as is alleged, and that the same extended with the general growth and increasing needs of the State, and was incomplete in 1861; but this respondent denies that prior to that time a very considerable portion of such improvements had been constructed in the territory now constituting West Virginia in order to meet the needs of the people of that portion of the State for their local purposes. On the contrary, the principal object of the State in entering upon this system was for the construction of a canal from the James River to the Ohio River for the purpose of connecting the Virginia seaboard with the western waters, the building of certain railroads projected in the same direction and in certain other directions, all within the present territorial limits of the State of Virginia, and for the construction of highways and bridges and certain public buildings, nearly all of which weere located and constructed within

the present limits of the State of Virginia. It is true, as alleged, that the expenditures of this money were under the direction and control of the Board of Public Works, the members of which were elected by the voters of the State at large, but respondent avers that this Board of Public Works was at all times composed of a majority of members residing within the present limits of Virginia and that only such members were chosen as were acceptable to the people residing within the present limits of Virginia and to promote their views and interests as to the method and policy of the expenditures of said moneys.

V.

It is true that on the 17th day of April, 1861, the people of Virginia in general convention assembled adopted an ordinance by which it was intended to withdraw Virginia from the union of the States, and it is also true that a considerable portion of the people of Virginia dissented from this action and that a great majority of the people residing in the territory now composing the State of West Virginia opposed the action thus taken by the people of Virginia then residing within the present territorial limits of that State, and representatives of the people organized a separate government within the territorial limits of Virginia, known and recognized by the people now living within the State of Virginia as the "Restored State of Virginia;" and this government was thereafter recognized by the executive and all the other departments of the United States Government and treated as the State of Virginia until long after the close of the Civil War.

VI.

It is also true that on the 20th day of August, 1861, the State of Virginia, in a convention assembled at the city of Wheeling, adopted an ordinance "to provide for the formation of a new state out of a portion of the territory of this State," and that section nine of said ordinance is in the following words:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within

the said new State during the same period. All private right and interests in lands within the proposed State derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of West Virginia."

Section ten of said ordinance provided as follows:

"When the General Assembly shall give its consent to the formation of such new State, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the Union of States."

The same ordinance also provided for a convention of the people to be held within the territorial limits of the then State of Virginia by representatives to be selected by a popular vote of the people within the limits of the proposed new State to adopt a constitution for such proposed new State, and the said convention assembled at Wheeling in November, 1861, and framed a constitution which was thereafter duly ratified by a vote of the people, which constitution contained the following provision relating to the public debt of the State of Virginia:

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

Subsequently, on the 13th day of May, 1862, an act was passed by the legislature of Virginia giving the consent of that State to the formation and erection of the proposed new State within the jurisdiction and territorial limits of said State of Virginia. Section one of this act provided as follows:

"That the consent of the Legislature of Virginia be, and the same is hereby, given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio, (and many other counties) according to the boundaries and under the provisions set forth in the Constitution of the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

Section three of said act provided:

> "Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union."

The respondent avers that said act was transmitted to the senators and representatives of Virginia in Congress. A correct copy of the same is attached to this answer and made part hereof as "Exhibit No. 1."

VII.

This respondent further says that the allegations contained in Paragraph VII of said bill with reference to the act of Congress and the admission of the State of West Virginia into the Union are true.

VIII.

This respondent for further answer to said bill says it is true that pending the admission of the State of West Virginia into the Union the general assembly of the Commonwealth of Virginia passed the act of February 3, 1863, which is set forth in Paragraph VIII of said bill; but this respondent denies that the property which was by this act appropriated and transferred from the Commonwealth of Virginia to the State of West Virginia amounted in the aggregate to several millions of dollars on the 3d day of February, 1863, as in said bill is alleged, and denies that the State of West Virginia realized and received into her treasury from the sale of bank stock alone about $600,000 as is in said bill alleged.

Respondent denies that she is chargeable for or on account of the transfer of said property, except the stocks of companies or corporations and the credits, or for any part thereof, otherwise than in a settlement with the State of Virginia for this respondent's just proportion of the public debt of that State as provided in the said ordinance of August 20, 1861, and in the said act of February 3, 1863; and respondent avers that she is not chargeable in any settlement for or on account of such stocks or credits with any sum in excess of the actual market value of the same at the times when they were transferred to her; and she avers that at the times when

such stocks and credits were transferred they were greatly depreciated and were of but little value.

IX.

Respondent admits the passage of the act of February 4, 1863, as alleged in Paragraph IX of said bill, but denies that she received, or that it was intended by said act that she should receive, any money except such as had then been collected, or might be thereafter collected, within the territory constituting the present State of West Virginia prior to the admission of the State into the Union, and she denies that she is legally or equitably liable to the plaintiffs for any part thereof, or that said act of the Legislature imposed, or purported to impose, any liability upon her or was so intended or understood. Respondent avers that after the Wheeling Convention and the passage of the ordinance providing for the formation of a new State, the Restored State of Virginia continued to impose and collect taxes in the territory now composing the State of West Virginia until the admission of that State into the Union, and a small part of the money realized by such taxation was returned to the new State under the said act of February 4, 1863, and no other money was appropriated or received under that act.

Respondent avers that nearly the entire amount of revenue collected by the "Restored State of Virginia," prior to the admission of West Virginia into the Union was collected from the counties now constituting the latter State, and that much the largest part of it was expended by the said state government outside of those counties, and that it was only just and equitable that such surplus as might remain at the time of admission into the Union should be restored to her in order that she might be able to install her government, establish courts and preserve order within her limits; and this just and equitable claim was recognized by Virginia when the said act was passed.

X.

This respondent, for further answer to said bill, says that it is true that the Constitution of the State of West Virginia contained the provision, among others, set forth and alleged in Paragraph X of said bill, but this respondent denies that the terms "public debt" or "previous liability" referred to either the property or money formerly belonging to the State of Virginia which had been

transferred to and received by West Virginia under the acts of the general assembly of the Commonwealth of Virginia set forth in Paragraph VIII and Paragraph IX of said bill, for the reason that said constitution was adopted long before the said acts of the general assembly of Virginia were passed, and before the act passed in May, 1862, by the said general assembly of Virginia giving her consent to the formation of the proposed new State out of the territory within her limits. This respondent therefore denies that anything contained in sections 5, 7, or 8 of Article VIII of the Constitution of West Virginia, adopted in 1861, bears any such construction, or is susceptible of any such meaning, as is given thereto by the allegations contained in Paragraph X of plaintiff's said bill.

XI.

This respondent for further answer to said bill says that she denies that the Commonwealth of Virginia made attempts at different times to ascertain and settle the equitable proportion of her public debt to be borne by West Virginia, upon the terms and in the manner contemplated by section nine of the ordinance adopted by the convention of the State of Virginia on the 20th day of August, 1861, in section eight of Article VIII of the Constitution of West Virginia, or in the manner prescribed by either of said instruments. The facts relating to the efforts of the Commonwealth of Virginia and the State of West Virginia to make an adjustment of the liability of the latter State, if any such liability exists, between the year 1865, when communication between the two States was re-established, and the year 1872, are as follows:

Prior to December, 1866, the Commonwealth of Virginia instituted a suit in equity against the State of West Virginia in this Honorable Court for a decision of the question whether or not the counties of Berkeley and Jefferson constituted a part of the State of West Virginia. This cause was not determined until the 6th day of March, 1871, on which day it was decided in favor of West Virginia. The effect of the pendency of this suit for over four years was to prevent a satisfactory adjustment of West Virginia's liability for the payment of an equitable proportion of the public debt of Virginia as provided in said ordinance of the Wheeling Convention because of the fact that West Virginia's boundaries could not be known and therefore it could not be

determined what amount of money had been expended within her limits for public works or other purposes prior to the 1st day of January, 1861.

Respondent avers that the Governor of West Virginia in his message to the legislature in January, 1866, recommended that Commissioners be appointed to settle with the commonwealth of Virginia respecting the said public debt; but no action was taken by the legislature of West Virginia of 1866 for the reason that the authorities of Virginia had made, at that time, no provision for a settlement, so far as was known to the authorities of West Virginia.

In his message to the legislature of West Virginia in 1867, the Governor again directed the attention of that body to the subject of the adjustment of the said public debt, stating that he was informed that Honorable Alexander H. H. Stuart of Virginia, together with two others, had been appointed under a resolution adopted by the General Assembly of Virginia: First for the purpose of securing a reunion of the two States, or secondly, for the purpose of adjusting the public debt and for a fair division of the public property. On the 28th day of February of the same year, the legislature of West Virginia by resolution declared that the people of that State were unalterably opposed to a reunion with the people of the commonwealth of Virginia, but expressed the willingness of the citizens of West Virginia to effect a prompt and equitable settlement between the States and directed the Governor as soon as the said suit in the Supreme Court of the United States, relating to the counties of Berkeley and Jefferson, had been disposed of, to appoint three commissioners on the part of West Virginia to treat with the commissioners of Virginia upon the matter of adjusting the public debt of that State as provided in the ordinance of 1861, and the Constitution of West Virginia, adopted by the convention which assembled in November, 1861, and also requiring a report of their action to the Governor in order that the same might be communicated to the legislature of West Virginia for its action.

In January, 1868, the Governor of West Virginia informed the legislature in his annual message that the commissioners had not been appointed under the resolution because the suit in relation to the counties of Berkeley and Jefferson had not been disposed of. But in February of that year the Committee on Claims and Grievances of the House of Delegates, upon the petition of one of Virginia's creditors asking that the State of West Virginia provide for

the payment of certain bonds of the State of Virginia of which he claimed to be the bona fide holder, reported that the settlement of West Virginia should be with the State of Virginia and not with the creditors of Virginia. And again in his message of 1869 to the Legislature of West Virginia the governor referred to the subject of the settlement of the public debt of Virginia and stated that commissioners had not been appointed by him up to that time owing to the fact that the suit between the States was still pending. The State of Virginia having, by an act approved February 18, 1870, provided for the appointment of three commissioners to treat with the authorities of the State of West Virginia, the governor of West Virginia, by communication dated February 24, 1870, advised the Legislature of West Virginia of the passage of that act by Virginia. and thereupon the Legislature of West Virginia, on the 1st day of March, 1870, appointed a joint committee of the two Houses of the Legislature to confer with the Virginia Commissioners and report to the Legislature, provided, however, that such appointment of commissioners should not in any manner prejudice the rights of West Virginia involved in the suit in equity brought against her by the commonwealth of Virginia as hereinbefore stated, which was still pending in this court.

Afterwards, on March 3, 1870, the governor of West Virginia was authorized by the Legislature to appoint three resident citizens of the state to treat with the authorities of the Commonwealth of Virginia upon the subject of the proper adjustment of the public debt of that State, but it was provided that nothing in that action was to be construed as impairing the jurisdiction of West Virginia over the counties of Berkeley and Jefferson; but as there was an omission to make an appropriation to pay the expenses of West Virginia's commissioners, and the resolution authorizing their appointment was passed on the last day of the session of the Legislature, the Governor of West Virginia again in his message of 1871 stated that no appointment had been made owing to the lack of funds to pay the expenses of such commission.

Pending the efforts thus being made on the part of West Virginia, the general assembly of Virginia, on February 20, 1871, through the Governor of that State, tendered to West Virginia a proposition for an arbitration of the question relating to the public debt of that State, the arbitrators not to be citizens of either State, each State to appoint two arbitrators and the two to select an umpire if deemd necessary. This proposal made by the Commonwealth

of Virginia was submitted to the Legislature of West Virginia on the 17th day of February, 1871, but on the 15th day of February, 1871, two days prior to the communication of this action of the General Assembly of Virginia, the Legislature of West Virginia had passed a joint resolution authorizing the Governor to appoint three disinterested citizens of the State to treat with the authorities of the Commonwealth of Virginia upon the subject of the adjustment of the public debt of that State existing prior to the 1st day of January, 1861, to report on various matters relating to the creation of the debt; upon the investments held by the State of Virginia, and, providing, among other things, compensation for the commissioners and for the employment of an accountant or clerk.

The proposal of Virginia relating to arbitration was referred by the Legislature of West Virginia to a joint special committee of the two Houses, which committee reported a preamble and joint resolution rejecting the tender of arbitration made by the Governor of Virginia because the adjustment of the debt should be subject to the ratification of the legislatures of the two States and because citizen commissioners from both States would be necessarily more familiar with the circumstances attending the creation of the said debt and other questions connected therewith. The said joint resolution also invited the Commonwealth of Virginia to appoint three disinterested citizens of that State as commissioners, with authority to treat with the commissioners, theretofore authorized upon the part of West Virginia; but it was provided that their report should be subject to the approval and ratification of the legislature of the State of West Virginia and the General Assembly of the Commonwealth of Virginia; and the Governor of West Virginia was also directed by said resolution to communicate to the Governor of Virginia, without delay, certified copies of the preamble and resolution. Accordingly, in pursuance of this resolution, the Governor of West Virginia appointed three commissioners to negotiate with the State of Virginia for a settlement of West Virginia's equitable part of the public debt. After their appointment the said commissioners proceeded to Richmond, where all the accounts, vouchers and other evidences of the receipt and expenditure of the money were kept, and there spent some time in the examination of such documents as were accessible, but realizing the necessity for further and more accurate information than they could obtain unassisted, they addressed a communication to the second auditor of the Commonwealth of Virginia soliciting specifically the necessary information. To

this request on the part of the Commissioners of West Virginia, the said second auditor made a reply in which he declined to furnish the information desired, a copy of which reply is herewith filed as "Exhibit No. 2" and made a part of this answer.

The failure and refusal of Virginia to co-operate with the said commissioners placed them at a great disadvantage in the examination of the records at Richmond, and they therefore obtained only such facts and figures as to enable them to make an imperfect report to the Governor of the State of West Virginia with reference to said public debt, showing the part of said public debt for which, in their opinion, according to such information as they could procure, West Virginia was liable.

Respondent avers that by reason of the inability of said commissioners to procure from the State of Virginia the necessary information concerning the public debt and other matters connected therewith, their report was not only very incomplete and inaccurate, but it appeared therefrom, that in making their investgations they wholly disregarded the provisions of the ordinance of the Wheeling Convention adopted August 20, 1861, and did not follow the method of settlement therein prescribed and respondent avers that for these and other reasons the conclusions of said commissioners were not agreed to or accepted by the Legislature of West Virginia; but subsequently the Senate of West Virginia proceeded to make an investigation of the subject through its Finance Committee, of which J. M. Bennett, who was for eight years auditor of the old State of Virginia, and whose time expired when the city of Richmond was evacuated in 1865, was chairman. Said committee made a report on the 22nd day of December, 1873, from which it appeared that the State of West Virginia upon a settlement with the Commonwealth of Virginia based upon the provisions of section nine of the ordinance passed by the commonwealth of Virginia at the Wheeling Convention, did not owe to the said Commonwealth of Virginia anything whatever, but that, on the contrary, the said Commonwealth was indebted to West Virginia on account of said debt on the 1st day of January, 1861, in the sum of $512,000, not including interest. A copy of said report is filed herewith, and made a part hereof as Exhibit 3.

The State of West Virginia has never receded from the provisions contained in section nine of the Wheeling Ordinance with reference to the settlement of this respondent's just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a State; and the resolutions adopted by her Legislature in

recent years in which she declared that she did not owe the State of Virginia anything on account of said public debt were based upon the said report of the Senate Committee made in 1873 as aforesaid, and upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance as the just and true one upon which a settlement between the two States could legally and equitably be made.

After the proposition of the Commonwealth of Virginia to select arbitrators, which was declined by the State of West Virginia as hereinbefore stated the said Commonwealth of Virginia at no time signified her desire to settle with West Virginia the matters relating to West Virginia's proportion of said public debt until the adoption of a joint resolution approved March 6, 1894, after she had compromised and settled with her creditors and been released from all liability, which resolution provided for the appointment of a commission of seven members who were thereby authorized and directed to negotiate with the State of West Virginia for a settlement and adjustment of the latter State's part of the public debt proper to be borne by her, but which also expressly provided that such commission should not proceed with such negotiations until assurances should be received from the holders of a majority in amount of the certificates issued by Virginia under the acts hereinafter referred to, that they desired the said commission to enter into and undertake such negotiations and would accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State which had not been assumed by the State of Virginia; and it was also provided in said resolution that in no event should said commission enter into negotiations except upon the basis that Virginia was bound only for the two-thirds of the debt of the original State and which, as recited in said resolution she had already provided for as her equitable proportion thereof. Under the aforesaid resolution no negotiations were proposed to West Virginia until the year 1895 and then only upon the conditions prescribed in the joint resolution of 1894, which has never yet been repealed or modified in this respect; and negotiations were again offered by Virginia in 1906 but upon the same condition, that West Virginia should enter upon such negotiations with the admission on her part that the said Commonwealth of Virginia should only be liable for two-thirds of said debt, which was again declined by the said State of West Virginia.

XII.

This respondent further answering the said bill, says that the efforts looking to a settlement, and the only efforts looking to a settlement, are those hereinbefore stated in paragraph XI in this answer; the said commonwealth of Virginia having declined in 1871 to appoint any commissioners empowered and authorized to adjust or confer with the commissioners appointed by the State of West Virginia to adjust and determine what was the proportion of the public debt of said commonwealth to be assumed by this respondent. But, on the contrary, the said State of Virginia in 1871, assumed the right herself to settle the said public debt, created prior to January 1, 1861, with her creditors and for that purpose, without advising or consulting with West Virginia, passed an act, approved March 30, 1871, whereby she repudiated the ordinance of the Wheeling convention and adopted a method of her own as a basis of settlement and set apart as her own just proportion of said public debt two-thirds thereof, providing for its adjustment and funding as in the said act is set forth; a copy of which is filed with said bill as exhibit No. 1.

XIII

This respondent further answering said bill, says that any burden that the commonwealth of Virginia assumed with reference to the payment of said debts, was made upon the assumption that she owed only two-thirds thereof and which she thereby admitted was not more than her just proportion; and therefore whatever she has paid on account thereof is a matter that cannot affect any controversy involved in this suit and is a matter of which the commonwealth of Virginia cannot complain. It is true, as alleged in said bill, that the great mass of creditors of the commonwealth of Virginia have agreed to accept the certificates issued under the acts of 1871, 1879, 1882 and 1892, for the one-third of her public debt, created prior to January 1, 1861, and have likewise agreed to accept the adjudication of this court what ever it may be, in full discharge of all their claims against Virginia on account of the old bonds and their claims represented by said certificates, thus relieving said commonwealth from any further liability as to said one-third of the public debt, or any part thereof, and this was the effect which the commonwealth of Virginia and the creditors intended and understood that the act of March 30, 1871, should have as to all the certificates issued under that act.

XIV

This respondent for further answer to said bill, and especially that part contained in paragraph XIV, says that the old bonds were all required by the acts of the Legislature to be surrendered by the holders thereof to the State of Virginia and canceled, and they were all surrendered and canceled and new bonds were issued in lieu thereof for two-thirds of the said debt, not including interest, and certificates were issued for the other one-third; and it was declared by Virginia in the acts authorizing the issues and in the certificates that they were to be paid by West Virginia; and respondent avers that the said commonwealth of Virginia now holds said certificates in trust only for the owners thereof.

This respondent denies that Virginia used any means for an amicable settlement of said debt with West Virginia, or made any overtures to that end which were repeatedly refused, as alleged in said bill, except as hereinbefore stated in paragraph XI of this answer.

XV.

This respondent, for further answer to said bill, avers that even if all the bonds and obligations and other evidences of indebtedness of the original State of Virginia outstanding or contracted before January 1, 1861, as stated in paragraph I of said bill, except a comparatively insignificant sum, not amounting to one percentum of this liability, have been taken up and are now actually held by the commonwealth of Virginia, this fact does not give to the plaintiff the right to call upon West Virginia for settlement with respect thereto, because this respondent avers that the said bonds and obligations and other evidences of public indebtedness of the commonwealth of Virginia, contracted prior to January, 1861, have been taken up by the issuance of other bonds in lieu of two-thirds thereof as before stated, and by the issuance of the certificates hereinbefore mentioned for the other one-third thereof, the said one-third to be paid by West Virginia, according to the plan of funding the said debt by said commonwealth of Virginia, and that all the said original bonds and obligations and other evidences of said indebtedness are without any force, effect or value and have been canceled and annulled as aforesaid. Respondent avers that whatever has been paid upon said old indebtedness, by Virginia, if anything, was paid only on account of her own separate and equitable proportion thereof as recognized and declared by herself; and this respondent denies that

the commonwealth of Virginia has any claim either in law or equity for any accounting with reference to said bonds or certificates or other evidences of indebtedness mentioned in paragraph XV of said bill or any part thereof. Respondent avers that the plaintiff does not allege or admit in said bill, nor does it appear thereby, that she is liable on account of the other one-third or for any part thereof, which is represented, as before alleged, by said certificates.

XVI.

For further answer to said bill respondent avers that if any sum has been paid by Virginia, even though amounting in the aggregate to $25,000,000, including principal and interest to date, calculated at the rate of 6 per centum per annum, it was paid by her on account of her admitted just and equitable proportion of said public debt created prior to January 1, 1861; and if she has any claim at all against West Virginia on account of said alleged payment, which is not admitted, but is denied, it can only be for such amount as may be ascertained upon the basis and according to the principles embodied in section 9 of the ordinance of the Virginia convention, as hereinbefore stated. So this respondent denies that she is liable for any part of the obligations mentioned in paragraph XV and paragraph XVI of the plaintiff's bill, alleged to have been taken up and paid on account of said public debt, and denies that the said commonwealth of Virginia has, in her own right, a "just claim" against West Virginia for contribution on account thereof.

Respondent, for further answer to said paragraph XVI of said bill, avers that all accounts, vouchers and other records relating to the said public debt of Virginia, showing the payments made thereon, if any, and all other facts connected therewith, are now and always have been in the exclusive possession and control of the plaintiff, and respondent has no knowledge or information concerning the alleged payment of $25,000,000, or any other sum, on account of said debt existing prior to January 1, 1861, and therefore denies that plaintiff has paid said sum of $25,000,000 or any part thereof, and demands strict proof.

XVII.

This respondent, for answer to paragraph XVII of said bill, avers that the matters therein contained do not relate to the public debt of Virginia within the meaning and contemplation of section 9 of the Virginia ordinance of August 20, 1861, and cannot be brought

into this suit for adjudication and determination. This respondent denies any and all liability for or on account of the matters referred to in said paragraph and avers that the said allegations are so uncertain, general and indefinite that respondent cannot answer them specifically and that no claim against this respondent can be founded upon them in this action.

XVIII.

This respondent, for further answer to said bill says that she denies that the alleged liability of the State of West Virginia for a just and equitable proportion of the public debt of the commonwealth of Virginia rests upon any of the grounds specified in paragraph XVIII of said bill except the second, upon which, as hereinbefore averred in this answer, the State of West Virginia has always been ready and willing, and is now ready and willing, to adjust her liability, and upon which she proposed adjustment from 1866 to 1873, at which time Virginia had clearly evinced by her legislative action with reference to her public debt, her intention not to observe or abide by section 9 of the ordinance adopted by the Wheeling convention, and actually repudiated the agreed method upon which a settlement between the States should be made.

XIX.

This respondent, for further answer to said bill, avers that the only acts of Virginia indicating a desire to treat with West Virginia with reference to said public debt was that in which she tendered a proposition to arbitrate the same, thereby proposing to ignore the mode of settlement provided in said ordinance, and the two subsequent ones whereby she declared the only conditions upon which she would negotiate with the said State of West Virginia was that West Virginia should admit that the said Commanwealth of Virginia was only liable for two-thirds of the said public debt; and this respondent avers that if it is intended by paragraph XIX of said bill to aver that plaintiff ever attempted an amicable negotiation with West Virginia, except the ones hereinbefore stated, then this respondent denies the allegations contained in said paragraph of the bill and calls for proof thereof.

XX.

This respondent, for further answer to said bill, avers that what has already been stated in paragraph XIX of this answer is also applicable to paragraph XX of said bill and is hereby

adopted as part hereof; and respondent avers in addition thereto that the alleged attempts of said commission to negotiate with West Virginia with reference to the said public debt related solely to the certificates owned by third parties and held in trust by said commission and the state of Virginia, which certificates represented about all, or practically all, of the one-third of the public debt not including interest of that State created prior to January, 1, 1861; and these efforts on the part of said commission to negotiate were upon the expressed condition that this respondent should concede that the Commonwealth of Virginia was, and is, liable for two thirds of the said public debt, and no more, which proffered negotations were declined by the State of West Virginia because the finance committee of one branch of her legislative body had ascertained and reported that there was no liability upon her part to the Commonwealth of Virginia on account of the said public debt under the ordinance of the Wheeling Convention, and this respondent now denies that she owes or will owe any sum whatever to the State of Virginia upon a settlement made in the mode provided in said ordinance.

For further answer respondent says that the ordinance adopted by the Wheeling Convention in August, 1861, provided for the formation of the new State out of a part of the territory of the Commonwealth of Virginia, defined in the manner in which the respondent's equitable proportion of the public debt of Virginia should be ascertained, as appears from section nine of the said ordinance, which is set out in paragraph VI of the plaintiff's bill, and is heretofore referred to and made part of this answer..

And the said Commonwealth of Virginia also provided by section 10 of said ordinance as follows:

> "When the General Assembly shall give its consent to the formation of such new state, it shall forward to the Congress of the United States such consent, together with an official copy of such Constitution, with the request that the said new state may be admitted into the Union of States."

And respondent avers that the General Assembly referred to in section ten was the General Assembly of the Commonwealth of Virginia and the constitution referred to in said section was the constitution to be thereafter adopted by the proposed new state.

The said ordinance as heretofore stated also provided for the holding of a convention by the citizens within the territory of the proposed new state for the purpose of framing a constitution. Af-

ter the promulgation of the ordinance of the convention, the people of Virginia, as well as those residing in that part of the territory to be converted into a new state as those residing in the other part of the Commonwealth of Virginia, which constitutes the present territory of that State, were fully advised as to the provisions of the said ordinance defining the manner in which the equitable proportion of the said debt was to be ascertained, and when the Constitution of West Virginia was framed and adopted in the year 1861 the said section nine was in full force, and both the Commonwealth of Virginia and the citizens residing in that portion thereof out of which the proposed new state was to be formed were satisfied with the methods therein provided for ascertaining this respondent's equitable proportion of the said public debt, and the constitution was framed and adopted, and West Virginia's equitable proportion of said public debt was assumed on the basis of the said ordinance, and not otherwise. It was provided in section eight, Article VIII, of the Constitution of the State of West Virginia:

> "An equitable portion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

After the adoption of this Constitution the Commonwealth of Virginia, on May 13, 1862, as hereinbefore stated, by an act of her Legislature, gave her consent to the formation of the new state. "According to the boundaries and under the provisions set forth in the Constitution for the said state of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th day of November, 1861."

Subsequently, by an act of Congress approved December 31, 1862, provision was made for the admission of West Virginia into the Union, the said act providing a change in the seventh section of the eleventh article of the constitution of the said new state, relating to slavery, and providing for a vote to be taken relative thereto, and the proclamation thereof by the President of the United States, under which West Virginia, on the 20th day of June, 1863, became one of the states of the Union.

And so this respondent is advised, and now avers, that when West Virginia framed her constitution and inserted in it the provision concerning the adjustment of the public debt of Virginia and the Commonwealth of Virginia, through her Legislature, by the act aforesaid, approved the constitution of West Virginia as the basis of her consent for the formation of that State and her admission into the Union, and upon the passage of the act Congress admitting the said state into the Union, a compact between the two states prescribing the manner in which this respondent's equitable proportion of the debt should be ascertained was concluded and it became, and is binding upon the Commonwealth of Virginia and the State of West Virginia.

The respondent avers that her equitable proportion of said debt cannot be otherwise ascertained or determined than by the action of the State of West Virginia through her Legislature, as provided by her constitution, nor can its liquidation be otherwise provided for than by a sinking fund of sufficient amount to pay the accrued interest and redeem the principal of whatever sum may be thus ascertained within the period of thirty-four years as likewise therein provided. Respondent therefore pleads and relies upon said compact in bar of the plaintiff's right to prosecute and maintain this suit in this Honorable Court and prays that the said bill may be dismissed.

XXII.

This respondent further answering and as a defense to said bill avers that the Commonwealth of Virginia, by her said bill and exhibits therewith filed and made part thereof, shows that she has adjusted before the institution of this suit to the entire satisfaction of her people and her creditors her alleged equitable proportion of her whole public debt existing on the first day of January, 1861, which she claims is only two-thirds thereof, and that therefore this respondent should be made liable for the other one-third thereof. In effecting this adjustment she refunded all the evidences of indebtedness created prior to January 1, 1861, except about one per centum thereof, and required the same to be surrendered to her and cancelled and annulled. Respondent avers that the said Commonwealth of Virginia did not refund two-thirds of her public debt, as alleged, in said bill although she proposed to do this by an act of her Assembly approved March 30, 1871; but finding that she could probably secure more favorable terms of set-

tlement of what she decided to be her just portion, another act was passed by her General Assembly which was approved March 28, 1879, whereby the debt was divided into two classes as shown by said act and thereby made a further reduction in the principal of her indebtedness, as well as securing a lower rate of interest to be paid thereon.

After various efforts to adjust the indebtedness on terms most favorable to herself, she secured a settlement whereby she funded and settled what she claimed to be her equitable proportion of her debt at a fraction less than forty-seven per cent upon the entire amount, including interest, a part of which she may have paid, but for the great volume of which she has issued her bonds, and which are now outstanding and unpaid. For one-third of her original indebtedness, created prior to January 1, 1861, she has issued certificates amounting in the aggregate to $18,227,153.60, of which it is alleged her Commissioners of The Sinking Fund and the Literary Fund hold $2,745,462.60, leaving $15,281,970 in the hands of the public.

Said certificates were issued by the State of Virginia and accepted by her creditors under the following acts of the General Assembly of that State, to-wit:

Under the act of March 30, 1871, certificates were issued for the sum of $15,281,970, of which it is alleged the Commissioners of the Sinking Fund and the Literary Fund held $2,578,515, leaving $12,703,451 in the hands of the public. Of these certificates issued to the public $10,851,294 had been deposited with the Virginia Commission on the fourth day of January 1906, and only $1,852,-157 had not been deposited at that time.

Under the act of March 28, 1879, certificates were issued to the amount of $564,258, of which $463,892 had been deposited with said commission at the date aforesaid, leaving $100,366 which had not been deposited. Neither the Commissioners of the Sinking Fund nor the Literary Fund held any of these certificates. The act of the Legislature under which all these certificates were issued and accepted by the creditors expressly provided that they should be taken "as a full and absolute release of the State of Virginia from all liability on account of said certificates."

Under the act of February 14, 1882 certificates were issued to the amount of $1,775,603 of which $166,943 were issued to the Virginia Literary Fund and $1,608,660 were issued to the public. Of the amount issued to the public $1,313,792 had been deposited

with the Virginia Commission on the date aforesaid, leaving outstanding at that time $294,868.

Under the act of February 20, 1892 certificates were issued to the amount of $605,320, of which $544,456 had been deposited on the date aforesaid, leaving $60,844 still in the hands of the old bond-holders or their successors in interest. Neither the Commissioners of the Sinking Fund nor the Literary Fund received any of the certificates issued under said act.

The certificates for $1,774,603 issued under the act of 1882 and the $605,320 issued under the act of 1892 were in the following form, and the respondent avers that the State of Virginia has been wholly released from liability thereon.

No..... The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for ..... dollars, dated ..... day of ....., from....., to be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this commonwealth.

Done at the Capitol of the State of Virginia, this ..... day of ....., eighteen hundred and ninety-two.

..... *Second Auditor.*

..... *Treasurer.*

And respondent says that the amount of certificates of all classes deposited with the Virginia Commission on the date aforesaid was $13,173,435.41, but respondent does not know what amount, if any, has been deposited since that time, and respondent asks that the State of Virginia be required to show on the hearing of this cause, what amount of certificates have been so deposited since January 4, 1906, and under what acts of the Legislature the same were issued. Respondent avers that all said deposits were made under and in accordance with the agreement made between the Virginia Commission and the Depositing Committee for the certificate holders on the 24th day of November, 1895, which, among other things provides as folliws:

> "And the said depositing committee agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be

realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in the said certificates respectively, in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and aquittance of all claims in the premises against the State of Virginia."

And so respondent avers that the Commonwealth of Virginia has been wholly released from all liability on account of the said certificates and every part of them and has no legal or equitable interest in any claim based thereon, and that this suit was instituted and is being prosecuted by the said Commonwealth of Virginia solely as trustee for and on behalf of the holders of said certificates and not in her own right; and that she has agreed through her said commission with the said creditors that she is to incur no expense on account of this action and that the whole expense thereof is to be borne by the holders of said certificates in whose behalf and for whose exclusive benefit the same was instituted and is now being prosecuted.

XXIII.

This respondent for further answer to said bill says that all the matters and allegations therein contained and not admitted in this answer to be true or heretofore specifically denied, are now and hereby denied and strict proof thereof is required.

Wherefore, this defendant, having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of plaintiff, material to be answered, according to her best knowledge and belief and humbly prays this Honorable Court that the said plaintiff's bill be dismissed and that this defendant have and recover her reasonable costs.

And as in duty bound she will ever pray, etc.

CLARKE W. MAY,
Attorney General,
J. G. CARLISLE,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
For West Virginia.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

This day there personally appeared before me, the undersigned authority in and for said County and State, William M. O. Dawson, Governor of the State of West Virginia, the defendant named in the foregoing cause, and being by me duly sworn, says that he is the Governor of the defendant, the said State of West Virginia, and that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein contained and alleged are true as therein alleged and stated to the best of his information and belief.

WM. M. O. DAWSON,
Governor of West Virginia.

Sworn to and subscribed before me this 5th day of October, A. D., 1907.

W. B. MATHEWS,
Clerk Supreme Court of Appeals.

EXHIBITS WITH ANSWER.

In the Supreme Court of the United States.

Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

EXHIBIT NUMBER 1.

An Act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State.

Passed May 13, 1862.

1. Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio, Marshall, Wetzel, Mason, Monongalia, Preston, Taylor, Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood, Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Upshur, Randolph, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell Wayne, Boone, Logan, Wyoming, Mercer, McDow-

ell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, Pendleton, Hardy, Hampshire and Morgan, according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling, on the twenty-sixth day of November, eighteen hundred and sixty-one.

2. Be it further enacted, That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of Berkeley, Jefferson and Frederick, shall be included in and form part of the State of West Virginia whenever the voters of said counties shall ratify and assent to the said constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

3. Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this commonwealth in congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union.

4. This act shall be in force from and after its passage.

Exhibit Number 2.

Second Auditor's Office,
Richmond, Nov. 16, 1871.

A. W. Campbell, Esq., Secretary, &c.:

Dear Sir:—Yours of the 14th was received. You ask me for a report upon a variety of questions connected with our public debt, the transactions of the Board of Public Works in regard to it, and the financial affairs of the State, which it is understood, of course, you propose to use in the contemplated adjustment of the portion to be paid by West Virginia of the debt.

To answer the questions propounded would involve an amount of labor which we could not bestow on the subject.

But, apart from this, I presume at an early day this office will be called upon by the Executive or the General Assembly of Virginia for detailed reports of all the matters referred to, which will be available to you.

The books and records of this office are open to your inspection.

I trust that in failing to respond to your inquiries you will not regard me as in any wise wanting in official courtesy to you or your associates. None, certainly, is intended.

I have the honor to be,
Most respectfully yours,
Asa Rogers.

EXHIBIT NUMBER 3.

REPORT OF THE SENATE FINANCE COMMITTEE OF 1873.

STATE OF WEST VIRGINIA,
CHARLESTON, December 22, 1873.

The attention of the Committee on Finance has been repeatedly called by resolutions introduced in the Senate and otherwise, to the subject of Virginia's public debt and the share which it is equitable for West Virginia to bear and pay. The committee under these frequent promptings have been constrained to give the subjects their most earnest and careful attention as a matter fraught with more than ordinary consequence to the State, and have come to a conclusion satisfactory to themselves, and it is believed that the conclusion of the committee will be apprroved by the judgment of the people interested, and will receive the sanction of any tribunal before whom it may be brought for adjudication.

It is necessary to a full understanding of this subject that reference be had to the treaty stipulations or fundamental conditions, by whatsoever name they may be called, between the representatives of the people of Virginia and the people desiring separation, by the creation of a new State, which led to the formation of a constitution, its adoption by the people and its approval by Congress, and the establishment of the State of West Virginia.

The ninth section of "an ordinance to provide for the formation of a new State out of a portion of the territory of this State," [Virginia] passed August 20, 1861, provided, that "the new State shall take upon itself a just proportion of the public debt of the commonwealth of Virginia *prior to the first day of January, 1861,* to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and deducting therefrom the monies paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Upon compliance with the conditions contained in the ninth section and here quoted the people within the counties now constituting West Virginia, were authorized to form a constitution to be presented to Congress for its approval and for the admission of the new State into the Union.

Accordingly a constitution was adopted by a convention of the people from the several counties now constituting the State of West Virginia and to carefully guard and secure the rights prescribed by Virginia as a condition precedent to the formation of the new State, a provision was incorporated into it to secure the exact fulfillment of the treaty stipulations as aforesaid.

By article eight, section eight of the constitution, it was provided that "an equitable proportion of the public debt of the Common-

wealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and that the Legislature shall ascertain the same as soon as may be practicable, and to provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This subject has received a careful consideration by commissioners appointed by authority of this State, and while this committee see much to approve in the Report of the Debt Commissioners of West Virginia on this subject for their great research and the ability with which they handled the subject, considering the peculiar difficulties under which they labored, as shown in their report, and in the illustration of the many problems that may rise in the discussion of this subject, yet this committee think the controlling question has not been discussed by the Commissioners by reason of the embarrassment surrounding their action; and the Committee beg leave to refer to the report which is appended hereto and marked No. 1.

In construing the legal principles involved in this matter, it may be assumed that a private creditor of Virginia cannot sue West Virginia for contribution; for that is prohibited by the Constitution of the United States; see article eleven of amendments United States Constitution which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign State." But notwithstanding this prohibition the third article extends the judicial power of the Supreme Court to controversies between two or more States. Under this provision of the Constitution it is within the power of Virginia to institute and prosecute any suit against West Virginia touching the controversies respecting the public debt.

If the conditions precedent to our admission as a State, prescribed by Virginia herself, be accepted as a true basis of adjustment and final settlement, Virginia's claims for expenditures can very properly be offset by our contributions.

Upon this basis the whole subject is one of easy solution, containing no other items than that of creditor or debtor with balances to be struck upon agreed principles. The legislative history of Virginia establishes beyond a doubt that the first act of assembly to create a debt or issue a bond was passed in the year 1821, and the executive records show that the first bond issued by the commonwealth of Virginia was in the year 1822.

From this latter period we date the commencement of our liability under the fundamental stipulations prescribed by Virginia for our separation, which were accepted by the people of this State, approved by Congress, and the President of the United States, as the head of the executive department, and subsequently affirmed by the Supreme Court of the United States, and may at this day be accepted by the public as firmly engrafted into obli-

gations and rights as if the same were constitutional provisions emanating from the supreme power.

The concurrent approval, binding alike upon the people of Virginia and West Virginia, lead us to the following conclusions which are the results of a mathematical demonstration, founded upon public official records, appropriate to determine how much of the bonded debt of Virginia existing prior to Januaary, 1861, was expended within the limits of this State, and how much was contributed by the counties forming the same.

The report of the Debt Commissioners hereinbefore referred to shows that all State expenditures within this State prior to January, 1861, amounted to $3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.

The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions to as upon the receipts of Virginia.

The committee have therefore assumed the foregoing sum of $3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the Debt Commissioners aforesaid.

From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia, from the counties included in this State during the same period. For the sake of convenience the committee have charged to Virginia, not the whole contribution, but the surplus after deducting a just proportion of the ordinary expenses of the State government. Our total contributions from taxes to the State of Virginia in the year 1822, amounted to $63,000; and in that year the total of the expenses of the State government chargeable to us was $47,000, leaving an excess of $16,000, which would go to the liquidation of the debt created for expenditures within our midst.

This small surplus in 1822, by the process of an increased rate of taxation, and the increased value of the subjects to be taxed, the rate rising from 8 cents to 40 cents on every one hundred dollars in value, made the excess of our contributions to the treasury of Virginia in the year 1860 amount to $512,000, rejecting fractions.

Thus our contributions to the treasury of Virginia arising from taxes collected in that year amounted to $647,079.96. In the same year our proportion of the ordinary expenses of government amounted to $135,000, which left the surplus aforesaid of $512,-079.96. It will be observed that the committee have referred only to the surplus in 1822 and in 1860. The surplus for the

intermediate periods swell the aggregate of our contributions to $3,892,000 which is in excess of expenditures within our limits by $525,000.

It will thus be seen that our state is not indebted and the Committee confidently advance this statement, not only as containing the true basis of settlement between the two States, but it is supported by incontrovertible facts, by conditions precedent prescribed by Virginia under the restored government which government has been approved as aforesaid by Congress, by the Executive and by the Supreme Court of the United States.

Notwithstanding the satisfactory condition of our finances and our material resources, the attention of the committee has been called to the fact that "West Virginia certificates" and "West Virginia bonds" are quoted at the marketable value of from five to fifteen cents on the dollar, in money of the stock exchanges and markets of the United States. This of course has a tendency to depreciate the just credit to which a State is entitled. For it is acknowledged that the credit of a State depends upon the value of its taxable property, the amount if its indebtedness and above all upon its punctuality in meeting its engagements. These quotations imply two things: first, that we owe a debt; second, that we are either unable or unwilling to pay the debt which beget a want of confidence in the minds of the public who are uninformed with respect to the true condition of West Virginia; and operate unjustly and injuriously upon us. It would seem to be enough for us to say, and we make the assertion without the fear of contradiction, that we owe no debt, that we have issued no bonds and our Constitution forbids the creation of a liability in the nature of a public debt; and with this assurance we cannot demand more nor expect less of all honorable stock brokers and bankers than the withdrawal from the list of indebted states the name of West Virginia.

"West Virginia certificates" and "West Virginia bonds" do not exist. No bonds have ever at any time been issued by West Virginia and we are prohibited from issuing at any time hereafter any bonds on the faith of this State. The bonds or certificates referred to were issued by Virginia, and West Virginia had no agency or participation therein.

In respect to the credit which our conduct and property would imply, we might be indifferent, but we have higher aims and more ennobling ambition. We desire to invite immigration, to cultivate our forests and to develop our mineral resources; this cannot be done with success, when men of thrift and capital are deterred from immigrating to and within our borders by reason of the persistent and unjustifiable misquotations of our credit. No one could be expected to invest capital within a State which has so absorbed the substance of the people thereof that its good faith and obligations were only worth five cents on the dol-

lar. West Virginia owes no debt, has no bonds for sale and asks no credit.

J. M. BENNETT,
Chairman.
JOHN W. GRANTHAM,
A. E. SUMMERS,
J. T. MCCLASKEY,
R. B. SHERRARD,
ELLIOTT VAWTER.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Decree Proposed by Virginia Referring the Cause to a Master.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs. In Equity.

STATE OF WEST VIRGINIA, *Defendant.*

Original No. 4..

DECREE PROPOSED BY VIRGINIA REFERRING THE CAUSE TO A MASTER.

This cause coming on this day to be heard upon the complainant's Bill and the Exhibits filed therewith, the Answer of the defendant, with the Exhibits filed therewith, and the General Replication filed by the complainant thereto, was argued by counsel. On consideration whereof, it is adjudged, ordered and decreed that this cause be referred to————————————, who is hereby appointed a Special Master herein, who, after giving ten days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will, without delay ascertain and report to the Court:

I.

The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stated specifically, how and in what form the same was evidenced, by what authority of

law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

What proportion and amount of said indebtedness and of the interest since accrued thereon, should, in equity, be apportioned to, and be now paid by, the State of West Virginia.

III.

He will make and return with his report any special or alternative statements of the accounts between the complainant and the defendent in the premises, which either may desire him to state, or which he may deem to be desirable to present to the Court.

It is further adjudged, ordered and decreed as follows:

(1) To the end that full and complete information may be afforded the Master as to all matters involved in the inquiries with which he is charged by this decree, the Commonwealth of Virginia, and the State of West Virginia shall each of them respectively produce before the Master, all such records, books, papers, and public documents as may be in their possession, or under their control, and which may, in his judgement, be pertinent to the said inquiries, and accounts, or any of them.

And the Master is authorized to visit the capitals of Virginia and West Virginia and to make or cause to be made such examination, as he may deem desirable, of the books of account, documents and public records of either state relating to the inquiries he is directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All published records published by authority of the Commonwealth of Virginia prior to the formation of the State of West Virginia, and all papers and documents, and other matter constituting parts of the public files and records of Virginia prior to the partition of new territory, which in the judgment of the Master, may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence, and considered by the Master. The public acts and records of the two states since the formation of West Virginia shall be evidenced if pertinent and duly authenticated; but all such testimony tendered by either party shall be subject to proper legal exception as to its competency.

The Master is empowered to summon any persons whose testi-

mony he, or either party, may deem to be material, and to cause their depositions to be taken before him or by a Notary Public, or other officer authorized to take the same, after reasonable notice to the adverse party.

(2) The Master is authorized and empowered to employ such accountants, stenographers, or other clerical assistance as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such accountants and stenographers and typewriters for such compensation to be made to them as the Master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

(3) The complainant will cause the sum of three thousand dollars to be deposited with the Marshal of this Court to the credit of this cause, on account of the costs and expenses of executing this decree, and of this suit; and in the event that the defendant shall desire any special statements or accounts to be made, she shall in like manner before the taking of any such account, or the making of such special statement, cause the sum of $———— dollars to be deposited with the Marshal.

And the Master is authorized from time to time to draw upon the fund so deposited by Virginia, for the compensation of the accountants and other clerical assistants whom he may employ, and for any other costs or expenses, including stationery, and printing, which it may in his judgment be necessary to be incurred in executing this order of reference, or making up any special statement or accounts asked for by the plaintiff; and he will draw upon the fund deposited by the defendant for any costs which may be incurred in making up any special statement or accounts which may be desired by the defendant to be specially stated, which drafts, accompanied by proper vouchers, the Marshal of this Court will pay.

And the said Marshal is allowed to have and retain a commission of five per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts and disbursments in the premises to the Court.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys General of the respective States.

Washington, D. C., Dec. 2, 1907.

To HON. CLARKE W. MAY,

Attorney General of West Virginia.

Please take notice that on the meeting of the Court on Monday next the 9th instant, we will move the Supreme Court of the United States to enter the decree of which the above is a copy in the above entitled cause.

WILLIAM A. ANDERSON,
HOLMES CONRAD,
Counsel for the Complainant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Decree Proposed by West Virginia Referring the Cause to a Master.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY.

Original, No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

DECREE PROPOSED BY WEST VIRGINIA REFERRING THE CAUSE TO A MASTER.

This cause came on this day to be heard upon the complainant's bill and the exhibits filed therewith; the answer of the defendant, with the exhibits filed therewith; the general replication thereto by the complainant, and was argued by counsel, and on consideration of which it is adjudged, ordered, and decreed that this cause be, and the same is hereby, referred to ——— ———, who is appointed a special master herein, who, after giving —— days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Vir-

ginia on the 1st day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

The amount of state expenditures made by the Commonwealth of Virginia prior to the 1st day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20, 1861, charging the same to the State of West Virginia; also a just proportion of the ordinary expenses of the state government of the Commonwealth of Virginia during the same period from the counties included in the State of West Virginia, charging the same to the State of West Virginia, but deducting therefrom the moneys paid into the treasury of the Commonwealth of Virginia during the same period from the counties included within the limits of West Virginia.

III.

Whether any agreements, contracts, or arrangements, other than those appearing from the exhibits filed with the bill herein, have been made by the Commonwealth of Virginia with her creditors since January 1, 1861, with reference to said public debt created prior to said date, or to the satisfaction or discharge of said indebtedness or any part thereof.

IV.

The amount of certificates relating to said indebtedness issued by the Commonwealth of Virginia under the acts of her General Assembly, approved March 30, 1871, March 28, 1879, February 14, 1882, and February 20, 1892; and what amount, if any, of said certificates have been deposited since January 4, 1906, with the commission appinted under the joint resolution of the General Assembly of the Commonwealth of Virginia approved March 6, 1894; and he will also ascertain and report what amount of said certificates so deposited since said date were issued under the act of March 30, 1871; what amount were issued under the act of March 28, 1879; what amount were issued under the act of February 14, 1882, and what amount were issued under the act of February 20, 1892.

V.

The master will ascertain and report to what extent said certificates issued by the Commonwealth of Virginia represented the principal of one-third of said public debt and to what extent they represented the interest thereon, and the rate at which the interest was reckoned; and he will also ascertain and report whether there is included in said certificates, or in any of them, the interest or any part of the interest, which had accrued on the portion of said public debt refunded by the Commonwealth of Virginia, and if so, what was the total amount of such interest and at what rate it was reckoned.

VI.

It is further ordered and decreed that the master shall ascertain and report what amount, if any, of the bonds or other evidences of debt issued by the Commonwealth of Virginia under the act of March 30, 1871, was subsequently surrendered by the holders thereof and exchanged for other bonds or evidences of debt issued under the acts of 1879, 1882, and 1892, and if such exchanges were made, the master will ascertain and report what rate of interest was agreed to be paid upon such new bonds or evidences of debt.

VII.

It is further ordered and decreed that the Commonwealth of Virginia and the State of West Virginia shall each produce before the master all such records, books, papers, and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to make or cause to be made such examination as he may deem desirable of the books of account, vouchers, documents, and public records of either state relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid which in the judgment of the master may be relevant and pertinent to

any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two states since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of three thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters, and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal is allowed to have and retain a commission of 5 per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys General of the respective states.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Referring Cause to Master.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original,—October Term, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

DECREE ENTERED MAY 4TH, 1908, REFERRING CAUSE TO MASTER.

This cause having been heard upon the pleadings and accompanying exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated, to ascertain and report to the court:

1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and valuation of the territory of Virginia and of West Virginia, June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the Commonwealth of Virginia with the territory now constituting the State of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of

Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.

6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof.

The answers to these inquiries to be without prejudice to any question in the cause.

It is further ordered that the Commonwealth of Virginia and the State of West Virginia shall each, when required, produce before the master, upon oath, all such records, books, papers and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts, or any of them.

And the master is authorized to make or cause to be made, such examination as he may deem desirable of the books of account, vouchers, documents and public records of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly

authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, aftter reasonable notice to the adverse party.

The master is authorized and empowered, subject to the approval of the Chief Justice, to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of five thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal shall receive such commission for his services in receiving and disbursing the funds so deposited with him as may be allowed by the court, and he will make a report of his transactions, receipts and disbursements in the premises.

Any notices to be given in connection with the execution of this decree may be given by and to the Attorney General of the respective States.

The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court.

And the court reserves the consideration of the allowance of interest; of the costs of this suit, and all further directions until

after the master has made his report; either of the parties to be at liberty to apply to the court as they shall be advised.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Order by the Court.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original.—October Term, 1907.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

It is ordered by the Court that counsel for the respective parties in this cause have leave to submit on or before the 18th instant the name of fit persons for appointment as Master to take the testimony herein.

Per MR. CHIEF JUSTICE FULLER.

May 4th, 1908.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Recommendation by Defendant.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original,—October Term, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

Now cometh the defendant, the State of West Virginia, by her counsel of record, and in pursuance of the order of this Court entered on the 4th day of May, 1908, doth respectfully submit the names of the persons hereinbelow set out, either of whom as the defendant believes and avers, would be a fit person for the appointment as Master to take the testimony under the decree in this cause entered on May 4th, 1908, to-wit:

Mr. JOHN W. YERKES, of Kentucky;

Mr. CHARLES E. LITTLEFIELD, of Maine.

We respectfully say to the Court that in the selection of these names we have deemed it proper and right not to consider any citizen of the Commonwealth of Virginia or of the State of West Virginia or of the Cities of New York, Philadelphia, Baltimore, or any of the other money centers where the so-called "West Virginia Certificates" are owned, or are sold or traded in, on stock exchanges or exchanges of a similar nature.

Respectfully submitted,

W. G. CONLEY,
Attorney General.

JOHN G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
Of Counseel for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Recommendation by Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 4, Original.

VIRGINIA, *Complainant*,

vs.

WEST VIRGINIA, *Defendant*.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On behalf of the Commonwealth of Virginia, the undersigned beg to nominate as suitable persons from whom a selection may be made by the court of one to be appointed "special master" to ascertain and report on the several subjects indicated in the order of the court on the ——— day of May, 1908, the following named gentlemen, *viz:*

Mr. J. J. DARLINGTON, of the District of Columbia;

Mr. GEORGE WHARTON PEPPER, of the city of Philadelphia.

Apart from the qualification of personal fitness, the residence of the master is regarded as a feature entitled to great consideration. He should be in a locality easily accessible to the counsel in the cause, and especially should he be where he could have easy and frequent access to the public records of Virginia, in the city of Richmond, from which nearly all the facts on which the inquiries he will be charged with conducting are to be found.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

I cordially concur in the above nominations.

HOLMES CONRAD,
Of Counsel.

May 14, 1908.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief for Virginia.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Original No. 4.

IN EQUITY.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

Brief for Virginia, upon motion to enter decree referring the cause to a master.

Drafts of a decree referring the cause to a Master have been submitted on behalf of the complainant, and the defendant, respectively.

[I]

There are some differences going rather to matters of procedure than to any question of principle, between the provisions of paragraphs III and IV of complainant's draft, as compared with paragraph VII of defendant's draft, which will be apparent upon reading the two papers.

We respectfully ask that the provisions expressed in paragraphs III, IV and V of complainant's draft be embodied in the decree which the court shall enter, for reasons which will be apparent on reading those paragraphs.

[II]

Our serious objections to the defendant's draft of decree are particularly to paragraph II, but also to paragraphs III, IV and V thereof.

The draft submitted on behalf of the complainant directs the master to take an account ascertaining:

I.

"The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what form the same was evidenced, by what authority of law, and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness."

The defendant's draft adopts this paragraph.

Paragraph II of plaintiff's draft directs the master to take the following accounts:

II.

"What amount and proportion of said indebtedness and of the interest accrued thereon, should in equity be apportioned to and be now paid by the State of West Virginia."

Paragraph II of plaintiff's draft directs the master to take the following accounts:

II.

(*a*) "The amount of State expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20th 1861.

(*b*) "The aggregate ordinary expenses of the State government of the Commonwealth of Virginia, prior to January 1st, 1861, and since any part of said indebtedness was contracted.

(*c*) "All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period."

Paragraph III of plaintiff's draft directs that the master.

III.

"Will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court."

We respectfully object to paragraph II of defendant's draft, on the ground that it seems to lend the sanction of the court in advance to a basis or scheme for the statement of the account, which is not shown by anything as yet in the cause to be either equitable or just.

Before any such question can be fairly adjudicated, it is necessary to the ends of justice, that there shall be a mass of evidence in the case, not yet introduced, which evidence the court should have the aid of its master in collating and thoroughly digesting.

There is by no means enough in the record to enable the court to come to any just or definite conclusion as to the precise scheme which it would be equitable to adopt in stating the account.

To do so at this stage of the litigation, would be to decide an important question in the case before the evidence necessary for a full understanding and just decision of that question is before the court. It would be largely to take a step in the dark, which might, and in all probability would, do injustice to one party or the other.

Our main objection to paragraph II of defendant's draft is that its effect manifestly is to have the court prejudge the case as to the basis on which the account shall be stated.

On the other hand, in the draft of decree tendered by counsel for Virginia, we have not asked the court to prejudge the case upon any controverted question of law or fact.

The case is not now being submitted for a decision upon its merits.

It is submitted for a decree referring it to a master, to state and report to the court the data necessary to enable the court to justly decide it upon its merits—and all the complainant desires is an opportunity to show the court and its master what is the fair and equitable basis upon which the account between the two States should be stated, under all of the circumstances of the case, as they shall appear when the evidence is all in.

If it should then appear that the basis prescribed by the Wheeling ordinance is binding upon the parties, and must be followed

as the basis upon which the account shall be made up, that basis would be adopted. But if it should be then manifest that that arbitrary basis of settlement is not the one on which the account should be stated, because it would, if applied to the facts of the case as they shall appear in the evidence, lead to absolutely unconscionable results and operate to impair the obligation of the contracts by which the common debt was created, contracts which were and are alike obligatory upon Virginia and upon West Virginia, or for any other valid reason, then the scheme of settlement indicated in the Wheeling ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted.

It is due to frankness to say, that, while the Wheeling ordinance upon its face, prescribes an absolutely arbitrary basis of settlement, the representatives of Virginia are satisfied that upon a fair, reasonable and just construction of the language of that ordinance, and of the subsequent supplemental enactments, the scheme of settlement therein defined will, when applied to the facts as stated in the bill, and as it is believed they can be established by proofs, result in fixing the proportion of the debt of Virginia which West Virginia should assume and pay, inclusive of interest, at a very large sum, though not so large a sum as it would be equitable for West Virginia to pay.

The debt, a portion of which she was to pay, was an interest-bearing debt. It would be manifestly "just" and "equitable" that West Virginia should be required to pay interest as well as principal. Indeed, any settlement which does not require that State to pay interest during the long period of her default and refusal to pay anything, would be not only unjust, and inequitable, but iniquitous.

The ninth section of said ordinance required the new State "to take upon itself a *just* proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861."

And section 8 of Article VIII, of the first Constitution of West Virginia, under the provisions of which she became a State, required that:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State;" and that "the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund *sufficient to pay the accruing interest* and redeem the principal within thirty-four years."

So, West Virginia came into the Union upon the distinct condition expressed in her Constitution, that she would assume an equitable proportion of the common debt of the undivided State, as it existed prior to January 1, 1861, and would provide for the payment of the accruing interest and the redemption of the principal thereof.

While it is believed that, upon the facts stated in the Bill and accompanying exhibits, and upon the proofs hereafter to be adduced in support thereof, West Virginia will owe a very large sum, even under the arbitrary scheme of the Wheeling ordinance, we submit that we should not, in the present status of the litigation, be tied down to the terms of that ordinance.

Indeed, its provisions were modified by the terms of the eighth section of Article VIII of the Constitution under which West Virginia was made a State, which provided that West Virginia should assume an equitable proportion of the common debt of the Commonwealth, principal and interest: And yet the defendant's draft excludes any item of interest from the account.

[III]

Another palpable objection to the defendant's draft is, that it excludes from the account the value of the property, assets, and money which West Virginia has received from the Commonwealth. Upon any basis of just accounting, these items should be brought into the account.

If the account should be stated on the basis of the Wheeling ordinance, these items would manifestly be proper charges against West Virginia.

By the terms of that ordinance, Virginia's title to, and ownership of, all of the property and assets theretofore belonging to the Commonwealth remain intact.

By it, West Virginia would acquire no title to any of those assets or of that property. Framed as that ordinance was, by western Virginian's and arbitrary, and on its face unjust, as were the criteria by which it undertook to provide that West Virginia's proportion of the common debt should be computed, its authors were not so conscienceless as to also propose that the new State, after making such an inadequate contribution to its share of a debt which had been chiefly contracted by the votes of the representatives of its people and for their benefit, should also have a

share of the property and assets of the Commonwealth, free of charge.

All that was, by the terms of that ordinance, to be ceded by the Commonwealth to the new State, was political dominion, and jurisdiction over the people and territory embraced in the new State.

The meaning and effect of the ordinance was to leave the title to, and ownership of, the assets and property of the Commonwealth in the Commonwealth.

If nothing more had been done or said by Virginia as to that property and those assets, than was said in the Wheeling ordinance, none of it ever would have become the property of West Virginia.

The Virginians who were the creators of West Virginia, who sat in the Wheeling Convention on the 20th of August, 1861, who constituted the convention which framed the first Constitution of West Virginia, and who constituted the Legislature of the restored government of Virginia which sat in Wheeling in 1862, and in 1863, fully recognized this to be true, for, pending the formation of the new State, and before the Legislature of Virginia had in any form given its consent to its creation out of the territory of Virginia, the Legislature of the restored State of Virginia, whose authority was supreme over the territory and people afterwards constituting West Virginia, and binding upon them, on the 3rd and 4th of February, 1863, passed the acts copied in the appendix to this brief.

These statutes constituted a part of the enactments out of which the State of West Virginia had its birth. It is particularly true of the act of February 3, 1863, that it was fundamental, so far as West Virginia was concerned: for it constitutes her title deed to a vast quantity of property, the title to which by law and under the Wheeling ordinance, was vested in Virginia.

These statutes, together with the Wheeling ordinance, the first Constitution of West Virginia, the act of the United States Congress approved December 31, 1862, under which the new State was afterwards admitted into the Union, and the act of the Wheeling Legislature of May 13, 1862, constitute the constating instruments and acts by which her political existence was created, and her governmental powers and duties determined.

As was indicated by this court in its decision overruling the defendant's demurrer, the Wheeling ordinance, and Section 8 of

Article VIII of the first Constitution of West Virginia, must be taken and read together: So also these constating acts of February 3rd and 4th, 1863, and particularly of February 3, 1863, must be taken and read together with Section 9 of the Wheeling ordinance, and with Section 8 of Article VIII of the first West Virginia Constitution, as together prescribing the terms and conditions on which the consent of the Commonwealth was given to the formation of the new State out of her territory, and the transfer to that new State when formed of any portion of the assets and property of the parent State.

Property and money large in quantity and value were thereupon transferred by Virginia to West Virginia, for all of which West Virginia must account, not only as an equitable obligation resting upon her, under the circumstances, but as a legal obligation put upon her by positive and binding enactment.

All of these just items of charge against West Virginia, are excluded from the account to be directed by the court by the terms of defendant's draft.

For convenience of reference, the "Wheeling Ordinance," and the acts of the Legislature of Virginia at Wheeling, passed February 3rd and 4th, 1863, are printed as an appendix to this brief.

[IV]

Another objection to the account called for by defendant's draft, is that it does not direct *any account to be taken ascertaining the amount and proportion of the debt of Virginia on and prior to January, 1, 1861, which West Virginia should assume and pay*, but contents itself with merely directing the arbitrary and inconsequential accounts defined in paragraph II of defendant's draft.

But our principal insistance is that defendant's draft of a decree prejudges the case in advance of a hearing upon the merits, while that tendered for the plaintiff cannot operate to the prejudice of either party, upon any material question in the cause; by this draft the adjudication of these questions being left to await a hearing after the Master's report shall be filed, upon the evidence then fully in the cause.

[V]

The precise accounts called for by paragraph II of defendant's

draft will be taken by the Master if he shall find it necessary and proper to take them in order to ascertain the amount and proportion of the Virginia debt which West Virginia should pay; and if the Master shall for any reason deem it unnecessary to take those accounts, the defendant can, under paragraph III of complainant's draft, have them stated as special accounts, if she shall be so advised.

Paragraph II of complainant's draft is designed to enable each party, or the Master, to have alternative, or special statements of the accounts made up on any basis on which either party or the Master may deem it proper or desirable that the same shall be stated.

By having the respective views and contentions of the complainant and the defendant thus presented in contrast in such concrete form, the court, with the assistance of the findings of the Master, will be enabled more readily and intelligently to reach a just conclusion.

[VI]

If the inquiries defined in paragraphs III, IV, V and VI of defendant's draft have any pertinency to any question in the case, it must be because of something not yet in the record.

We object to them as being unnecessary and irrelevant.

(*a*) There is nothing in the cause, or so far as we know out of it, to show that there is any foundation in fact for the inquiry mentioned in paragraph III of defendant's draft, as to whether Virginia has made any other contracts or arrangements with the public creditors, since January 1, 1861, in reference to the public debt. So that inquiry, though harmless, is useless.

(*b*) The accounts provided for in paragraphs IV and V of defendant's draft, are not pertinent to any issue in the cause.

Both relate to the certificates or receipts given by Virginia to the holders of the bonds issued by the Commonwealth before her dismemberment, who have deposited these bonds with her.

Those certificates are in the nature of a declaration of trust by Virginia, that she holds said bonds (so far as they have not been funded in the new securities which the Commonwealth has given for about two-thirds of the aggregate amount thereof, principal and interest), for the benefit of the owners of the bonds deposited with her.

It is impossible to see how those transactions could in any way affect any question which will arise in this cause.

The only function of those certificates is to show who are now entitled to the bonds which were so deposited with Virginia, and which she holds in her treasury for the benefit of these certificate holders, awaiting a settlement with West Virginia.

As is true of the inquiries mentioned in paragraph III, of defendant's draft, the objection to those provided for by paragraphs IV and V are that they are unnecessary and useless.

(c) The same objection applies to paragraph VI of defendant's draft. That relates to the obligations which were issued by Virginia, as now constituted, in settlement of the two-thirds of the old bonds funded, and payment of which was assumed by her.

That is a matter with which West Virginia has nothing to do, and which does not affect the rights or obligations of either party in respect to the claims asserted in complainant's bill.

Those new bonds given by Virginia for the two-thirds of the old bonds assumed by her, and accepted by the owners of the old bonds so deposited with Virginia, operated as a payment and discharge of the old bonds to the extent of the two-thirds thereof so funded.

West Virginia is not sued here to pay any part of that two-thirds so settled by Virginia. She is sued to have her assume and pay so much of the remaining unfunded third of the common debt of the undivided State, as may be West Virginia's equitable portion of the whole of the debt represented by the bonds of the original State. It has never been claimed or suggested that there was any liability on West Virginia beyond said unfunded third of the bonds of the original State which have been funded; or that West Virginia should pay more than one-third of the bonds issued by Virginia prior to the formation of West Virginia, which have not been funded.

The liability of West Virginia on account of the common public debt, has sometimes been estimated by Virginia or her representatives at one-third thereof, but never at more than one-third, and Virginia has undertaken to take care of the other two-thirds with which West Virginia has nothing to do.

It is true, that there are some millions of the debt of the undivided State, which Virginia has paid in full, and holds the obligations so taken up by her as a claim against the new State, to the extent of West Virginia's equitable liability for contribution therefor; and the extent of that liability can be ascertained

and stated in the account directed by paragraph II of complainant's draft.

There is no occasion for any of the accounts directed by paragraphs III, IV, V and VI of defendant's draft. If West Virginia wants any of them to be stated, she can have that done as a special statement under paragraph III of complainant's draft.

[VII]

We object generally to the defendant's draft, that it does not direct the accounts which are necessary to be taken in order to intelligently, definitely, and fairly determine the amount and proportion of the debt of the undivided State, which West Virginia is equitably and justly bound to pay.

Respectfully submitted,

WILLIAM A. ANDERSON,
Counsel for Virginia.

APPENDIX.

Copy of the ordinance adopted by "the Wheeling Convention," providing for the formation of the new State afterwards called West Virginia.

AN ORDINANCE.

To provide for the formation of a new State out of a portion of the territory of this State.

(Passed August 20, 1861.)

Whereas, it is represented to be the desire of the people inhabiting the counties hereinafter mentioned, to be separated from this Commonwealth, and to be erected into a separate State, and admitted into the Union of States, and become a member of the government of the United States:

1. The people of Virginia, by their delegates assembled in convention at Wheeling, do ordain that a new State, to be called the State of Kanawha, be formed and erected out of the territory included within the following described boundary: beginning on the Tug Fork of Sandy river, on the Kentucky line where the

counties of Buchanan and Logan join the same; and running thence with the dividing lines of said counties and the dividing line of the counties of Wyoming and McDowell to the Mercer county line, and with the dividing line of the counties of Mercer and Wyoming to the Raleigh county line; thence with the dividing line of the counties of Raleigh and Mercer, Monroe and Raleigh, Greenbrier and Raleigh, Fayette and Greenbrier, Nicholas and Greenbrier, Webster, Greenbrier and Pocahontas, Randolph and Pocahontas, Randolph and Pendleton, to the southwest corner of Hardy county; thence with the dividing line of the counties of Hardy and Tucker, to the Fairfax Stone; thence with the line dividing the States of Maryland and Virginia, to the Pennsylvania line; thence with the line dividing the States of Pennsylvania and Virginia, to the Ohio river; thence down said river, and including the same, to the dividing line between Virginia and Kentucky, and with the said line to the beginning; including within the boundaries of the proposed new State the counties of Logan, Wyoming, Raleigh, Fayette, Nicholas, Webster, Randolph, Tucker, Preston, Monongalia, Marion, Taylor, Barbour, Upshur, Harrison, Lewis, Braxton, Clay, Kanawha, Boone, Wayne, Cabell, Putnam, Mason, Jackson, Roane, Calhoun, Wirt, Gilmer, Ritchie, Wood, Pleasants, Tyler, Doddridge, Wetzel, Marshall, Ohio, Brooke, and Hancock.

2. All persons qualified to vote within the boundaries aforesaid, and who shall present themselves at the several places of voting within their respective counties, on the fourth Thursday in October next, shall be allowed to vote on the question of the formation of a new State, as hereinbefore proposed; and it shall be the duty of the commissioners conducting the election at the said several places of voting, at the same time, to cause polls to be taken for the election of delegates to a convention to form a Constitution for the government of the proposed State.

3. The convention hereinbefore provided for may change the boundaries described in the first section of this ordinance, so as to include within the proposed State the counties of Greenbrier and Pocahontas, or either of them, and also the counties of Hampshire, Hardy, Morgan, Berkeley and Jefferson, or either of them, and also such other counties as lie contiguous to the said boundaries, or to the counties named in this section; if the said counties to be added, or either of them, by a majority of the votes given, shall declare their wish to form part of the proposed State, and

shall elect delegates to the said convention, at elections to be held at the time and in the manner herein provided for.

4. Poll books shall be prepared under the direction of the governor for each place of voting in the several counties hereinbefore mentioned, with two separate columns, one to be headed "For the New State," the other "Against the New State." And it shall be the duty of the commissioners who superintended, and the officers who conducted the election in May last, or such other persons as the governor may appoint, to attend at their respective places of holding elections, and superintend and conduct the election herein provided for. And if the said commissioners and officers shall fail to attend at any such place of holding elections, it shall be lawful for any two freeholders present to act as commissioners in superintending the said election, and to appoint officers to conduct the same. It shall be the duty of the persons superintending and conducting said election, to employ clerks to record the votes, and to endorse on the respective poll books the expenses of the same.

If on the day herein provided for holding said election, there shall be in any of the said counties any military force, or any hostile assemblage of persons, so as to interfere with a full and free expression of the will of the voters, they may assemble at any other place within their county, and hold an election as herein provided for. It shall be the duty of the commissioners superintending, and officers conducting said election, and the clerks employed to record the votes, each before entering upon the duties of his office, to take, in addition to the oath now required by the general election law, the oath of office prescribed by this convention. It shall be the duty of the officers and commissioners aforesaid, as soon as may be, and not exceeding three days after said election, to aggregate each of the columns of said poll books, and ascertain the number of votes recorded in each, and make a return thereof to the Secretary of the Commonwealth, in the city of Wheeling, which return shall be in the following form, or to the following effect:

We, ..., commissioners, and ..... conducting officer, do certify, that we caused an election to be held at ....., in the county of ....., at which we permitted all persons to vote that were entitled to do so under existing laws, and that offered to vote, and that we

have carefully added up each column of our poll books, and find the following results:

For a new State, ... votes; Against a new State, ... votes.

Given under my hand, this ..... day of ....., 1861.

Under which certificate there shall be added the following affidavit:

..... County, To-wit:

I, ..., a justice of the peace, (or any officer now authorized by law to administer oaths,) in and for said county, do certify that the above named commissioners and conducting officer severally made oath before me, that the certificate by them above signed is true.

Given under our hand, this ..... day of ....., 1861.

The original poll books shall be carefully kept by the conducting officers for ninety days after the day of election and upon the demand of the executive shall be delivered to such person as he may authorize to demand and receive them.

5. The commissioners conducting the said election in each of said counties shall ascertain, at the same time they ascertain the vote upon the formation of a new State, who has been elected from their county to the convention, hereinbefore provided for, and shall certify to the Secretary of the Commonwealth the name or names of the person or persons elected to the said convention.

6. It shall be the duty of the governor, on or before the fifteenth day of November next, to ascertain and by proclamation make known the result of the said vote; and if a majority of the votes given within the boundaries mentioned in the first section of this ordinance, shall be in favor of the formation of a new State, he shall so state in his said proclamation, and shall call upon said delegates to meet in the city of Wheeling, on the 26th day of November next, and organize themselves into a convention; and the said convention shall submit, for ratification or rejection, the Constitution that may be agreed upon by it, to the qualified voters within the proposed State, to be voted upon by the said voters on the fourth Thursday in December next.

7. The counties of Ohio shall elect three delegates; the counties of Harrison, Kanawha, Marion, Marshall, Monongalia, Preston, and Wood shall each elect two; and the other counties named

in the first section of this ordinance shall each elect one delegate to the said convention. And such other counties as are described in the third section of this ordinance, shall, for every thousand of the population according to the census of 1860, be entitled to one delegate, and to an additional delegate for any fraction over thirty-five hundred; but each of said counties shall be entitled to at least one delegate. The said delegate shall receive the same per diem as is now allowed to members of the general assembly; but no person shall receive pay as a member of the general assembly and of the convention at the same time.

8. It shall be the duty of the governor to lay before the general assembly, at its next meeting, for their consent according to the constitution of the United States, the result of the said vote, if it shall be found that a majority of the votes cast be in favor of a new State, and also in favor of the constitution proposed to said voters for their adoption.

9. The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.

The lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents therein. No grants of lands or land warrants issued by the proposed State, shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last, which shall be located on lands within the proposed State now liable thereto.

10. When the general assembly shall give its consent to the formation of such new State, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the union of States.

11. The government of the State of Virginia as re-organized by this convention at its session in June last, shall retain, within the territory of the proposed State, undiminished and unimpaired, all the powers and authority with which it has been vested, until the proposed State shall be admitted into the Union by the Congress of the United States; and nothing in this ordinance contained, or which shall be done in pursuance thereof, shall impair or affect the authority of the said re-organized State government in any county which shall not be included within the proposed State.

(SIGNED) A. I. BOREMAN, *President.*
(SIGNED) G. L. CRANMER, *Secretary.*

Copies of acts passed by the Legislature of Virginia, at Wheeling, February 3rd, and February 4th, 1863.

CHAPTER 68.—*An ACT transferring to the proposed State of West Virginia, when the same shall become one of the United States, all this State's interest in property, unpaid and uncollected taxes, fines, forfeitures, penalties and judgments, in counties embraced within the boundaries of the proposed State aforesaid.*

Passed February 3, 1863.

1. Be it enacted by the General Assembly of Virginia, That all property, real, personal and mixed, owned by or appertaining to this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads, and other internal improvements, or parts thereof situated within the said boundaries, and now vested in this State, or in the president and directors of the board of the literary fund, or the board of public works thereof, or in any person or persons, for the use of this State to the extent of the interest and estate of this State therein; and shall also include the interest of this State, or of the said president and directors, or of the said board of public works, in any parent bank or branch

doing business within the said boundaries; and all stocks of any other company or corporation, the principal office or place of business whereof is located within the said boundaries standing in the name of this State or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State.

2. Be it further enacted, That all unpaid and uncollected arrearages of taxes on lands, town lots, property tax, capitation tax, license tax, militia fines, fines imposed by courts, forfeitures and penalties, belonging to the State in the hands of sheriffs, collectors or individuals, in any or all of the counties embraced within the boundaries of the proposed State of West Virginia, as also all bonuses on the capital stock of any bank, taxes on the dividends declared by any bank, savings institution or insurance company; dividends on stock owned by the State, or by the board of public works, or the president and directors of the board of the literary fund, in any bank, bridge or other corporation in any one of the counties aforesaid; also taxes on seals, deeds, wills, writs and other legal processes due from the clerks of the courts, notaries public or the secretary of the commonwealth; taxes on passengers and tonnage due from railroad companies, taxes on bank notes or other property transported by express companies within the counties aforesaid; also all fines, forfeitures and penalties incurred by railroad, express companies or other parties or persons within the counties aforesaid; also all judgments, decrees or penalties incurred by officers of the State, railroad or express companies, or other persons before or since the reorganization of the State government at the city of Wheeling; also all suits and their results now pending in the name of the board of public works, or of the president and directors of the board of the literary fund in any court of any of the counties aforesaid; also all taxes on lands, town lots, property tax, capitation tax, assessed in the counties aforesaid, and due the State for the year eighteen hundred and sixty-three, in the hands of officers of the State or individuals, together with all the rights of the State, or of the board of public works, or of the president and directors of the board of the literary fund to any and all moneys and claims in the counties aforesaid that may not be specifically mentioned in this act, but that rightfully belong to the State or corporations for the use of the State, shall be the property of the State of West Virginia, when the same shall become one of the United States.

3. It shall be the duty of all sheriffs or collectors of the public revenue, also of the presidents or other officers of railroad, express, bridge or internal improvement companies, presidents and other officers of banks, savings banks and insurance companies, clerks of courts, notaries public, the secretary of the commonwealth, and of individuals owing or having money in their hands due the State, or the board of public works, or the president and directors of the board of the literary fund, in any of the counties aforesaid, to pay the same into the treasury of the State of West Virginia, when the same shall become one of the United States.

4. Be it further enacted, For the purpose of carrying this act into effect, that suits may be brought in the name of the commonwealth for the use of the State of West Virginia, when it becomes one of the United States, on any bond or claim which shall pass to or become the property of the State of West Virginia by virtue of this act.

5. Be it further enacted, That if the appropriations and transfers of property, stocks and credits provided for by this act take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State: provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government.

6. It shall be the duty of the auditor of public accounts, the secretary of state, the treasurer and the adjutant-general of this commonwealth to procure fit and proper blank books for the purpose, and cause to be transcribed therein true copies of all such records, official acts, orders, minutes and memoranda, and like copies of original papers upon which any such official action was based, which from its locality or general state interest appertains to and will be useful and advantageous to the State of West Virginia; and the officers aforesaid shall severally certify to the governor of this commonwealth the correctness of their respective copies; and it shall be the duty of the governor to certify to all whom it may concern, the official character of such officers so certifying under the great seal of this commonwealth, and deliver all such copies to the governor of West Virginia, when his election is officially declared, for the use of said State of West Virginia.

7. This act shall take effect when the proposed State of West Virginia shall become one of the United States.

CHAPTER 72.—*An ACT making an appropriation to the proposed new State of West Virginia when the same shall become one of the United States.*

Passed February 4, 1863.

1. Be it enacted by the General Assembly of Virginia, That the sum of one hundred and fifty thousand dollars be, and is, hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

2. Be it further enacted, That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State.

3. Be it further enacted, That the act passed May fourteenth, eighteen hundred and sixty-two, making an appropriation of one hundred thousand dollars to the State of West Virginia be, and the same is hereby repealed.

4. This act shall be in force from passage.

Supreme Court of the United States

OCTOBER TERM, 1907.

Brief for Defendant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

In Equity.—Original No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

against

WEST VIRGINIA, *Defendant*.

BRIEF FOR DEFENDANT ON COMPLAINANT'S MOTION TO REFER CAUSE TO MASTER.

The complainant proposes an interlocutory decree referring the cause to a master with a direction to the master to take an account ascertaining

I.

"The amount of the public debt of the Commonwealth of Virginia as of the First day of January, 1861, stating specifically how and in what form the same was evidenced and by what authority of law and *for what purposes the same was created* and the dates and nature of bonds or other evidences of said indebtedness."

This paragraph was adopted in the decree proposed by the defendant, although in our view entirely unnecessary; but, upon reflection, it seems to require amendment in order to conform it to the allegations of the bill and the admission of the Answer. The words "for what purposes the same was created" imply that the debt was

created for diverse purposes. The bill alleges that "on the first day of January, 1861, your Oratrix was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory."

The bill is burdened with allegations as to the internal improvements, the motive which led the Commonwealth of Virginia to enter upon the policy, etc. The first sentence of paragraph I. of the Answer is as follows:

> "That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in 'about' the sum of $33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvements within her then territory."

Then, upon the allegation of the bill that the indebtedness of about $33,000,000, as it existed prior to January 1st, 1861, was incurred in connection with the construction of works of internal improvement, both parties are by bill and Answer in accord. In so far, therefore, as paragraph I of the proposed decree calls for an investigation into the purposes for which the same was created, if by "purposes" it means for the accomplishment of objects other than the construction of works of internal improvement, it is a departure from the fact established by the pleadings. Unless that is admissible, which we deny, the paragraph is objectionable for its uncertainty of expression. It would be better in accord with the Bill and Answer, and more useful to the court and to the parties, if the words were stricken out and there were inserted in their place: "for what particular works of internal improvement the same was created and its proceeds expended and where the same were located."

II.

"What amount and *proportion* of said indebtedness and *what interest* accruing thereon *should in equity* be *apportioned to and be now paid by the State of West Virginia.*"

The defendant's objection to Paragraph two is radical and will fully appear in the argument submitted herein in support of *its* proposed Paragraph two.

The remaining paragraphs of the decree proposed by the complainant need not here be set forth.

On the other hand, the defendant proposes a decree which directs the master to ascertain:

II.

(*a*) "The amount of State expenditures made by the Commonwealth of Virginia prior to the First day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20th, 1861."

(*b*) "The aggregate ordinary expenses of the State government of the Commonwealth prior to January 1st, 1861, and since any part of said indebtedness was contracted."

(*c*) "All moneys paid into the treasury of the Commonwealth of Virginia from the Counties included in the State of West Virginia during said period."

Paragraph III. of the complainant's proposed decree directs that the master:

> "III. Will make and return with his report any special or alternative statement of the account between the complainant and defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the Court."

The difference between the two proposed decrees above quoted is radical, and presents to the Court a question which in our view is fundamental and which West Virginia contends, respectfully and very earnestly, should be decided before any reference to a master to state the account between the parties.

The jurisdiction of the Court over this case is settled by the decision overruling the demurrer. We are quite aware that the Court has recognized a distinction between suits by private parties in respect of the application of the rules of pleading and of practice, and suits between States. Thus it was held, in *Rhode Island vs. Massachusetts* (13 Peters, 23), that:

> "From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern Courts of Equity in suits between individuals. In the last-mentioned cases, the material allegations in the bill are comparatively few in number, and rest in the personal knowledge of the individual who is to put in his answer. But a case like this, and one, too, of so many years' standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual."

In Rhode Island vs. Massachusetts (14 Peters, 256), the Court, through Mr. Chief Justice TANEY, says:

> "The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a Court of justice; and we have no precedents to guide us in the forms and modes of proceeding, by which a controversy of this description can most conveniently, and with justice to the parties, be brought to a final hearing. The subject was, however, fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the Court determined to frame their proceedings according to those which had been adopted in the English Courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon re-examining the subject, we are quite satisfied as to the correctness of this decision (12 Peters, 735, 739).
>
> "The proceedings in this case will therefore be regulated by the rules and usages of the Court of Chancery. Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the Court to mould the rules of Chancery practice and pleading in such manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading. And if it appears that the plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of her claim, on which she relies, the case ought not to be disposed of on such an issue. Undoubtedly the defendant must have the full benefit of the defense which the plea discloses; but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing upon the whole of her case. In ordinary cases between individuals the Court of Chancery has always exercised an equitable discretion in relation to its rules of pleading whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength."

West Virginia does not and could not successfully here contest the principles thus laid down, but the principles of equity and the rules of

chancery procedure so far as *essential* to protect the rights of parties litigating in this tribunal will, of course, be substantially enforced. The application of some of the rules of procedure are certainly essential to substantial justice. Mr. Bates, in his work on Federal Equity Procedure (Vol. II., p. 802), says (section 753):

> "Before a cause is referred to a master to take and state an account between the parties, the following preliminary steps should be taken, as conditions precedent to the reference, viz: (1) The pleadings should be perfected and the cause put at issue; (2) the parties should take the proofs upon the issues made by the pleadings, as fully as the nature of the case will allow; (3) the cause should be regularly set down for hearing; (4) the cause should be regularly heard upon the pleadings and the evidence by the court; (5) *upon such hearing the court should pass upon all the issues made by the pleadings, and should enter an interlocutory decree declaring the rights of the parties,* and *also settling and declaring the principles upon which the account is to be taken;* (6) the decree should refer the cause to a master to take and state the account in accordance therewith and report to the court, and all other matters should be reserved until the coming in of the report. * * *"

While the foregoing quotation refers to the equity practice which obtains in the *Circuit* and *District Courts* of the United States, so far as the practice is based upon substantial justice and is necessary for the protection of the rights of parties litigant, we suppose it will be pursued by this Court in the exercise of its *original* jurisdiction. If there were two bases of accounting in this case, both equally open to adoption by the Court, the objection of West Virginia to paragraph II. of the decree proposed by the complainant, would be perhaps without force, but from our standpoint, it is conclusively apparent that there is but one basis upon which an accounting in this case for West Virginia's Equitable proportion of the Virginia debt can be decreed. The bill alleges, in paragraph VI., that on the 20th day of August, 1861,

> "The Restored State of Virginia in convention assembled in the City of Wheeling, Virginia adopted an ordinance to 'provide for the formation of a new State out of portion of the territory of this State,' section 9 of which ordinance was as follows, to wit: '9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, *to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted,*

and deducting therefrom the moneys paid into the treasury of the Commonwealth from the Counties included within said new State during such period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.' "

The bill also alleges, paragraph VII., that:

> "On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinance of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in the proposed Constitution with regard to the liberation of slaves therein."

Also that it was provided by the Act of Congress that whenever the President should issue a proclamation stating that such change had been made and ratified, the Act admitting such new State should be effective sixty days after the date of such proclamation.

The bill also alleges that a proclamation was issued by President Lincoln on April 20th, 1863, and that West Virginia in conformity therewith, and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863.

The bill also alleges, in paragraph X. *inter alia, that*

> "'By section 8 of Article VIII. of the Constitution of West Virginia it is provided:
>
> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the First day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.' "

The bill in paragraph XVIII. alleges the second of four grounds upon which the liability of West Virginia in this suit is asserted, as follows:

> "II. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia as it existed prior to the creation and erection of the State of West Virginia, *forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in*

which the method of ascertaining her liability on account of said debt is prescribed, and this liability is embedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union."

This is rhetorical, but it is none the less accurate and true.

The answer admits (paragraph VI.) the allegations of the bill as to the adoption and terms of the ordinance, including Section 9. It also admits the allegations of the bill averring the assumption of a liability and making provision for its ascertainment and payment by the constitutional provision quoted in the bill.

Paragraph XVIII. of the answer is as follows:

"This respondent for further answer to said bill says: that she denies that the alleged liability of the State of Virginia for a just and equitable proportion of the public debt of the Commonwealth of Virginia rests upon any ground specified in Paragraph XVIII. of said bill *except* the *second, upon which, as hereinbefore averred in this answer,* the *State of West Virginia has always been ready and willing and is now ready and willing to adjust her liability."*

Thus it stands *alleged in the bill* and *admitted by the answer,* and if it were not admitted by the answer, it is *conclusively established by the bill and its exhibits,* that there was a solemn agreement entered into in 1861 between the State of Virginia and the new State of West Virginia, with the consent of the Congress, by which the latter State assumed (as one of the conditions of the assent of Virginia to her becoming a State) a just proportion of the indebtedness of that Commonwealth as it existed prior to January 1st, 1861, *the manner of ascertaining which proportion was defined by the ordinance itself.*

The ordinance was, as treated by this Court in the case of Virginia vs. West Virginia (11 Wallace, 39), a *proposition* by the Commonwealth of Virginia to the people of the proposed new State. It was accepted by the constitutional convention of the proposed new State, carried into its Constitution and adopted by the people; and when the State was admitted into the Union by the Congress, with the assent of Virginia, *it became a completed compact between competent parties, upon adequate consideration, protected by the Constitution of the United States from impairment by either party.*

We say the ordinance defines what would be a just proportion. This is an accurate statement; for the ordinance provided not only for the assumption of a just proportion, but provided *specifically in what manner that proportion shall be ascertained.* We do not understand

the suggestion which appears to have been made at the argument, that the continued obligation of the compact depends upon the *continued assent to it by both States.* A compact between States, entered into with the consent of Congress, has always been treated by this Court as irrevocable by *either* of the parties, and where the legislation of either has attempted to impair the obligation of a compact, it has been held void under the Constitution of the United States (See *Greene vs. Biddle,* 8th Wheaton, 1).

The obligation of a lawful compact between two States, justiciable in its nature, certainly is as binding in law upon *both* until abrogated by *both* in a constitutional way, as a contract between a State and an individual, or between two individuals, and a disregard or violation of it by one, certainly cannot thereby release it from its obligation.

It is difficult to understand how, from the averments of the bill and the admsisions in the answer, and the argument at the Bar, it can be an *open question in this case* that the only liability of West Virginia for an Equitable proportion of the *ante-bellum* debt of Virginia is upon the basis of the ordinance.

The bill, in paragraph XVIII, summing up the grounds upon which it rests the liability of Virginia to account, says:

> "First. The area of the territory now known as the State of West Virginia, formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original state at the time of its dismemberment, and the State of West Virginia *by the acquisition and appropriation of said territory,* with the population thereof, *assumed therewith liability for a just and equitable portion of the public debt* created prior to the partition of said territory."

This is followed by the second ground, hereinbefore quoted, which is based upon the ordinance and Section 8 of the Constitution.

The third ground is as follows:

> "The State of West Virginia has further by repeated enactments and joint resolutions of her legislature recognized her liability for a just proportion of this debt."

The first ground invokes the application of what is assumed to be the rule of *international* law that "debt follows territory," and that the debt as between West Virginia and Virginia is to be "ratably apportioned" on the basis of *population* and *territory* at the time of the separation.

In support of this theory of liability, which is absolutely incompatible with the theory of liability based upon the compact, one of the

learned counsel for the complainant read, on the argument from the opinion of Mr. Justice FIELD, who wrote for the court in *Hartman vs. Greenhow* (102 U. S., 672) this sentence:

> "Where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them."

counsel added, "That is in Hartman vs. Greenhow."

JUSTICE HARLAN: "Please read that again."

MR. CONRAD: "Where a state is divided into two or more states in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them."

Counsel added: "That is an opinion of this court that has received no dissent."

With the greatest veneration for the learning and just fame of Mr. Justice FIELD as a jurist, we venture the observation that the subject was not at all involved in the case. The question there was solely as to the *receivability of coupons*, of bonds representing the funded debt of Virginia, *for taxes*. West Virginia was not a party; nor was Virginia. But aside from this the quotation read from Mr. Justice FIELD did not in the slightest degree correctly put before the Court the view which he must be deemed to have entertained. We supply the deficiency, quoting all that he said:

> "Writers on public law speak of the principle as well established that, where a State is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On this subject Kent says: 'If a State should be divided in respect of territory, its rights and obligations are not impaired; *and, if they have not been apportioned by special agreement*, their rights are to be enjoyed and their obligations fulfilled by all the parties in common' (1 Com., 26); and Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the division are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts, and the practice of nations.' (International Law, c. 3, Sect. 27.)"

Mr. Justice FIELD continues:

> "In *conformity* with the doctrine thus stated by *Halleck*, both States—Virginia and West Virginia—have recognized in their constitution their respective liability for an equitable

> proportion of the old debt of the state, and have provided that measures should be taken for its settlement."

It is apparent that Mr. Justice FIELD, in the clause last above quoted, referred to the *special* agreement evidenced by Section 9 of the Ordinance and to the first clause of Section 8 of Article VIII. of the West Virginia Constitution.

It is worth noting that, in *Antoni vs. Greenhow* (107 U. S., 769), which also involved the same Funding Act, Mr. Justice FIELD, in his dissenting opinion, in which Mr. Justice HARLAN concurred, said, referring to the same subject:

> "It is a well-settled doctrine of public law that, upon the division of a state into two or more states, the debt shall be ratably apportioned among them (*See authorities upon this subject in Hartman vs. Greenhow* (102 U. S., 672, 677)."

Phillimore, after quoting both Grotius and Kent, says:

> "If a nation be divided into various distinct societies, the obligations which had accrued to the whole before the division are, *unless they have been the subject of special agreement*, ratably binding upon the different parts";

and Sir Sherston Baker in "First Steps of International Law," page 36, says:

> "The case is slightly different where one state is divided into two or three distinct and independent sovereignties. In that case the obligations which had accrued to the whole before the division are (*unless they have been the subject of a special agreement*) ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts and the practice of nations. It is incorporated into the treaty by which the modern Kingdom of Belgium was established."

Thus it will be seen that the general rule as quoted from Mr. Justice FIELD, is *essentially qualified* by the authorities which he quotes, in this, that a *special agreement* between the two states in respect of the assumption of a proportion of the debt as it existed before the separation, *takes the case out of the general rule;* so that the second ground alleged in the bill, which specifically avers a *special agreement, destroys the applicability of the rule to this case.* Upon what theory is this special agreement, consisting of a proposition by Virginia, its acceptance by the constitutional convention, its embodiment in the Constitution, the ratification of the latter by the people, and the admission of the State into the

Union by Congress, to be so cavalierly dismissed from this case as the decree proposed on behalf of Virginia would do? This Court had occasion to consider the validity of this ordinance in the case of *Virginia vs. West Virginia*, 11 Wallace, 39, in respect of the provision contained in it for the incorporation of the counties of Berkeley and Jefferson in the latter State conditioned upon a popular vote therefor; and the Court said:

> "There was then a valid agreement between the two states consented to by Congress, which agreement made the accession of these counties dependent on the result of a popular vote in favor of that proposition."

If the ordinance was valid *then* in respect of the incorporation of the two counties, upon what theory can it be held to be invalid as to the specific provision contained in Section 9 for the assumption by the new State of a just proportion of the indebtedness *to be ascertained in the manner defined*, clearly carried into the Constitution of the new State and assented to by Congress by the admission of West Virginia into the Union? It does not impeach or even belittle the "Restored State of Virginia" or the validity of its acts to refer to it as a "revolutionary government" or to the ordinance as a "revolutionary proceeding." Whether it was or was not the lawful government of Virginia was a political question. When the House of Representatives admitted the members of Congress from that State and the Senate admitted the senators elected by the legislature of the "Restored State," and the President recognized that government as the true government of Virginia, that forever settled its legality and regularity beyond the power of judicial review and made valid its acts *ab initio*. But for that "Restored State of Virginia," and its recognition by the political departments of the Federal Government, there would have been no government of Virginia *under the Constitution* of the United States from April, 1861, to the close of the war. The ordinance of the Wheeling convention of '61, which was the genesis of the State of West Virginia, and the adoption of its Constitution, are, from the standpoint of law, as clearly acts of the Commonwealth of Virginia as if they had taken place in 1851 instead of in 1861.

The suggestion so often made in oral and printed argument that West Virginia is the "daughter of Virginia," is sentimental, but inaccurate. When admitted into the Union she came in on an equality with the original states and became a member of the

sisterhood of states, equal in sovereignty and personality to the older commonwealth of which her territory had once been a part, and of which her people had once been citizens.

May it not be that this misconception of the real relation of West Virginia as a State of the Union to old Virginia has played an unconscious part in the disregard by the latter of the special agreement which has operated to delay an adjustment under its provisions? If this special agreement in respect of the proportion of the debt of Virginia which was to be assumed by the State of West Virginia constituted a valid compact between the two states, when did it cease to be valid, and for what reason, at the suit of Virginia, is it to be ignored? It was said, by Mr. Justice BALDWIN, in *Rhode Island vs. Massachusetts* (12 Peters, 748), speaking for the Court:

> "In Poole *vs.* Fleeger, this Court declared that an agreement between States, consented to by Congress, bound the citizens of each State."

Greene vs. Biddle, *supra*, involved the validity of the compact between Virginia and Kentucky, entered into at the time she separated from the former and was admitted into the Union as a State, and the compact in that case in respect of the assent of Congress to it, is not unlike the compact in the present case. The Court said:

> "The compact was entered into between Virginia and the people of Kentucky, upon the express condition that the general government should, prior to a certain day, assent to the erection of the District of Kentucky into an independent State, and agree, that the proposed State should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that District assembled under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said District should become a separate State on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to Congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a State, *upon certain terms and conditions*, and the acceptance by Kentucky *upon the terms and conditions so prescribed;* and, on the 4th of February, 1791, Congress passed an

act, which, after referring to the compact, and the acceptance of it by Kentucky declares the consent of that body to the erecting of the said District into a separate and independent State, upon a certain day, and receiving her into the Union.

"Now, it is perfectly clear, that, although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State, without the assent of Virginia, or upon terms variant from those which Virginia had prescribed, But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of Congress, without which, Kentucky could not have become an independent State, and then it would follow, that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation."

It was held that the act passed by the Legislature of Kentucky in violation of the compact was void.

The suggestion that Virginia never assented to the compact with West Virginia because of the amendment which Congress proposed to the Constitution, is without weight.

The conditions imposed by Virginia upon West Virginia were embodied in the Ordinance. It may be admitted that any amendment proposed by Congress which would vary the terms of the *Ordinance* might have been operative to destroy the consent of Virginia to the erection of a new State out of her territory, but her General Assembly was content with the Constitution as not being in violation of the ordinance, and the amendment proposed by Congress to the Constitution, relative to slavery, was a matter with which Virginia could have no concern, it being purely local to the State of West Virginia, as affecting the status of property and persons within her borders and under her sovereignty. It sustained no relation whatever to the Ordinance or to the conditions upon which Virginia had given her assent. It is almost an evidence of desperation that, at this day, it should be solemnly argued in this Forum in behalf of Virginia that West Virginia did not become a State with the assent of Virginia, because Con-

gress decided, in response to representations from West Virginia, to require, as a condition of admission, an amendment to the Constitution providing for the gradual extinction, within her borders, of slave ownership.

We have asserted that the Ordinance was carried into the Constitution. The provision is as follows:

> "ARTICLE VIII, Section 8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years."

It will be noted that this language of assumption is the language of the ordinance except that the word "equitable" is used in the Constitution, while the word "just" is used in the ordinance. As a qualifying word, used in such a connection, "equitable" and "just" are synonymous. An equitable proportion could not be other than a "just" proportion, and a just proportion would be an "equitable" proportion. The ordinance and the Constitution are the constating instruments upon which the State was erected and they are to be read *in pari materia*, and it is not susceptible of doubt that the word "ascertain" as used in Section 8 of the Constitution is an adaptation of the word "ascertained" in section 9 of the Ordinance. It will be remembered that this convention assembled within ninety days after the adoption of the Ordinance. Its sole warrant for assembling was the ordinance. Its authority to frame the Constitution was derived from the ordinance. The ordinance as a whole was a proposition to that Convention and, as a whole, was accepted by the Convention. The Convention complied with all the provisions of the Ordinance. The Constitution was framed to meet all the requirements of the Ordinance. It was the basis of the Constitution.

It is difficult to consider with equanimity, the studied and inconsistent attempt to eliminate the Ordinance from the case. This is apparently the present posture of counsel for Virginia. If section 8 of the Constitution is not read in connection with the Ordinance, and, therefore, as an assumption of an equitable proportion of the debt to *be ascertained as provided in the Ordinance*, the Ordinance is eliminated, and section 8 of the first Constitution

is to be construed as the assumption by the new State of an equitable proportion of the public indebtedness of Virginia prior to January 1st, 1861, upon the basis of *population* and *territory*. It is inconceivable that such can be the law of this case. The assembling of the Convention was an acceptance of Section 9 of the Ordinance. The Ordinance embodied the conditions, and section 9 by no means the least important of them, of Virginia's consent to the erection of the new State out of her territory.

If the Convention had failed to comply, *in the Constitution*, with the *requirements of the Ordinance*, or had departed in any way from the conditions of Virginia's assent, as stated in the Ordinance, its work would have been nugatory. It was bound by the ordinance to carry into the Constitution the assumption by the new State of an equitable proportion of the indebtedness of Virginia prior to January 1st, 1861, to be ascertained as provided in the Ordinance.

It could no more disregard the terms of Section 9 than it could the other conditions of the ordinance. It was for Virginia to fix the terms of her consent. It was not for the convention to depart therefrom. It could only accept or reject. If it rejected it, it must have adjourned. Its work would have been done. Although we take it that nothing is finally decided in this case except the question of jurisdiction, we note that the court was impressed, as shown by the opinion of the Chief Justice with the relation of the ordinance to the Constitution. In the opinion it is said:

> "Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression 'that the legislature shall ascertain' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed and provide for the liquidation of the amount so ascertained."

The attempt to dislocate the first clause of section 8 of Article VIII of the Constitution of West Virginia "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State" from section 9 of the Ordinance, is subversive of fundamental principles of Constitutional construction and is indefensible from every standpoint of law or equity. It is beyond all reason to suppose that the plain language of the first clause of Article VIII, general in its terms, was anything more or less than an acceptance

of the proposition theretofore specifically made in section 9 of the Ordinance in order that the first clause of section 8 and section 9, would together make plain the compact.

The suggestion that section 8 of Article VIII of the Constitution had no reference to section 9 of the Ordinance, assumes that the new State was taking upon herself an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, without definition or understanding as to the basis upon which it was to be ascertained, therefore leaving open the vital question as to what would constitute an equitable proportion, for future adjustment between the two states. This is not to be believed.

The debt of the Commonwealth of Virginia on January 1st, 1861, was doubtless well known throughout the State of Virginia. It was a matter of public record and reduced to a certainty. It is alleged in the bill that about $33,000,000 of it were incurred in connection with the construction of works of internal improvement—an enormous sum "in those days." If it had been the purpose of Virginia, in requiring as a condition of her assent, the assumption by the proposed new state of an equitable proportion of the public debt without specification as to the manner in which, and the basis upon which that proportion should be ascertained, it is inconceivable that the language of section 9 of the Ordinance would have been what it was, and that the language of section 8 of Article VIII of the Constitution would have been what it was. It was entirely for Virginia to dictate the terms, and if it had been her purpose to require an assumption of the debt upon the basis of territory and population, West Virginia would have been required to assume "one-third of the debt as it existed prior to the first day of January, 1861," or "an equitable proportion to be ascertained upon the basis of territory and population." If she had so provided in Section 9 of the Ordinance, the first clause of Section 8 of Article VIII of the Constition would have *adequately assumed liability upon that basis.* But no such proposition was made to her. No such condition of assent to her statehood was imposed upon her and there is no reason to believe that in her then condition in respect of financial ability, her people would have been willing to enter upon the status of statehood burdened with $11,000,000, or thereabouts, of the indebtedness of the old state. At all events, she was neither called

upon nor given an opportunity to decide whether she would accept statehood upon such a condition.

If section 9 of the Ordinance had provided "The new state shall take upon herself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained upon the basis of territory and population" or "The new state shall take upon herself one-third of the public debt of the Commonweaith of Virginia prior to January 1st, 1861, would West Virginia be heard here for a moment to contend that the Ordinance was no part or basis of the Constitutional provision and that the court is at liberty to adopt some other basis than that agreed upon by the parties? It would not tax the ability of the distinguished counsel on the other side, to demolish such a proposition. And section 9, as it was written, defining the basis upon which the new state should take upon herself an assumption of a just proportion of the public debt as completely forecloses the question of basis as would have been the case had the language of the Ordinance been as we have suggested.

To rub out section 9 of the ordinance and put upon West Virginia, liability for one-third of the debt of the Commonwealth of Virginia, as it existed prior to January 1st, 1861, upon the theory that this was what she assumed by section 8 of Article VIII of the Constitution, is a proposition as unjust as it is untenable. Indeed, if the opposite theory were adopted no testimony need be taken except to ascertain the amount of the public debt of Virginia on the first day of January, 1861, and the proportion of population and territory of the new state to that of the Commonwealth of Virginia at the time of the separation. If the Ordinance were eliminated it follows that the assumption of an equitable proportion of the debt by section 8 of Article VIII of the Constitution of West Virginia was purely voluntary *and not in any sense a condition of the assent of Virginia to the admission of West Virginia as a state into the Union.* This is contrary to repeated allegations of the bill and against the truth as disclosed everywhere in the record. If section 9 of the Ordinance were eliminated, it is a grave question whether, but for an assumption of liability by section 8 of Article VIII of the Constitution, West Virginia would have been legally liable at all, upon principles of international law, for a dollar of that debt (See Hall on International Law, sec. 27, p. 78, and especially note on p. 80).

An effort is argumentatively made in the bill and was repeated

at the bar, and it seems to have somewhat impressed the court, to make it appear that Sections 5 and 7 of Article 8 are a recognition, not only of the liability to assume a portion of the indebtedness of Virginia, but as a recognition of liability to Virginia for grants of land and money made by the Acts of February 3 and 4, 1863.

Although not especially material, with great deference, we are unable to agree to this construction. Section 5 of Article 8 provides:

> "5. No *debt* shall be contracted by this state except to meet casual deficits in the revenue, to redeem a *previous liability* of the state, to suppress insurrection, repel invasion or defend the state in time of war."

And Section 7 of the same article provides:

> "7. The legislature may *at any time* direct a sale of the stocks owned by the state, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the *public debt* and hereafter the state shall not become a stockholder in any bank."

We do not see that the words "a previous liability," in Section 5, and the words "public debt," in Section 7, can be construed, all things considered, as referring to *any liability* of the new state to Virginia. Both Sections 5 and 7 were manifestly intended to be permanent provisions of the Constitution. They would have been properly included in the Constitution if Virginia, at the time of separation, had owed not a dollar of debt. Section 5, in our view, was intended to express the policy of the state as to indebtedness. The word "debt" is used here in contradistinction from the word "liability." A debt is a liability, but a liability is not necessarily a debt, and where they are *both used in the same clause*, as above, they are not to be construed as synonymous. The phrase "a previous liability" is altogether indefinite, and has no regard to the time at which it is incurred, except that it must have been incurred *prior* to the *contracting of a debt* with which to redeem it. The provision will apply to any liability incurred during the history of the state, which *thereafter* must be provided for by the contracting of a debt. It was the evident policy of the Constitution that West Virginia should "pay her way" except as therein otherwise indicated. If it is uncertain whether anything will be demandable by virtue of the contract, it cannot be called a debt. "Debt," as used here, we think, means a certain sum of money due upon an express agreement.

Hagar *vs.* Reclamation District, 111 U. S., 701.

The theory of the constitutional provision was, we submit, that the state should rely upon taxation and current revenues to carry on its operations, and was to prohibit the contracting of debts (borrowing of money), evidenced by bonds or otherwise, except to meet casual deficits in revenue, etc., *which would involve a previous liability.* In other words, that money should not be borrowed, *save as excepted,* in *anticipation of liabilities.* The words, "public debt" in Section 7 are not to be construed as having any reference to unliquidated demands. It will not be pretended that until an accounting West Virginia owes a "debt" to Virginia. She has assumed a liability which may or may not ripen into a debt, only to be determined by a judicial accounting or by voluntary adjustment.

Section 7 was likewise a permanent provision of the Constitution. To say otherwise is to assume that there was not to be any "public debt" *except* the debt to be contracted under the ordinance when its amount shall be ascertained. This assumption is untenable, for Section 5 authorizes the state to borrow money to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion or defend the state in time of war. Very conclusive evidence that this is the true construction of these provisions is to be found in the fact that in the new constitution of West Virginia adopted in the year 1872 from which was *omitted* Article 8 of Section 8 which was in the Constitution of 1861, is found this provision.

(Sec. 4, Article 10):

> "No debt shall be contracted by the state except to meet casual deficits in the revenue, to *redeem a previous liability* of the state, to suppress insurrection, repel invasion or defend the state in time of war, but the payment of any liability other than that for the ordinary expenses of the state shall be equally distributed over a period of at least twenty years."

Strongly supporting the view which we urge is the fact that in the Constitution of *Virginia* of *1867-8,* Article X, section 7, is found this provision:

> "No debt shall be contracted by this State except to meet casual deficits in the revenue, to *redeem a previous liability* of the State, to suppress insurrection, repel invasion or defend the State in time of war."

This seems to have been rather a customary permanent Constitutional provision in that region.

But a better reason, why sections 5 and 7 of Article VIII of the West Virginia Constitution should not be construed as having any reference whatever to any liability of West Virginia to the Commonwealth of Virginia is that by section 8 of the same Article, it was provided:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year 1861, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

This is a provision not susceptible to misconstruction in respect to the subject to which it refers. Its language is not general. It is in its nature a temporary provision. It deals with but one thing and that is the assumption by West Virginia of a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, with a provision for its ascertainment and liquidation.

It is hardly to be supposed that three distinct sections of Article VIII, two of them general and permanent and one specific and self-executing so far as the assumption of the indebtedness was concerned, were deemed necessary in order to carry into the constitution the provision of section 9 of the Ordinance. The omission of the clause in the next Constitution was very natural and nowise sinister. It would have been absurd to readopt it in the Constitution. The liability had been solemnly assumed, and once assumed in the Constitution, it was an acceptance of the proposition of the Ordinance and, with the assent of Congress, by her admission into the Union became an irrevocable compact between West Virginia and Virginia. It is as valid today as it was when it was made. It could not be subtracted from by omission to repeat it in every new or revised Constitution, nor could it be added to by frequent repetition. Any act passed by the Legislature of West Virginia or any subsequent Constitutional provision attempting to repeal this assumption of liability would be void under the Constitution of the United States; and it is as binding upon *Virginia*, who was a party to it, as it is on *West Virginia*.

But *under Section 5 of Article VIII* it is perfectly clear that

when the proportion of the public debt of Virginia prior to the 1st day of January, 1861, to be borne by West Virginia under the ordinance and the constitutional provision shall have been ascertained, as provided by the former, a "debt" may lawfully be contracted by the State to redeem it, upon such terms as the legislature may prescribe. The question is: Was the ordinance binding and is it still binding?

If it be valid and binding, it is impossible for us to discover any ground upon which it can be disregarded by the Court, for if it is binding upon the states, it is binding upon the Court. True, West Virginia could not by any suit prevent Virginia from disregarding it in the adjustment with her creditors of her debt or any portion of it. But when Virginia invokes the original jurisdiction of this Court in a suit against West Virginia to compel her to account for an equitable proportion of her debt prior to January 1, 1861, upon the basis of the ordinance *and upon other and different bases*, she may plead the ordinance as the only basis upon which the Court can decree an accounting by her. The Court will not make a new contract for the parties. They were competent to make one for themselves, and they did make one for themselves. It is unfortunate that the two states were unable many years ago to adjust the matter in accordance with the agreement which they had entered into and which subsist between them. Without asserting that the fault for delay rests solely with either, we have a right to say on the record that it does not lie in the mouth of Virginia to impute much, if any, of the fault for delay to West Virginia. The records of this Court show that in December, 1866, Virginia instituted a suit in equity in this Court against the State of West Virginia to test the question whether the Counties of Berkeley and Jefferson were or were not a part of the territory of West Virginia. The cause was not determined until the 6th day of March, 1871, upon which day it was decided in favor of West Virginia, and until it was settled, obviously there could be no accounting under the ordinance, for the boundaries of West Virginia depended upon the decision, and until it was determined what Counties were a part of West Virginia, the basis for accounting under the provisions of the ordinance was wanting.

This Court takes judicial notice of the general laws and constitutions of the states. The Constitutional Convention which assembled at Alexandria on the 11th day of April, 1864, framed

and adopted a constitution, it not being submitted to the people for ratification. Section 27 was as follows:

> "The General Assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt proper to be borne by the States of Virginia and West Virginia, respectively, and may authorize, in conjunction with the State of West Virginia, the sale of all lands and property of every description, including all stocks and other interests owned and held by the State of Virginia in banks, works of internal improvement, and other companies, at the time of the formation of the State of West Virginia, *and no ordinance passed by the Convention which assembled at Wheeling on the 11th day of June, 1861, adjusting the public debt between Virginia and West Virginia shall be binding upon this State.* It shall provide for the payment of any debt or obligation created in the name of the State of Virginia by the usurping and pretended authorities at Richmond, and shall not allow any County, City or corporation to levy or collect any taxes for the payment of any debt created for the purpose of effecting any rebellion against the State or the United States. The legislature shall not provide for the payment of any bonds now held by rebels in arms against the State or United States Government."

This convention was provided for by the General Assembly of Virginia of 1863. Relatively few delegates were elected for the districts were mostly within the Confederate lines. The Constitution was adopted by the convention but was not required, nor was it submitted to a vote of the people. Under this Constitution the government of Virginia was conducted until it was superseded by another Constitution adopted some years later. We apprehend that no lawyer would contend that this attempted repudiation of section 9 of the ordinance of the Wheeling Convention, embodied in the Constitution of Virginia, adopted in convention *after the State of West Virginia had been for over a year in the Union*, was of the slightest validity. Nevertheless, it showed bad faith and doubtless had a tendency to prevent an energetic effort by West Virginia for the ascertainment of the liability under the ordinance with that government.

The Court will find appended to the bill as an exhibit the argument of Mr. Randolph Harrison, representing the Virginia Debt Commission, before the Joint Committee on Finance of the West Virginia Legislature, February 1, 1905, in relation to West Virginia's contributive share of the debt of Virginia, an unusual doc-

ument to be found in such a relation, but certainly the complainant is not in position to impeach its accuracy, for it is made a part of its bill. In that argument Mr. Harrison says:

> "In February, 1870, Virginia sent delegates to Wheeling, West Virginia, then the capital of the State, for the purpose of inviting the Governor and the legislature of West Virginia to unite with her in making a statement in settlement of this account, but the Governor of West Virginia did not think the time opportune to deal with the subject, because the suit between the two states involving the counties of Jefferson and Berkeley had not then been decided. *Soon thereafter the Governor of West Virginia sent Commissioners to Virginia with authority to state the account, but at that time Governor Walker of Virginia, did not feel that he had authority to appoint commissioners, because the legislature of Virginia had in the meantime passed an act to submit the question to arbitration, and so nothing came of this effort to settle the controversy.*"

It cannot therefore upon the basis of the Bill be truthfully said here that West Virginia was in the beginning laggard in respect of attempting to adjust on the basis of the ordinance the burden which she had assumed by her acceptance of it. She could not do it without the co-operation of Virginia.

Then came the enactment, on March 30, 1871, by the General Assembly of Virginia of the first funding bill, approved March 30, 1871, (Exhibit No. 1 of the bill). By this act Virginia *herself* undertook to "apportion," without consulting West Virginia, the debt between *herself and West Virginia* upon the assumed international law basis, and adjusted it upon the basis that Virginia's share of the debt was two-thirds, and *West Virginia's share was one-third;* which act provided for the issue of several million dollars of what were known in the market as "West Virginia certificates" for one-third of the debt. This was in utter disregard of the compact. If she had settled with her creditors on the basis of two-thirds, and left open the ascertainment, on the basis of the ordinance, of West Virginia's share, without issuing the "West Virginia certificates," it would have been simply her affair. But the preamble to this act challenges attention. It is as follows:

> "WHEREAS, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and
>
> "WHEREAS, *in the ordinance authorizing the organization of such state it was provided that the said State shall take*

upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary; and

"WHEREAS, the people of this Commonwealth are anxious for the prompt liquidation *of her portion of said debt*, which is estimated to be two-thirds of the same; and

"WHEREAS, it has been suggested that the authorities of West Virginia may prefer to pay that *State's portion of said debt* to the holders thereof, and not to this State, as the Constitution of this State provides;

"NOW, THEREFORE, to enable the State of West Virginia to settle *her proportion* of said debt with the holders thereof and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her portion of said debt as the same shall become due therefor;

"1. Be it enacted by the General Assembly of Virginia," etc.

Here, the Court will observe, is a distinct reference in the second clause of the preamble of the first funding act, to the *Wheeling ordinance*, under *which West Virginia was to take upon herself the just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861*, with the declaration that it had not yet been fulfilled, although repeated and earnest efforts in that behalf had been made by this State, "and will continue to be made as long as may be necessary." This ordinance is made the basis of her funding legislation.

How strange it seems that in this legislation asserting the liability of West Virginia to be based upon section 9 of the ordinance, and declaring that it would be continuously insisted upon, its terms, brief as they were, should have been garbled, and that the legislature should have proceeded to ignore it. But the reference to section 9 of the ordinance in the preamble was operative in law to incorporate it *all*, and to put upon notice of its terms as measuring the liability assumed by West Virginia thereunder, every person who accepted a bond or a certificate issued under that act and under the subsequent acts.

In the act of 1879, approved March 28, 1879, Exhibit No. 2 of the bill, it was provided by section 7:

"The owners of all classes of bonds mentioned in this act who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the *remaining one-third of their principal and interest due and payable by the State of West Virginia*, shall receive certificates of a like character to those issued under the act of March 30, 1871, when they made such exchange, etc."

In the act of February, 1882, Exhibit 3 of the bill, it is provided:

"6. For all *balances* of such indebtedness constituting *West Virginia's share of the old debt*, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said Board for Sinking Fund Commissioners shall issue a certificate as follows:

"No. . The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for , held by , dated the day of , numbered , leaving a balance of , with interest from , *to be accounted for by the State of West Virginia without recourse upon this Commonwealth.*"

Exhibit No. 4, Chapter 325, provides for the issue of similar certificates, "to be accounted for to the holder of this certificate by the State of West Virginia."

In the act, Exhibit No. 5, Chapter 747, after reciting in the preamble the various funding acts of 1871, 1879, 1882 and 1892, occurs the following:

"WHEREAS, in each of said acts provision is made for issuing to creditors of the original State of Virginia which should accept the new bonds provided for by said several acts, certificates for such proportion of the obligations surrendered by them as was *deemed proper to be borne by the State of West Virginia*, to wit, *one-third of the amount of said obligations*, of which certificates this State holds a large amount, through the agency of the Commissioners of its Sinking Fund and Literary Fund; and

WHEREAS, the present State of Virginia has settled and adjusted to the entire satisfaction of her people and her creditors the liability assumed by her on account of two-thirds of the debt of the original State;

"NOW, THEREFORE, be it resolved," etc., "that a commission of seven members is hereby created," etc., "which is known as the Debt Commission, and said Commission is hereby authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public

debt of the original State of Virginia properly to be borne by West Virginia;" concluding with this language:

"But said Commission shall in no event enter into any negotiation hereunder, *except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof.*"

Thus beginning with 1871, Virginia has proceeded without regard to her compact to adjust two-thirds of the indebtedness as her own, and to issue $18,000,000 or thereabouts, of West Virginia certificates, frequently characterized in the act as West Virginia's proportion, and several millions of them bearing on their face the statement that they are to "be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth," and hawked about in the markets, to the injury of the credit of West Virginia. Is the State of West Virginia much to be chided for the delay which has occurred in adjusting with Virginia this matter on the basis of the ordinance?

But there would seem to be, from the bill and the argument on behalf of Virginia in this Court, no question open here as to the validity and binding force of the compact created by the proposition in the ninth section of the Wheeling ordinance, its acceptance by the Convention of November, 1861, its incorporation in the constitution of West Virginia, its ratification by the people of the State, and the assent of Congress to it, evidenced by the admission of the State into the Union.

It was said on the argument by the learned Attorney-General of Virginia, who officially and very ably represents the Commonwealth in this cause, after outlining, at page 323, what he thinks *would have been* a fair adjustment and coming to the ordinance, as follows:

"MR. ANDERSONS In the 11th Wallace case it was established that the Wheeling government was the government of Virginia, and the effect of that decisoin was to uphold the validity of what is known as the Wheeling ordinance.

"Now instead of letting these questions be settled upon the principles of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment. *We have to concede that we cannot go behind this, that we must accept it.*

"Section 9 of the ordinance, giving the consent of Virginia to the formation of the new State, reads as follows:

"MR. JUSTICE HARLAN: What are you reading ?

"MR. ANDERSON: From the Wheeling Ordinance quoted at page 3 of the brief of the counsel for the plaintiff. Section 9 of the ordinance reads as follows:

"'9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period.'

"*That is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of this new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards, in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitutes a primary obligation and lies at the very foundation of the right of West Virginia to be a State.*"

Nothing could be stronger than this statement nor could anything be more accurate.

It is very difficult to reconcile this explicit and conclusive statement by the chief law officer of the Commonwealth of Virginia, in respect of the binding force and effect of the ordinance, with the decree which he proposes on behalf of Virginia and the brief which he submits in its support; for this proposed decree asks the Court to ignore the ordinance, to treat the matter as being as completely open as if the ordinance had never been adopted or accepted; and to commit the case at large to a master to ascertain as an original proposition on the alleged basis of international law or any other basis he may choose to adopt, what proportion of said indebtedness and of the interest accrued thereon *should in equity be apportioned* to and be *now* paid by the State of West Virginia. (See Kimberly *vs.* Armes, 129 U. S., 512). West Virginia says to this:

That she thinks herself entitled to have the the question whether or not the special agreement as to what shall constitute a just proportion of the debt solemnly entered into between the two states is binding, determined at this juncture *by the Court* and that, if it be held to be a binding agreement, Virginia is entitled to no accounting with West Virginia in this suit for her equitable proportion of the debt of the Commonwealth prior to January 1, 1861, *except under the terms of that ordinance, carried into the constitution.*

True, the decree proposed by the complainant directs that the master

> "III. Make and return with his report any special or alternative statements of the account between the plaintiff and the defendant in the premises *which either* may desire him to state or which *he* may deem to be desirable to present to the Court."

This asks the Court to leave the determination of the pivotal point in the case, which we think should be decided by it in advance of an accounting, to a master, albeit only in an advisory way, and it gives West Virginia permission to have an accounting made, *if she desires*, it, on the basis of the ordinance *at her own expense. She is defendant* here. In that event we would have two lines of investigation proceeding before the master at the same time, each entirely distinct in basic principle from the other, each burdensome in labor, expense and the consumption of time. Neither would throw any light upon the other. An exhaustive accounting under the ordinance would not aid the Court in determining whether it is *binding* and the only legal basis of settlement or not. An exhaustive investigation upon the international law basis would no more aid the Court in determining whether the ordinance is binding and therefore the sole ground upon which the liability of West Virginia to an accounting at all can be based. If the compact is in force, any accounting save under that will be not only burdensome, but superfluous. If both were made, upon what principle would the Court choose between them?

Upon general principles there must be a distinction, one would think, dealing with the general doctrine of apportionment, *in the absence of a special agreement* between a debt incurred by a state, before separation, in repelling invasion, *a debt which would be for the equal benefit of all its inhabitants,* and a debt incurred, as was the *entire* debt of Virginia prior to the first day of January, 1861, for *works of internal improvement.* If the proceeds of such a debt were all expended in the territory of the original state, there would seem to be no equity in requiring the new state erected out of a portion of its territory to be saddled with any portion of the debt, for the reason that the improvements for which the debt was incurred would be owned by and remain entirely within the limits of the original state. Upon the other hand, if a portion of the debt were expended in improvements within the boundaries of the newly erected state, it would seem that upon separation, as such *improvements would be local* and the old state would be deprived of her property in them and the new

state would become the proprietor and beneficiary by virtue of the separation *in the absence of a special agreement*, she should, in equity, contribute their cost or value to the payment of the debt of the original state. And this was the theory of the Ordinance.

In this case it is alleged in the bill that the larger portion of the indebtedness for internal improvements, for which the debt was incurred, were constructed within the state of Virginia, but it is alleged, generally, that several millions were expended in constructing improvements within the territory of the new state of West Virginia. All this, manifestly, must have been taken into account in the framing of the ordinance. All the local improvements which were constructed in what is now Virginia remain in Virginia, of course; and those which were construed in what is now West Virginia were fixed within her borders. It is alleged in the bill:

But it must be remembered, *first*, that these internal improvements which have been completed within the territory, now West Virginia since January 1st, 1861, have been completed without expense to Virginia, and for that she is entitled to no credit. *Second*, Obviously, the completion of such works to a connection with the railroads and other means of transit in Virginia, has enhanced the value of the improvements local to Virginia constructed with the proceeds of said debt, by increasing the business over them. The allegations of the bill, that these improvements in Virginia, which began in 1820, were mainly with a view to ameliorating the condition of the people of West Virginia, and for their benefit are not issuable allegations, but they are denied by the answer. They are easily pleaded, but they afford no basis upon which the Court can enforce a liability upon West Virginia. Whatever element of fact there is in the allegation was well known to the government of Virginia when the Wheeling ordinance was adopted, and undoubtedly entered into the proposition embodied in Section IX.

It is said in the brief for complainant by way of objection to Paragraph 2 of the decree proposed by defendant:

> "That the completion of some of the main lines of improvement beyond the said range toward the Ohio River since the first of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvements which could not have been had not the lines east of said range ben first constructed."

"We respectfully object to paragraph 2 of defendant's draft,

on the ground that it seems to lend the sanction of the court in advance to a basis or scheme for the statement of account, which is not shown by anything *as yet* in the cause to be either equitable or just.

"Before any such question can be fairly adjudicated, it is necessary to the ends of justice, that there shall be a mass of evidence in the case, not yet introduced, which evidence the court should have the aid of its Master in collating and thoroughly digesting."

In reply to this we have to say that *all that can be shown,* bearing upon the question whether the ordinance, and its acceptance and incorporation into the constitution with the consent of Congress, is the measure of liability assumed by West Virginia in agreement with Virginia *is already in the case.* No evidence can throw any light upon it. It raises a question of law pure and simple; evidence or aid by a Master are not necessary to its determination. The facts are not only undisputed and indisputable, but they are documentary, and are alleged in the bill and admitted by the answer. If the court is of the opinion that it is the basis agreed upon between the two states, it certainly is not for the court to determine whether the agreement *ought,* or *ought* not, *to have been made between the states.* Whether it would, from the standpoint of today, be a just or equitable basis, is beside the question, which is: Is it the basis agreed upon? It is also said:

"There is by no means enough in the record to enable the court to come to any just or definite conclusion as to the precise scheme which it would be *equitable* to adopt in stating the account.

"To do so at this stage of the litigation would be to decide an important question in the case before the evidence for a full understanding and just decision of that question is before the court. It would be largely to take a step in the dark, which might, and in all probability would, do injustice to one party or the other.

"Our *main* objection to *paragraph* 2 of defendant's draft is that its effect manifestly is to have the court *prejudge* the case as to the *basis* upon which the *account shall be stated.*"

All this means but one thing, and that is, that the court shall take a mass of testimony in order to enable it to determine whether or not *it will set aside the compact between the two states.* We take this to be an impossible proposition. Of course it is not possible to determine now what the result of an *accounting,* on the basis of the ordinance, will be, if such an accounting is had. The records, archives and papers bearing upon it, for the most part have been

in the continued custody of the complainant, and were not open, upon reasonable request many years ago officially preferred, by the Commissioners appointed by West Virginia authorized to state the account. It seems to be the notion of the learned counsel that the court will feel itself at liberty to enforce the ordinance as the basis of accounting, or set it aside and resort to the alleged international law basis, according as *testimony* shall be furnished as to whether it *was equitable or otherwise.* We do not understand that to be within the province of the court upon the allegations of this bill and the conceded facts in this case. It involves no pre-judgment. It is simply what occurs in such cases generally that the court will have decided where upon the pleadings and other exhibits it is able to do so, upon the *principle which shall govern the accounting.* There is no allegation in the bill that the proposition made by the restored government of Virginia, defining the just proportion of the debt to be assumed by the new state, was not advisedly made. There is no allegation of fraud or overreaching, and if there were it comes over forty years too late. It must not be forgotten that this proposition, which was accepted by West Virginia, was a proposition *made by Virginia,* and that the *acceptance* of it was a *condition* upon which *she gave her assent* to the *erection of the new state out of her territory.* It is not for her to ask the court to aid her in repudiating it. It must be borne in mind, too, that the fairness of the agreement is to be considered, if it were an open question, without reference to the condition of either party at this day but with reference solely to the condition of both in 1861 when the ordinance was adopted. Probably it is true that with the development of West Virginia, which has come about through the lapse of years, the increase of her population, the expenditure of vast sums in transportation facilities, in mining and other operations, and the general exploitation of her resources, Virginia would not be willing to make the proposition which she did make a half century ago. But when one thinks of West Virginia as she was then, with her undeveloped resources, with scant transportation facilities and population, it will be quite apparent that the agreement in her then condition was at least a fair one. If it is open to criticism at all, it is that it is unfair to West Virginia. True, Virginia has suffered; she was through four years of war a battleground; her people were largely withdrawn from their vocations of peace; her agriculture languished; her commerce was paralyzed and much of her property destroyed by contending armies. But the people of West Virginia, who adhered to the Union and helped

to rescue the government of their state and to bring it into harmony with and support of the government of the United States are neither to blame for it nor should they be compelled to pay for it. West Virginia likewise suffered from her proximity to the theatre of war. Counsel add:

> "It is submitted for a decree referring it to a Master, to state and report to the court the data necessary to enable the court to justly decide it upon its *merits*—and all the complainant desires *is an opportunity to show to the court and its Master what is the fair and equitable basis upon which the account between the two states should be stated, under all of the circumstances of the case, as they shall appear when the evidence is all in.* If it should *then appear* that the *basis prescribed by the Wheeling ordinance is binding upon the parties* and *must be followed as the basis upon which the account shall be made up, that basis would be accepted.* But if it should be then manifest that that arbitrary basis of settlement is not the one on which the account should be stated, because it would, if applied to the facts of the case as they shall appear in the evidence, lead to absolutely unconscionable results and operate to *impair the obligation of the contracts by which the common debt was created*, contracts which were and are alike obligatory upon Virginia and West Virginia, or for any other valid reason, then the scheme of settlement indicated in the Wheeling ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted."

This, too, is but a restatement by counsel, in different language, of the proposition that it is for the court to take testimony through a Master, to determine what *would be a just and equitable basis* of settlement between Virginia and West Virginia, the agreed basis, or the assumed international law basis. This is plainly calling upon the court to ignore the ordinance as a binding agreement, notwithstanding the solemn statement of the Attorney-General on the argument as to its binding force and contractual character. This, it seems to us, is impossible.

What is meant by the suggestion that the ordinance may be held to be *unconstitutional* because it *impairs* the obligation of contracts by which the common debt was created, "contracts which were and are alike obligatory upon Virginia and West Virginia," is difficult for us to understand. It is easy to see that it begs the question, for it assumes the indebtedness of Virginia prior to January 1st to be contracts which are binding alike upon Virginia and West Virginia. The personal identity or individuality of Virginia as a state which issued the bonds and owed the debt was not at all affected by the sepera-

tion of West Virginia from her and her erection into a new state. It would have been entirely competent for Virginia to have agreed with West Virginia that she would not be liable to assume any portion of the debt of Virginia as it existed prior to the first day of January, 1861. It would not have impaired the obligation of any contract, just as it was competent for the United States to enter into an agreement with Texas that she should pay her own debt, consisting of several millions of dollars, incurred before she was received into the Union.

The writers on international law are unanimous as to the validity of agreements between nations, under similar circumstances, as to the apportionment of indebtedness accrued before a separation. It is needless to again quote or cite them.

Counsel say further by way of objection to paragraph second of the decree proposed by the defendants:

> "While it is believed upon the facts stated in the bill and the accompanying exhibits and upon the proofs hereafter to be adduced in support thereof that West Virginia will owe a very large sum under the arbitrary scheme of the Wheeling ordinance, we submit that we should not in the present status of that litigation be *tied down to the terms of that ordinance.*"

If it is binding upon the two states, why should not both parties be "tied down to the terms of that ordinance?" It will be observed by the Court that no argument is made that it is not binding and that no reason is given why it should not be binding and enforced. Indeed it is insisted upon in the Bill as an irrevocable Compact.

Counsel add:

> "Indeed, its provisions were modified by the terms of the eighth section of Article VIII. to the State Constitution, under which West Virginia was made a state, which provided that West Virginia should assume an equitable proportion of the common debt of the Commonwealth, *principal and interest,* and yet the defendant's draft excludes any item of interest from the account."

Section 8 of Article VIII. of the first West Virginia constitution *did not* assume the payment of *any interest upon the debt of Virginia as it existed prior to the 1st day of January, 1861.* It is brief, we repeat it:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State."

The above words constitute all there is in the Constitution by way of *assumption of liability for indebtedness.* If there was unpaid interest due January 1, 1861, that would be a part of the debt of the Commonwealth of Virginia then existing, an equitable proportion of which was assumed by this constitutional provision. After assuming an equitable proportion of the debt, Article VIII. laid a command upon the *legislature:*

> "* * * to ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This injunction for reasons which appear in the case was not observed. There was no agreement to assume an equitable proportion of the *interest* on the *debt* which *might accrue after January 1, 1861.* The Constitution shows that it was in the contemplation of its framers that the new State, confessedly sparsely settled and undeveloped, would require time for the discharge of the equitable proportion of the *debt* so *assumed* when it should have been *ascertained,* and it was provided that the legislature should make provision for the liquidation of the *debt so assumed,* when ascertained, by a sinking fund to pay the *interest* accruing on the *debt so ascertained* and *assumed* by West Virginia, and to pay the principal of the *debt so ascertained* and *assumed* within thirty-four years.

The thirty-four years have expired. The constitutional provision has been omitted. The provision as to ascertaining the indebtedness and providing for its liquidation, etc., within thirty-four years was outside of the constitutional *assumption* of an *equitable proportion of the debt* of the Commonwealth of Virginia, as it existed prior to January 1, 1861. It was no part of the ordinance which was carried into the Constitution, and fulfilled by the specific assumption of an equitable proportion of the debt. The ordinance had made no provision as to the tribunal by which the debt should be ascertained, nor did it contain any provisions as to its payment, after its ascertainment. The assumption of the debt was a literal acceptance and fulfillment of the requirement of Section 9 of the ordinance, to be ascertained as therein provided. If Article VIII. had stopped there, it would, so far as the obligation of West Virginia to Virginia was concerned, have been complete; it would have constituted, as it does constitute, a compact for the assumption and payment of an equitable proportion of the debt of the Commonwealth of Virginia as it existed prior to January 1st, 1861. If the requirement that the Legislature

should "ascertain" the amount and provide for its payment, principal and interest, within thirty-four years, had been carried out and bonds issued therefor, the bonds might have been delivered to Virginia for distribution among her creditors and would have borne interest; or they might have been sold by West Virginia, and the cash proceeds paid to Virginia for distribution among her creditors. Either method was open under section 8 to the legislature and so, when there shall have been an accounting under the ordinance and an ascertainment thereby of what is the equitable proportion of the debt as it existed prior to the date of January 1, 1861, assumed by West Virginia, the legislature of West Virginia is perfectly free as to the manner in which the obligation shall be discharged. It would not be obliged to issue bonds for thirty-four years, that provision of the Constitution having been omitted in the revised Constitution. *It might do so if it chose.* It might provide for the issue of bonds due in 100 years, or 20 years. It is at liberty to fix the rate of interest which the bond shall bear at 2 per cent. or 3 per cent. or 4 per cent. It could provide for the delivery of the bonds to West Virginia in discharge of her obligation to that Commonwealth, if acceptable to her, or she could borrow the money on her bonds at a low rate of interest and discharge the debt to Virginia *in money.* That would be a "debt contracted" under section 5 of the Constitution for the *redemption of a previous liability,* and in nowise a modification of or departure from the ordinance or the contract of assumption made irrevocably by the adoption of section 8 of the first Constitution. She made no covenant to pay interest upon the proportion which she assumed upon its ascertainment, until the amount should be paid to the State. But whether she should pay interest or not, is a question which is not necessary to determine at this time through a Master or otherwise. In any event, it is very difficult to see what testimony could be taken before a Master which would aid the Court in determining the *liability* of the defendant *to pay interest.*

Under Point III., the learned Attorney General objects to the second paragraph of the decree proposed by the defendant also upon the ground that it excludes from the account the *value of the property, assets and money which West Virginia is alleged to have received from the Commonwealth* of Virginia by grants contained in the *acts of February 3 and 4, 1863.* The learned Attorney General says that these acts were passed, as we understand him, "before the legislature of Virginia had in any form given its consent to its (West Virginia) creation out of the territory of Virginia." In this he is certainly in

error. It has been our understanding that the claim of Virginia, for which an accounting is sought in this case, is restricted by the court to an accounting which shall ascertain the equitable proportion of the debt of the Commonwealth of Virginia, prior to January 1, 1861; but be this as it may, the argument of the learned Attorney General is extraordinary.

It is said that upon the basis of the ordinance alone none of the property embraced by the grants contained in the acts of February 3 and 4, 1863, would have passed to the State of West Virginia; and on page 6:

> "By the terms of that ordinance Virginia's title to ownership of all the property and assets theretofore belonging to the Commonwealth remained intact. By it West Virginia would acquire no title to any of these assets or of that property. Framed as that ordinance was, by West Virginians, and arbitrary on its face, unjust as were the *criteria* by which it undertook to provide that West Virginia's proportion of the common debt should be computed, its authors were not so conscienceless as to also propose that the new State, after making such an inadequate contribution to its share of a debt, which had been chiefly contracted by the votes of the representatives of its people and for their benefit, should also have a share of the property and assets of the Commonwealth free of charge.
>
> "All that was by the terms of that ordinance to be ceded by the Commonwealth to the new State was political dominion and jurisdiction over the people and territory embraced in the new State."

To this we do not agree. There is nothing in the terms of the ordinance which affirms Virginia's title to and ownership of all the property and assets theretofore belonging to the Commonwealth of Virginia, or of any thereof located in the territory of the proposed new state. Virginia consented to the erection of West Virginia into a new State, out of her territory. She did not *grant sovereignty* to the new State. There could not be a new State without sovereignty, and when she gave her consent to the erection of the new State, it was accompanied by all the rights and powers which upon principles of international law would follow the territory and inhere in the sovereignty of the new State over the territory within her borders. The ordinance contained nothing upon the subject. The ordinance did provide—as such ordinances have always provided:

> "SECTION 9. All *private* rights and interests in lands within the proposed State derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws

of the proposed State derived from the laws of Virginia prior existing in the State of Virginia. The lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents therein. No grants of land, or land warrant issued by the proposed State, shall interfere with any warrant issued from the Land Office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed State now liable thereto."

By Section 1 of the ordinance it is declared:

"The people of Virginia, by their delegates assembled in convention, *do ordain that a new State,* to be called the State of Kanawha, be formed and erected out of the territory included within the following described boundary, to wit: * * *"

And there is not a word in the ordinance in regard to what should be possessed by the new State of West Virginia, nor a *single reservation* in *the ordinance of assets or property of any kind to the commonwealth of Virginia.* What passed to the State of West Virginia by the separation was what would have passed had Virginia been a nation and a portion of her people had, by revolution, separated themselves from her sovereignty and formed of the people and the territory an entirely distinct and new nation called West Virginia; and what would be possessed by the new nation out of what had been possessed by the old one, would be measured entirely, *in the absence of special agreement,* by the settled principles of international law. It is needless to cite authorities. As Mr. Hall says (p. 79):

"And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person which it has not expressly lost; so that property enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continues to belong to it. *On the other hand, rights possessed in respect of the lost territory,* including rights under treaties relating to cessions of territory, and demarcations of boundary, *obligations contracted with reference to it alone* and *property which is within it and which has therefore a local character,* or which, *though not within it, belongs to State institutions localized there, transfer themselves to the new State person.*"

Again he says:

"Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the State, and the like."

State banks, which are State institutions and local in their nature, certainly belong to the new State created after a forcible secession. The same result would follow from an agreed dismemberment, unless the property in them were reserved. The same would be true of railroads and all proprietary interests of the old State *local to the new State*. Section 9 of the ordinance industriously sefeguards all *private* rights and interests in lands within the proposed new State and their titles; but we repeat, it is silent as to *public interests* and *ownership* of the old State *located within the borders of the new*.

All that Virginia required in a financial way of the new State was that she should—

> "take upon herself a just proportion of the public debt of the commonwealth of Virginia prior to the 1st day of January, 1861, by charging to the defendant all stated expense within the limits thereof and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted and deducted therefrom, the moneys paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Expressio unius est exclusio alterius.

Possibly, these grants were made in February, 1863, mainly to afford a ground for the claim that the property which had passed by the separation should be "accounted for in the settlement hereafter to be made." The learned counsel contends—as he is obliged to contend, we think, to give any plausibility even to his proposition—that the *statutes of February 3d and 4th, 1863,*

> "*together with the Wheeling ordinance*, the *first Constitution of West Virginia*, the Act *of the United States Congress, approved December 31, 1862*, under which the new State was afterwards admitted into the Union, and the act of the Wheeling legislature of May 13, 1862, constitute the constating instruments and acts by which her political existence was created and her governmental powers and duties determined."

And he adds:

> "As was indicated by this court in its decision overruling the defendant's demurrer, the Wheeling ordinance and Section 8 of Article VIII of the first Constitution of West Virginia must be taken and read together; *so, also*, these constating acts of February 3 and 4, 1863, and particularly of February 3, 1863, *must be taken and read together with*

Section 9 of the Wheeling ordinance, and with Section 5 of Article VIII of the first West Virginia Constitution, as together prescribing the terms and conditions on which the consent of the commonwealth was given to the formation of the new State out of her territory, and the transfer to that new State, when formed, of any portion of the assets and property of the parent State."

The court does say in the opinion overruling the defendant's demurrer, "Reading the Virginia ordinance and the West Virginia Constitution, in *pari materia*, it follows that what was meant by the expression that the legislature "shall ascertain" was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed and provide for the liquidation of the amount so ascertained." True this was said in deciding adversely to the contention that the admission of the State under the ordinance and Section 8 of the Constitution, with the consent of Virginia, created a *compact which gave to the legislature of West Virginia power of final ascertainment of the equitable proportion of the public debt of Virginia prior to January 1st, 1861, assumed, as provided in the 9th Section of the ordinance.* But there can be no question of the correctness of the proposition above quoted from the opinion. We dissent altogether from the suggestion of counsel that the acts of February 3d and 4th, 1863, are to be taken and read with Section 9 of the Wheeling ordinance and with Section 8 of Article VIII, of the first West Virginia Constitution, *as together prescribing the terms and conditions on which the consent of the commonwealth was given to the formation of the new State out of her territory.* This proposition is entirely untenable. The Wheeling ordinance was adopted August 20th, 1861. The Constitutional Convention assembled in November, 1861, and framed the Constitution which was thereafter duly ratified by a vote of the people, which Constitution contains Section 8, assuming an equitable proportion of the debt. *On the 13th of May, 1862*, an act was passed by the legislature of Virginia giving the consent of that State to the formation and erection of the proposed new State within the jurisdiction and territorial limits of said State of Virginia, Section 1 of which is as follows:

> "That the consent of the legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brooke and Ohio (and many other counties), according to the boundaries and

under the provisions set forth in the constitution of the said State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

Section 3 of said act provided:

"Be it further enacted That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with the certified original of the said Constitution and schedules, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

It ought here to be stated that the Constitutional Convention of West Virginia appointed three Commissioners to that end also that the Commissioners presented on May 31, 1862, to the United States Senate a memorial praying for the admission of that State into the Union, addressed to the Hon. B. F. Wade, Chairman of the Committee on Territories, in which they gave a history of the proceedings which led to the organization of the restored government of Virginia, and which *included at length the ordinance adopted on the 20th of August, 1861, by the Convention at Wheeling entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," which, on the 31st day of May, 1862, was referred by the Senate to the Committee on Territories and ordered to be printed* (Congressional Globe, p. 2451; 37 Cong., 2d Session, Misc. Senate Doc. No. 99), thus *clearly demonstrating that Congress had before it not only the Constitution of West Virginia but the Wheeling ordinance in full.*

On the 31st day of *December, 1862*, an act was passed by the 37th Congress providing that the new state, thus formed in pursuance of the ordinance of the Wheeling convention above referred to, should, upon a certain condition, be admitted into the Union by the name of West Virginia, with the Constitution which had theretofore been adopted by the new State and by the people thereof; said condition being that a change should be made in the constitution of the proposed State in regard to the liberation of slaves therein. And it was provided by the act of Congress that whenever the President should issue his proclamation stating the fact that such change had been made and ratified, *thereupon the act admitting the new State into the Union should become effective 60 days after the date of such proclamation.*

The proclamation was duly issued by President Lincoln on the *20th day of April, 1863, and on the 20th day of June, 1863.* West Virginia became a state and fully organized as one of the States of the Union.

Prior to the passage, it will be observed, of the acts of February 3 and 4, 1863, the general assembly of Virginia *had consented* to the admission of West Virginia under the Constitution adopted by her people and had requested her admission, and *Congress had admitted her under that Constitution with the single condition* that *a change should be made in it relative to the liberation of slaves, which was made.* And we deny that it was in the power of Virginia *after the action of Congress* to withdraw her consent to the admission of West Virginia or to change the terms of her consent, Congress not having required as a condition of her admission any *change in the ordinance* adopted by the Wheeling convention or in the Constitution *in anywise affecting the provisions of the ordinance.*

Virginia could not thus play fast and loose with Congress in respect of her consent to the admission of West Virginia. This proposition has been sustained by this Court in *Virginia vs. West Virginia*, 11 Wallace, 39.

It cannot be supposed that after Congress had passed the law admitting the state of West Virginia into the Union upon the conditions indicated and authorizing President Lincoln to issue the proclamation announcing a compliance with the condition, that a *specific withdrawal by Virginia of her consent to the admission of the new state into the Union would have been of any force.* If this be a correct proposition, it necessarily follows that no modification of the consent theretofore given upon which Congress had acted and *after Congress had acted on the faith of her prior consent*, would be of any efficacy. The proposition of the learned counsel must have for its predicate the assumption that after Congress had passed the act for the admission of West Virginia and up to the time President Lincoln issued his proclamation declaring the condition imposed by Congress to have been complied with, the General Assembly of Virginia possessed the power to withdraw her consent or to modify it as she might see fit. If she could withdraw it, she could modify it. She could change its terms and impose other conditions. *Prior to February, 1863*, West Virginia *had been admitted into the Union upon a condition subsequent.* The act was complete. Congress simply suspended the taking effect

of the act until sixty days after the proclamation of the President that the condition had been complied with. The argument places the acts of February 3 and 4, 1863, upon precisely the same basis, which it is conceded that the Wheeling ordinance of August 20, 1861, and the constitution of 1861 stand. It is probable that Virginia might have withdrawn her consent to the formation of the new state at any time before the acceptance of the proposition proffered by the ordinance, by the convention which framed, adopted and submitted for ratification the constitution of 1861. That she could do it afterwards and before the action of Congress is subject to grave doubt, although it is academic, since she *did not attempt to do so.*

The counties of Berkeley and Jefferson involved in the case of Virginia *vs.* West Virginia, *supra*, were by the ordinance authorized to be incorporated in West Virginia upon the condition that a majority of the votes of the counties were cast in favor of becoming a part of West Virginia. The convention by the constitution made provision for their being incorporated. By act afterwards Virginia renewed her consent by legislation. The *vote* was not *taken by the counties until after the state had been admitted into the Union* and by that time *and before the vote was taken Virginia had repented and had passed an act withdrawing her consent;* and, to test the question whether these counties had become a part of the State of West Virginia, the suit of Virginia *vs.* West Virginia was brought in this Court. The Court said:

> "Now, we have here on two different occasions the legislative proposition of Virginia that these counties might become part of West Virginia, and we have the *constitution of West Virginia agreeing to accept them* and providing for their place in the new-born state. There was one condition, however, imposed by Virginia to her parting with them and one condition made by West Virginia to her receiving them, and those conditions were the same, namely, the assent of the majority of the votes of the counties to the transfer. It seems to us that here was an agreement between the old state and the new that these counties should become part of the latter, subject to that condition alone."

Again, as to Congress having assented, the Court says:

> "It is therefore an inference clear and satisfactory that Congress by that statute (referring to the act of admission) intended to consent to the admission of the state with the contingent boundaries provided for in its constitution and in the statute of Virginia; which prayed for its admission on

those terms and that in doing so it necessarily consented to the agreement of those states on that subject. There was then a valid agreement between the two states, consented to by Congress, which agreement made the accession of these counties dependent upon the result of a popular vote in favor of that proposition."

Mr. Justice DAVIS, with whom concurred Justices CLIFFORD and FIELD, dissented upon the ground, that Congress had not given its consent to the compact between the states for the transfer of Berkeley and Jefferson Counties to West Virginia until March 2, 1866, saying:

"If so, the consent came too late because the legislature of Virginia had on the 5th day of December, 1865, withdrawn its assent to the proposed cession of these two counties. This withdrawal was in ample time, as it was before the proposal of the state had become operative as a concluded compact, and the bill in my judgment shows that Virginia had sufficient reasons for recalling its proposition to part with the territory embraced within these counties. *But it is maintained in the opinion of the Court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia when it admitted Virginia into the Union.*"

From this the learned justices dissented.

It is clear to our apprehension that whatever may be the opinion of the court as to the effect of the acts of February 3 and 4, 1863, it cannot be said that they had any effect whatever, qualifying or otherwise, upon the assent which Virginia gave in the ordinance and by the act of her legislature to the admission of the State of West Virginia into the Union, and if the Court shall be of the opinion that under the general public law which governs between nations, the property referred to in the acts of February 3 and 4 or either of them, passed by the acceptance of the ordinance and the conditional admission of the State by Congress upon the request of Virginia, the enactment of the acts of February 3 and 4, 1863, were not necessary as evidences of title, and *in no event could be anything more than that.* The learned Attorney General further says:

"It is objected to the draft of the proposed decree for the defendant that it does not direct any account to be taken ascertaining the amount and proportion of the debt of Virginia on and prior to January 1, 1861, which West Virginia should assume and pay, but contents itself with merely directing the arbitrary and

inconsequential accounts defined in paragraph second of defendant's proposed decree." This is an objection simply that the proposed decree of the defendant is upon a different theory from that proposed by the complainant. That this is true, is freely admitted. It was not intended by the draft that the Court should direct the Master to ascertain and report what *proportion* of the public debt of Virginia prior to the first day of January, 1861, West Virginia *ought to assume and pay*. That was settled by Virginia and West Virginia nearly fifty years ago. The latter was required to take upon herself a just proportion of the debt, and the two states agreed how that should be ascertained. The draft proposed by the defendant is in literal execution of the contract of the parties, as evidenced by the ordinance and section eight of the first constitution.

It directs the Master to ascertain and report:

(*a*) The amount of State expenditures made by the Commonwealth of Virginia prior to the 1st day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of August 20, 1861.

We agree that the last clause need not be inserted.

(*b*) To ascertain the aggregate ordinary expenses of the State Government of the Commonwealth prior to January 1, 1861, and since any part of said indebtedness was contracted.

(*c*) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during the said period.

The items (*a*) and (*b*) are, under the ordinance, to be *charged* to West Virginia.

The item (*c*) is under the ordinance to be *credited* to the State of West Virginia, and when these three steps shall have been taken, and the two items *charged*, and the one item *credited*, the *sum which it was agreed between the two States should constitute a just proportion of the debt of the Commonwealth of Virginia prior to January 1, 1861, which West Virginia assumed, will have been ascertained.* It is vain to refer to these as "arbitrary and inconsequential items."

They are the items which Virginia herself framed and required to be accepted by the proposed new State as a condition of assent to her separation and admission into the Union.

The entire debt of the Commonwealth of Virginia as it existed

prior to January 1, 1861, *as averred in the bill*, and *admitted by the answer*, was contracted for, and its proceeds are alleged to have been expended in, the construction of a system of internal improvements, the greater part of which were expended in what is now Virginia, and several millions of which were, it is alleged by the Bill, and denied in the answer, expended in what is now West Virginia. It was just that Virginia should provide that there should be charged to West Virginia so much of the proceeds as were expended in the construction of internal improvements within her territory. It ought not to be very difficult to ascertain how much of the debt was expended for internal improvements within the limits of what is now West Virginia.

There is but one item in section 9—defining the manner in which the account should be taken in order to ascertain the proportion of the debt to be taken upon herself by the proposed new State—left at all indefinite, and that is item (*b*), "'*a just proportion*' of the ordinary expenses of the State Government, since any part of said debt was contracted." This involves a determination of the basis upon which a "just proportion" of the aggregate ordinary expenses of the State Government during the said period is to be ascertained. Shall it be population or territory, or both, or taxable values? We are strongly of the opinion that it should be based upon population, since "government"—including the administration of justice, the making and administering of the laws, the education of the children through a system of common schools, academies and a State university, the maintenance of State institutions, the support of prisoners, the care of the insane and paupers, and the like—is for *people*, not *acres*. It is difficult to conceive of *government* except in its relation to *people*, and so, it has seemed to us that the basis must be population. We therefore suggest that there should be added to the draft proposed by the defendant, in respect of an ascertainment of the aggregate ordinary expenses of the State, a direction to the Master to find alternatively certain facts substantially as follows:

> "For the purpose of enabling the Court to determine the just proportion of the aggregate of the ordinary expenses of the State Government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of said indebtedness was contracted, said Master shall ascertain and report the population during the said period of the counties now constituting the Commonwealth of Virginia, and separately the population of the counties now constituting the

State of West Virginia, as shown by the decennial censuses taken during the said period by the United States, and also the average population of Virginia during each of said periods of ten years."

The aggregate ordinary expenses being found, and the items suggested as to population, it will be easy to determine the "just proportion" if that is the proper basis.

We submit that this case should not be cast at large, with no definition of the principles to govern his action, into the hands of a Master; that at least it should be settled before a reference for the *purpose of taking an account*, whether the liability of Virginia to West Virginia is upon the *special agreement* which preceded and accompanied her admission into the Union, *or, because of the absence of a special agreement*, upon the basis of *population* and *territory*.

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Of Counsel for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Reply Brief for Virginia.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

REPLY BRIEF FOR VIRGINIA UPON MOTION TO REFER THE CAUSE TO A MASTER.

The propositions contended for by the counsel for West Virginia in their elaborate brief upon the above motion will be here reviewed, though not in the order in which they are presented.

AS TO ORDER OF PROCEDURE.

While this court in *Rhode Island* v. *Massachusetts*, 14 Peters, 210, 257, considered it proper that the proceedings in that case should "be regulated by the rules and uses" of the English Court of Chancery, it declared that:

> "in a controversy where two sovereign States are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring this case to a final hearing *on its real merits. It is too important in its character, and the interests concerned are too great, to be decided upon the mere technical principles of chancery pleading.*" 14 Peters, 257.

It will not be gainsaid that this language applies with added force to this case.

The only rule of chancery practice adopted by this court, is in accordance with this just conception of its powers and duties, and is as follows:

> "Rule 3. This court considers the former practice of the courts of King's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary."

Neither the technical rules of practice obtaining in the circuit courts of the United States; nor those approved by Mr. Bates and other learned text-writers; nor those sanctioned by any other tribunal whatever will *control* this court in the matter of the procedure and processes which it may deem necessary and proper to adopt, in order to attain the ends of justice.

This results from the very nature of its powers and duties in a case like this, as to which its jurisdiction is not only exclusive, but final, plenary and absolute.

In this its only rule upon the subject, the court has indicated the former practice of the courts of chancery in England as "affording outlines" for the practice of this court in chancery causes.

If we look to the practice of the English courts in chancery, and to the chancery practice sanctioned by the courts and jurists of this country, precedents and authorities will be examined in vain to find any sanction for the proposition that each of the six rules laid down by Mr. Bates in the section quoted in the brief for West Virginia, must be complied with before there can be a decree for an account in a case like this; nor are we willing to believe that the learned counsel for the defendant would carry their contention to any such extremity.

2 Daniel's Chy. Pl. & Pr. (5th Ed.) p. 1004 and note 7;

Adam's Equity (8th Ed.) Book III, Chapter 1, M. pp. 220 to 222-226;

Story's Eq. Pl., Sec. 218 & note (b);

1 Story's Eq. Jurisprudence (13th Ed.) Chapter VIII. Titles, Account, Apportionment, and Partnership, Sections 450, 469 to 477-483-488-671.

The general rule is that a decree for accounts, or order of reference is from its nature interlocutory, because it directs an inquiry and contemplates the bringing of new and additional facts into the record.

It would be practically impossible to state in advance all the principles of law which might apply to the facts as they might thereafter be developed. As if an account of debts were ordered against a partnership, corporation, or estate, it would be impracticable to state in advance what rules of law should obtain in regard to the establishment of such debts; as for instance, what might be valid defences, such as failure, or want of consideration, the statute of limitations, payment, set-off, &c., any of which might be interposed against the different debts as presented, and no one could say in advance to what extent they might be applicable or valid.

"A decree is understood to be interlocutory whenever an inquiry as to a matter of law or fact is directed preparatory to a final decision." *Bebee* v. *Russel*, 19th How., 285, and in the same case we find the following citation from the 2nd volume of Perkin's Daniel's Chancery Practice 1193, "that the most usual ground for not making a perfect decree in the first instance, is the necessity which frequently exists for a reference to a master of the court, to make inquiries, or take accounts, or sell estates and adjust other matters which are necessary to be disposed of, before a complete decision can be come to upon the subject matter of the suit," p. 285.

The primary purpose of this suit is to invoke the equitable jurisdiction of "Account"; to have the account between the parties involving more or less complicated transactions, made up of a vast number of items running through a period of more than seventy years, stated, in order to obtain from the defendant the amount for which she shall be thus ascertained to be equitably liable.

The principal facts upon which the complainant's claim depends, namely: the formation of the new State out of the territory of the Commonwealth of Virginia; the existence of a public debt of the undivided State of some $33,000,000.00 at and before that event, a large part of which remains an unsatisfied and binding obligation upon both States; the ordinances, public acts, and fundamental stipulations and enactments by which West Virginia assumed, and became liable for an equitable proportion of that common indebtedness,—all of these and other material facts are alleged in the bill, and are, either not controverted by the defendant's answer, or are established by the documents and public records filed with the bill, or are a part of the history of the two States, and of the times, and of the country.

The facts which justify the complainant in instituting her suit for an accounting, and for a decree thereupon, are thus sufficiently

established to entitle her to a decree to that end. Indeed, we had supposed that the decree of this court overruling the defendant's demurrer, had pretty well settled this.

If precise proof of Virginia's claim should be required to be made, before a decree for an accounting would be entered, it would be necessary for the court to devote months of its time to the examination of the books, accounts, documents, and transactions of the Commonwealth, in connection with the creation of the debt, the expenditures made in the counties now constituting West Virginia, and the payments made from those counties into the treasury of Virginia, during a period of forty years or more, and also to the examination of the records of both States in reference to the lands and other property which West Virginia received from Virginia.

It is difficult to conceive how a stronger case could be presented for the exercise of the equitable jurisdiction of "Account," "in order to bring the case to a final hearing upon the merits."

But while the case is not in a condition for the court to intelligently and fairly "pass upon all the issues made in the pleadings," it is in condition for a decree of reference, in which decree the principles upon which the account shall be stated should be settled, so far as it is practicable to do that from the data now in the record, and without doing injustice to either party.

In the draft of decree tendered on the 7th of last December by counsel for the complainant, some important questions were left open which we are prepared now on further consideration to say, it would be as well, or better, to have settled in advance.

To this extent we concur, upon this point, in the views presented by the learned counsel for West Virginia.

While the basis of settlement prescribed by the Wheeling Ordinance is, as we have always considered it, arbitrary and inequitable, we have never taken the position that that Ordinance, *reasonably and fairly construed,* and taken and applied together with the Act of the Restored Government of Virginia of February 3, 1863, and section 8 of Article VIII of the Constitution under which West Virginia became a State, was not binding on both States.

While thus construed and applied, the amount and proportion of the public debt assignable to West Virginia will doubtless be much less than it would have been equitable for her to have assumed and paid, we are constrained to the opinion that the plan of settlement prescribed and sanctioned by the foregoing enactments is binding upon Virginia.

It is due to candor also, to say that, although it is true that the Convention which enacted the Wheeling Ordinance, was not called, constituted, or organized in accordance with the requirements of the Constitution and laws of Virginia, and was a revolutionary body; although it could then have been shown that that Convention and its acts were invalid, and may now be contended that the Convention and the Wheeling Ordinance which it adopted, were fictions, nevertheless, they and their offspring, the Restored Government of Virginia, and the State of West Virginia, have since received such recognition and sanction from every department of the United States Government, and from the Government of Virginia also, that, what, in its inception, was a fiction, has become a *legal* fiction, and now has all of the force, if not all of the virtue, of a legal verity.

We are constrained to recognize the following propositions as true:

(a) That the State of West Virginia could have no legal birth or existence without the consent of the Legislature of Virginia.

(b) That the only Legislature of Virginia which ever gave its consent to the formation of West Virginia, was the Legislature of the Restored Government which, sitting at Wheeling on the 13th of May, 1862, gave its consent to the formation of the new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th of November, 1861."*

(c) That the Act giving such consent and the Legislature which passed it, depended for their validity upon the validity of the Wheeling Ordinance under which the Restored Government of Virginia was organized.

(d) That said Convention, and its acts, and the Government which it established, have been legitimated, by recognition by every department of the Government.—by the President of the United States in his official intercourse and dealings with the Governor and officials of said Restored Government, by approving the bill for the admission of West Virginia, and by his proclamation announcing

*At the time of the argument upon the demurrer, counsel for complainant were under the impression that this Legislature had not been convened pursuant to the proclamation of the Governor, without which proclamation the meeting of the Legislature would have been, under the then Constitution of Virginia, invalid; but subsequently the Executive Journal of the Governor of Virginia at Wheeling, for 1862, was found, and it appears from it that Governor Pierpont issued a proclamation under which the special session of the Legislature in May, 1862, was held.

the admission of the new State into the Union; by the Congress of the United States in the admission of Senators Willey and Carlisle elected by the Legislature of the Restored Government, by the passage of the Act approved December 31, 1862, admitting West Virginia into the Union, and by other acts; and by the United States Supreme Court, by its decision in *Virginia* v. *West Virginia*, 11 Wallace, p. 39, in which the Wheeling Convention and this very Wheeling Ordinance and the Wheeling Legislature of Virginia, are recognized as being a Convention, an Ordinance, and a Legislature of the Commonwealth of Virginia.

We are forced by these considerations to conclude that it is too late now to question the binding effect of the Wheeling Ordinance.

Still, it cannot be forgotten that there was not a man in the Virginia, and West Virginia, Wheeling Conventions of 1861-2, and 3, from any of the counties or cities which now constitute Virginia, except the four men admitted to seats in the Virginia Convention at Wheeling, of August, 1861, two of them from Alexandria and two from Fairfax county, both parts of the present State of Virginia; that there was no pretence that there was any representation whatever in said Conventions, or in the Legislature of the Restored Government of Virginia, from more than two-thirds of the territory and people of Virginia; and that, in a number of instances, the very same men acted as the representatives both of the people of Virginia, and of the people of West Virginia, in said Conventions and Legislatures.

The indisputable facts are, that it was the people of the counties and cities now constituting West Virginia, or their representatives, who were dealing with the people of the same counties and cities, or their representatives, and undertaking to make covenants and stipulations with themselves which would bind all the people, and the entire Commonwealth of Virginia, in matters of the utmost importance to them.

Among other instances of manifest injustice in the plan prescribed in the Ordinance, is, that it operates to exclude from the account all items of expenditure in the early years of the last century.

If the principle adopted by that Ordinance was just, why should its application be stopped in 1820?

For a number of years before that date there had been large expenditures made by Virginia in what is now West Virginia, towards which the people of that section had contributed little or nothing. For a long period after the settlement of Western Virginia, the rest

of the State had practically to carry that section of the Commonwealth.

Many times as much was expended there on public account, as it contributed to the Treasury of the Commonwealth.

All that was well enough, for it was reasonably hoped that in time, with the development of the bountiful resources of that trans-montana region and the consequent increase of its wealth, the accounts would be squared.

From the very dawn of the internal improvement policy of Virginia the dream of her leading men was the construction of some efficient line of communication between her Eastern and her Western waters.

This was earnestly advocated by Washington, and others of her representative citizens, and among these Chief Justice Marshall applied the great powers of his mind and unerring judgment in aid of a wise solution of the problem.

In 1812, at the request of the General Assembly, he devoted much of his time to arduous service as Chairman of a Commission which was created for the purpose of examining the intervening region, and ascertaining and reporting as to the best route and mode of communication between the Eastern and Western waters.

Together with other members of the Commission, the Chief Justice spent some time among the mountains and wild woods of Western Virginia, much of it then almost a trackless wilderness, in the patriotic discharge of this voluntarily accepted duty.

The report of this Commission which was evidently written by the Great Chief Justice, will be filed as an exhibit in the cause, not only as indicating the purpose and desire of Virginia at that early day to open up a highway through West Virginia, but as an interesting fact in connection with the history of the internal improvement policy of Virginia.

From 1812 down to the breaking out of the war which resulted in her dismemberment, the means and energies of the Commonwealth were largely devoted to the construction of roads, turnpikes, waterways, and railroads, and especially to lines which were designed to develop Western Virginia.

This policy generally received the earnest support of the people of what now constitutes West Virginia, and their representatives, and very little indeed of the debt would have been contracted if they had opposed it; for there was a powerful opposition to that policy

and to contracting the debt in large portions of the Eastern part of the State.

As giving some notion of the views of leading and representative citizens of Western Virginia, extracts from the message to the General Assembly, of Governor Joseph Johnson, of Harrison county, West Virginia, in January, 1852, will be printed in the appendix to this brief.

These are incontrovertible facts, to which we cannot shut our eyes, unless we would ignore the truth.

We therefore respectfully submit that these ordinances and public acts, adopted under such circumstances, should not be construed strictly against Virginia, who, without the actual consent of her people, or their representatives, was to be bound by them.

On the contrary, they should be strictly construed against West Virginia, in whose interest they were manifestly conceived and made.

That the rule embodied in the Wheeling Ordinance was not only arbitrary, and inequitable, but contrary to the usages of nations, and the principles of natural equity and public law, as enunciated by the great publicists and jurists of the world, and also as expressed by learned American authors, will be manifest from an examination of the extracts from the works and opinions of a number of these authorities which will be found in an appendix to this brief.

It will be seen that the authorities there quoted, with a single exception, all substantially agree that the rule of equity applicable to such a case is, that the common debt and common assets shall be apportioned between the two States ratably.

The only exception to this practically unbroken line of authority, is to be found in Mr. Hall's treatise on International Law. With entire deference for his ability, we respectfully submit, that the views of this learned author upon this subject are unsupported by reason or authority, and are repugnant to those principles of justice and right, from which the rules of International and Public Law derive their highest sanction.

If Mr. Hall is correct, then three-fourths, or four-fifths, of a State, could, by splitting off from the original State, escape liability for the common public debt of the unsevered Commonwealth, and leave that burden to rest exclusively upon the remaining parcel thereof.

The flagrant injustice of such a rule would be the same if it should be applied to this case, the only difference here being one, not in principle, but in degree; for, here the new State embraced perhaps one-third of the actual, and one-half of the prospective and potential

resources and wealth of the original State, instead of three-fourths, or four-fifths thereof, as in the case just assumed.

The debt was created by the whole State, bound the whole State, and should be paid by the whole State.

Its obligations rested equally upon the whole State, and upon every part of it, and should have been, and should now be, borne by every part of the undivided Commonwealth, whether each part has received its ratable shares of the expenditures made out of the money for which the debt was contracted, or not. It would be exceedingly difficult, indeed impossible, to apportion the debt upon any basis which would require each county, or each section, or each grand division, to contribute to its payment in proportion to the benefits actually received by such county, section, or grand division—and no sanction for any such principle will be found in the writings of the publicists and jurists who have considered and discussed these questions.

But, if it be true, as is indicated in the Bill, and as it can and will be demonstrated to be true, that the public debt of the Commonwealth was created largely for the construction of works of internal improvement which would develop the vast resources of Western Virginia then known to be lying there in boundless but almost useless affluence; that some of the most important and most expensive of these works would not have been undertaken, if it had not been believed that their construction would have that effect; that the policy under which and the acts by which that debt was contracted received the warm and active support of the people of the counties which now constitute the new State; *that a large part of that debt was contracted by the votes of a majority of the representatives from those counties, and against the wishes and the votes of a majority of the representatives in the General Assembly from the counties constituting the present State of Virginia; and that a very small part of the debt was or could have been created had the people from the counties now forming West Virginia, and their representatives in the General Assembly opposed its creation,*—if these facts which are a part of the history of the Commonwealth, be true, how could the amount of money which was expended in West Virginia be, by possibility, any just or equitable measure of the share of that debt which, in good conscience, she should assume and pay?

Yet, by the Wheeling Ordinance, that is made the chief measure for determining the production of the common debt which the younger Virginia should assume and pay.

Tried by every test of authority, and every standard of principle and right, the basis of settlement prescribed by the Wheeling Ordinance, was, upon its face, arbitrary, illogical, and inequitable, and yet the learned counsel for West Virginia, would, by construction, give it a meaning which would make it work even greater hardship and injustice upon Virginia, than its language fairly interpreted would justify.

Here, then, we have an Ordinance which prescribes a plan of settlement, palpably unjust and inequitable, and in contravention of both common right, and of the common public law of the civilized world.

Such an enactment clearly comes within the time-honored rule, that a statute in derogation of common right or of common law must be strictly construed—and so construed as to conform it in its operation and effect, to the principles of right and justice and of the common law, so far as this can be done without violating the manifestly *expressed* purpose of the statute.

See this Rule as applied to Acts in derogation of the common law.

> Enlich on Interpretation of Statutes, §127, citing *Brown* v. *Barry* 3 Dall., 365, 367; *Shaw* v. *R. R. Co.*, 101 U. S., 557; *Newell* v. *Wheeler*, 48 N. Y., 476; and a number of other cases.

This salutary rule, especially as to statutes in contravention of common right, but also as to those in derogation of the common law, is embodied in the jurisprudence of both Virginia and West Virginia.

> *Commonwealth* v. *Gaines*, 2 Va. Cases, 172-175.
> *Richmond City* v. *Daniel*, 14 Gratt., 485, 487.
> *Delaplain* v. *Crenshaw*, 15 Gratt., 457, 470.
> *Virginia & S. W. R. R. Co.* v. *Clower*, 102 Va., 867, 871.
> *Wheelright* v. *Commonwealth*, 103 Va., 512, 519.
> *Davis* v. *Commonwealth*, 17 Gratt., 617.
> *Alexandria & Fredericksburg R. R. Co.* v. *Alexandria & Washington R. R. Co.*, 75 Va., 780, 788.
> *Harrison* v. *Leach*, 4 W. Va., 383.
> *Harrison* v. *Smith*, 4 W. Va., 97.
> *Pendleton* v. *Barton*, 4 W. Va., 496.
> *McGugin v. O. R. R. R. Co.*, 33 W. Va., 63, 68.
> *Richardson v. N. & W. R. R. Co.*, 37 W. Va., 641.

To the same effect are a large number of decisions of other States, a few of which are:

> *Webb* v. *Baird*, 6 Ind., 13.
> *Sewall* v. *Jones*, 9 Pick., 412.

Mayor of Savanah v. *Hartridge*, 8 Ga., 23.
Chapin v. *Persse & Brooks Paper Works*, 30 Conn., 461.
Phillips v. *Dunkirk R. Co.*, 78 Pa. St., 177.

By the express terms of the 9th Section of the Wheeling Ordinance, it was provided that:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained," &c.

That is the paramount and controlling mandate and stipulation of the clause which prescribes the portion of the debt which the new State shall assume and pay.

Our insistence is, that the residue of the clause should be so construed as to give effect to the righteous principle thus expressly made the rule by which West Virginia's liability under it shall be determined.

The enactment should be interpreted and applied so as not to defeat that purpose: *ut res magis valeat quam pereat.*

And so, whenever in stating the account between the two States under the provisions of the Ordinance, a question shall arise as to whether a particular item of charge against West Virginia shall be included in the account, such construction should be given to the Ordinance as will tend to place upon the new State a just proportion of the common indebtedness, rather than a construction which will tend to exonerate West Virginia from her just and equitable share thereof.

In other words, in the application of the arbitrary basis prescribed by the Ordinance, Virginia should, according to the equitable rules of construction which are especially applicable to this case, be given the benefit of every reasonable doubt.

If the construction and effect, which, as we understand their position, opposing counsel advocate, be given to that Ordinance, the Act of February 3, 1863, and to Section 8 of Article VIII. of the first Constitution of West Virginia, the result will be one of palpable wrong and injustice to Virginia.

The whole Wheeling Ordinance will be found printed in full in the appendix to the opening brief of counsel for Virginia upon this motion.

Its provisions and the language in which they were formulated, were manifestly the work of intelligent and able lawyers.

It fully specifies the terms upon which Virginia authorized the formation of the new State,—terms which having been recognized as

being in the nature of things fundamental, upon the acceptance of them, and the formation of a new State under them with the sanction of Congress, they became contractual, and operated as a covenant binding both States.

As a necessary corrollary to this, there results this now self-evident truth, namely, that no additional or new term could be added to that Ordinance, without the consent of Virginia.

While it is true that the opening brief of counsel for Virginia, upon this motion, did not accept the basis prescribed by the Wheeling Ordinance as having been *irrevocably* fixed, as the one by which the settlement must be made, and intimated that in the event that it should turn out upon the application of that scheme of accounting to the facts of the case, that it would "lead to absolutely unconscionable results, and operate to impair the obligation of the contracts by which the common debt was created, contracts which were obligatory alike upon Virginia and West Virginia, or for any other valid reason, then the scheme of settlement indicated by the Wheeling Ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted."

In other words, if the basis prescribed by the Ordinance should, when applied, produce results which would shock the moral sense of mankind, and operate a fraud upon Virginia and the common creditors of both States, then it would be right for the court to adopt some other basis.

But the statement above quoted is immediately followed by this qualifying paragraph:

> "It is due to frankness to say, that, while the Wheeling Ordinance upon its face, prescribes an absolutely arbitrary basis of settlement, the representatives of Virginia are satisfied, that upon a fair, reasonable, and just construction of the language of that ordinance, and of the subsequent supplemental enactments, the scheme of settlement therein defined will, when applied to the facts as stated in the bill, and as it is believed they can be established by proofs, result in fixing the proportion of the debt of Virginia which West Virginia should assume and pay, inclusive of interest, at a very large sum, though not so large a sum as it would be equitable for West Virginia to pay."

Farther investigation and consideration convince the representatives of Virginia and her counsel that fairly construed and applied, as we believe they must be construed and applied by a court of equity, the Ordinance and the constating Acts which constitute as much

a part of the plan of settlement adopted by the two States, as does the Ordinance itself, will not lead to any such unconscionable results, as would appear to be inevitable, particularly if the Ordinance be taken by itself.

It may be that the framers of those instruments built fairer than they intended. It is pretty certain that they built fairer than they knew.

Clause III., pp. 6 to 8 of the opening brief upon this motion, succinctly and frankly states the position of the complainant in reference to the scheme of settlement which we seem to be shut up to. The following quotation from that clause (p. 7 of opening brief):

> "As was indicated by this court in its decision overruling the defendant's demurrer, the Wheeling Ordinance, and Section 8 of Article VIII of the first Constitution of West Virginia, must be taken and read together: So also these constating acts of February 3, and 4, 1863, and particularly of February 3, 1863, must be taken and read together with Section 9 of the Wheeling Ordinance, and with Section 8 of Article VIII of the first West Virginia Constitution, *as together prescribing the terms and conditions on which the consent of the Commonwealth was given to the formation of the new State out of her territory, and the transfer to that new State when formed of any portion of the assets and property of the parent State,*"

correctly expresses the views of complainant and her counsel upon this question, as the same are stated in the Bill, in the oral arguments and printed briefs of counsel for complainant upon the questions arising upon the demurrer, and as now stated in this brief, and as, in principle at least, sanctioned by the opinion of the court upon the questions raised by the demurrer.

Various questions are suggested by the brief of the distinguished counsel for West Virginia, in respect to the meaning and effect of that Ordinance, and the basis, and principles upon which the accounts between the two States should be stated, and the settlement between them made, which questions we agree should be now determined by the court, and directions given to its Master accordingly, so far as it is practicable to do so without working injustice.

These questions will be now considered:

I.

The first of them which we ask the court now to decide is: Whether West Virginia is not justly and legally chargeable with interest?

In this connection, we must remember that the contract which we are considering was a Virginia contract.

Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation,—and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.

In *Jones* vs. *Williams*, 2 Call, 106, decided in 1799, Edmund Pendleton, who was one of the great Judges of our country, delivering the opinion of the court said:

> "Interest is allowed because it is natural justice that he who has the use of another's money should pay interest for it."

Cited with approval in *Baker* vs. *Morris*, 10 Leigh, 284, *McVeigh* vs. *Howard*, 87 Va., 599, and *Stuart* vs. *Hurt*, 88 Va., 343.

In *Hatcher* vs. *Lewis*, 4 Randolph, 152, 157, the court laid down the rule in the following expressive language:

> *"The interest follows the principal as the shadow does the substance."*

In *Chapman* vs. *Shepherd*, the court said:

> "In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse."

Chapman vs. *Shepherd*, 24 Gratt., 377, 384.

Roberts vs. *Cocke*, 28 Gratt., 207.

Tidball vs. *Shenandoah National Bank*, 100 Va., 741.

> "Interest is favored both by the legislative and judicial bodies of the State."

Tazewell vs. *Saunders*, 13 Gratt., 354, 370.

In *McVeigh* vs. *Howard*, the Supreme Court of Appeals of Virginia said: (87 Va., 599.)

> "It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals." * * *

Citing *Jones* vs. *Williams* and *Hatcher* vs. *Lewis*, quoted above.

Such is the law of Virginia as to interest.

The law of West Virginia in regard thereto is the same.

In *Shipman* vs. *Bailey*, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

> "Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule, which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

Shipman vs. *Bailey*, 20 W. Va., 140, 146.

That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

In *Pickins* vs. *McCoy*, the court affirms *Shipman* vs. *Bailey*, and adopts the language just quoted from that decision. 24 West Va., 344-352.

Independently of these West Virginia decisions, such parts of the common law, and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of Article XI of the first West Virginia Constitution.

The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

As a part of this body of laws, the law of Virginia as to in-

terest became, and has continued to be, a part of the laws of West Virginia.

Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidenced by the public Acts of Virginia and West Virginia set forth in complainant's Bill.

The framers of the Wheeling Ordinance must be presumed to have drawn that instrument with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest court.

To Virginia lawyers of that day, as since that time, Judge Coalter's apt formula of the doctrine that, "the interest follows the principal as the shadow does the substance," was as familiar as any other accepted rule of equity or of law.

Under the law of Virginia in force at the time of these transactions, interest upon the portion of the debt which West Virginia was to take upon herself, was an essential incident of the debt, and its payment as much a part of the obligation as was the payment of the principal.

But, even if the *lex loci contractus* had not brought us to this conclusion, the language of the ordinance itself, fairly construed, leads to the same result.

That language is that:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," etc.

Now, that debt was an interest bearing debt. It was represented by obligations of the undivided State, some of them payable at a future day, some of them at a future day and thereafter at the pleasure of the Commonwealth, but all of them interest bearing obligations, obligations in which the payment of the stipulated interest was made as much a part of the debt as was the payment of the principal.

The interest was as much a part of the debt as was the principal, and as many of the bonds were payable thirty-four years after date, and some of them at the pleasure of Virginia with interest from date, the interest as to much of the debt constituted much the greater part of it.

It was the manifest intention of the enactors of that Ordinance, unless we are to ascribe to them the sinister purpose of perpetrating flagrant wrong and injustice upon Virginia, that the new State should take upon itself, and relieve what remained of the old State of a part of the burden of debt which rested upon both States. They knew that that burden consisted as well of interest, as principal, and as much, or more, of interest than of principal.

It was not proposed that the new State should, as soon as she became a State pay in cash a sum to be ascertained in the manner indicated in the Ordinance. The framers of the Ordinance understood too well that under the conditions then existing, it would be impossible for the new State to raise and pay any considerable sum in cash.

Why the new State was dependent upon the old State for the money necessary to enable her to begin business and she did not have and in the nature of things could not command a sufficient amount in cash to pay off one-fifth or even one-tenth of the then Virginia debt.

The stipulation was not that the new State should pay a sum in cash on account of its share of a common indebtedness; but that it should take upon itself a just proportion of that debt, to be ascertained as in the Ordinance prescribed.

Are we to understand that a court of conscience is to be asked to construe that stipulation to mean that the new State shall take upon itself only a proportion of a part of that debt? That it shall assume a share of the principal only of the debt, but shall be exonerated from any part of the interest which was, and is, as integral a part of the Virginia debt, and of the obligations which represent it, as the branches are a part of the tree from whose trunk they spring?

In their very elaborate reply brief upon this motion, opposing counsel devote very little attention to this important question, although it was plainly in their minds when they prepared their draft of decree, and although their attention was challenged to it by the opening brief for Virginia. There is some discussion of the question at pp. 35 to 37 of their brief, but that discussion ignores the facts and the principles upon which West Virginia's legal, "equitable," and "just" obligation to assume and pay the interest as well as the principal of her share of the debt, rests.

But West Virginia's equitable and legal liability to pay interest upon her share of the debt of Virginia does not depend alone upon the Wheeling Ordinance, or upon the law of Virginia and of West Virginia which makes the interest an essential part of the debt; but it rests also upon the express terms of the Constitution under which West Virginia became a State.

Now, by the Act of the Virginia Legislature at Wheeling, of May 13, 1862, the validity of which we no longer question, for reasons hereinbefore stated, Virginia gave her consent to the formation of the new State out of her territory, "under the provisions set forth in the Constitution for said State of West Virginia and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th day of November, 1861."

It is true that this consent was predicated upon West Virginia's being erected into a State under the provisions of that identical Constitution, without the performance of which condition that consent was abortive and ineffectual.

The fact is, that at the behest of Congress, that Constitution was subsequently amended in a material particular, which change, unless objection thereto had been waived, or the change assented to by the Legislature of Virginia, would have rendered the previous conditional consent null and void.

But since the opening brief upon this motion was filed the counsel for Virginia who writes this brief has discovered the following joint resolution, which it seems was adopted by the Legislature of Virginia at Wheeling, on the 9th of December, 1862:

> "No. 2. Joint Resolution requesting the House of Representatives of the United States to take up and pass without amendment, the bill for the admission of the State of West Virginia, passed by the United States Senate on the 10th of July last.
>
> Passed December 9, 1862.
>
> *Resolved*, That feeling the greatest anxiety and interest in the successful issue of the movement for a new State in West Virginia, we earnestly request the House of Representatives of the United States to take up and pass, without alteration or amendments, the bill which passed the Senate of the United States on the 10th of July last."

See "Constitution and Statutes Va. and West Va., 1861-66."

This resolution was telegraphed to Washington on the evening of the day on which it was passed. History of West Virginia by Lewis, p. 389.

The Senate Bill referred to in the resolution was taken up in the House of Representatives, and passed on the 10th of December, and was approved by President Lincoln and became a law on the 31st of December, 1862, in the very form in which the Legislature of Virginia had by its Joint Resolution of the 9th of December, 1862, requested and urged that it should be passed.

This Act of Congress to which the Legislature of Virginia had thus given its assent, made it a condition of the admission of the new State into the Union, that its proposed Constitution should be amended in the particular in which it was afterwards amended by the Convention and people of West Virginia, in regard to the emancipation of slaves.

The effect of said Joint Resolution, was, under these circumstances, to waive any objection by the Legislature of Virginia to the amendment made to the Constitution of West Virginia at the instance of Congress, and to make the consent given by the Act of May 13, 1862, effective, notwithstanding that amendment.

What, then, was the effect of the admission of West Virginia to the Union under the consent thus given, and the Constitution upon which that consent was predicated?

It will not be denied that the condition upon which the consent of the Legislature of Virginia was given to the formation of West Virginia and her admission into the Union as a State, was, that she should become a State under the provisions of the Constitution under which her statehood was sanctioned by Congress.

Among the most important of those provisions, so far as Virginia was concerned, were those expressed in Article VIII of that Constitution in reference to the public debt.

Section 8 of that Article reads as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

We have a right to assert that, unless West Virginia had been

required to assume and pay an equitable proportion of the Virginia debt in manner and form as was expressly prescribed in this Section, the consent of the Legislature of Virginia would never have been given to the creation of the new State.

These were, therefore, fundamental conditions of West Virginia's existence.

By accepting these conditions, the new State became bound in equity and in law to performe them in good faith.

Upon grounds which have been already indicated, as sufficient and controlling we are constrained to concede that Section 8 of Article VIII of the first West Virginia Constitution, and Section 9 of the Wheeling Ordinance being *in pari materia*, must be read together, and that the proportion of the debt which the new State was required by this provision of her Constitution to assume, was to be ascertained in the manner prescribed by the Ordinance.

But the Constitution goes farther, and expressly provides as to the equitable proportion of the debt which West Virginia should assume, that her Legislature should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This was precisely in accordance with the plan which had long theretofore been adopted by the Commonwealth for the payment of her debt.

This plan was embodied not only in the statutes, but also in the Constitution of Virginia in force when West Virginia, became a State.

It was embodied in that Constitution in the following terms:

> "29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. Whenever, after the said first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon

at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion." . .

Section 29 of the Constitution of Virginia, in force from January 1, 1852, Code of Virginia for 1860, p. 47.

It was expressed in a concrete form and given further effect by the second Section of the following Act passed by the General Assembly of Virginia:

"Chap. 17.—An Act establishing a sinking fund and providing for the payment of the semi-annual interest on and redemption of the public debt.
Passed March 26, 1853.

* * * * * * * * * * * * *

"2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the Commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner hereinbefore directed."

* * * * * * * * * * * * *

Acts of General Assembly of Virginia, Session of 1852-3, p. 29.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the Commonwealth, and which experience had approved.

That scheme was, the creation from the annual revenues of the State, of a fund equivalent to seven per centum of the principal of the debt. Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the principal sum due, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and if the calculation is made it will be shown to be true, that one *per centum* of any sum invested and compounded at six *per centum* interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was a plan with which Messrs. Willey, Van Winkle, Hall, Brown, Haymond, and other members of the first West Virginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar: And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a State rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new State should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *assume* "an equitable proportion of the public debt of the Commonwealth" existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument, the plan which for nine years or more had been a part of the organic and statutory law of Virginia for the extinguishment of her public debt, and the Legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the part of the Commonwealth to pay the accruing interest, and to liquidate or re-redeem the principal of each bond representing the debt, within thirty-four years.

(This statement is subject to this qualification, that as to a considerable portion of the debt, particularly that contracted prior to 1852, like English consols, the principal was redeemable at the pleasure of Virginia).

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that lan-

guage, is conclusively shown when we read it in the light of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt which plan was adopted by the new State as to its share of that debt.

And so, we find that both by the express terms of the Wheeling Ordinance fairly construed, and by the express terms of the Constitution under which Virginia and the National Congress consented that West Virginia should become a State, this new State has become expressly obligated to pay interest upon the share of the principal of the common public debt for which she is liable. U. S. *vs.* N. Carolina, 136 U. S., 211.

Another question which arises in connection with the consideration of this subject, is, from what time is West Virginia justly and equitably bound to pay that interest?

Answer to this is furnished by the Wheeling Ordinance and by the Section of the first West Virginia Constitution above quoted.

The settlement by the terms of both instruments was to be made as of the arbitrary date of January 1, 1861, or to be precisely accurate, as of December 31, 1860. That, accordingly, is the date from which fairly, equitably, and legally, (because it accords with the express terms of both the Ordinance and the Constitution) the interest should be computed.

As already shown, the debt, a proportion of which as of that date, West Virginia was to assume and pay, was an interest bearing debt, and the interest was as integral a part of it as was the principal.

A farther kindred inquiry to the last is: To what time should West Virginia be required to pay such interest?

Our response to this is, that she is justly, equitably, and legally bound to pay this interest,

(1) By the terms of the Wheeling Ordinance, certainly, for the period during which the debt of the Commonwealth existing on the 31st of December, 1860, would continue to be an interest bearing debt: And we have seen that that was not only until the obligations representing the debt became due, but under the just rule of the law of Virginia as to interest, in force during the whole period of the creation of the debt, until that principal should be fully paid.

(2) By the terms of the Section of her Constitution above

quoted, West Virginia undertook that her Legislature should assume and pay the accruing interest and the principal of her share of that debt in thirty-four years.

Her Legislature has failed either to assume, or to pay that share, or any part of it.

The interest accruing thereon from December 31, 1860, has continued to accrue, as to her, until it now amounts to vastly more than the principal. It was that interest which West Virginia agreed to pay, and it was that principal for the payment of which West Virginia's Legislature was to make provision, so that the same should be paid within thirty-four years.

We are unwilling to anticipate that the learned and fair-minded counsel for the defendant will argue that West Virginia, by the language of that provision of her Constitution, is only bound to pay interest for thirty-four years from December 31, 1860, or from June 20, 1863, because we are unwilling to assume that our distinguished opponents would contend that a State, any more than an individual, should be allowed to take advantage of her own wrong, or profit by her own procrastination, and neglect of duty.

Here, West Virginia has not only not taken upon herself a just, or any other proportion of the common public debt, nor provided for the payment of the accruing interest thereon, and for the payment of the principal, but she has persistently failed and refused to do either of these things, and has by the votes of her Legislature, repeatedly repudiated any and all liability whatever for any part of that indebtedness.

(See Resolutions of Legislature of West Virginia in Appendix).

With all deference for the distinguished counsel for the defendant, we venture to believe that a court of equity will not allow any defendant, and particularly a State, which should be an exemplar of fair and honorable dealing in all of its transactions, to make gain out of its own palpable dereliction of duty.

And so, our response to such contention, if it shall be urged it, that equity will not suffer any party to take advantage of his own wrong.

Here, fortunately for West Virginia, it will, by reason of her increased wealth and prosperity, be far easier for her to pay the principal and the accumulated interest now, than it would have been to have paid the interest annually as it accrued, and the principal thirty-four years from 1861, or 1863. West Virginia

could pay thirty million of dollars now, with as little inconvenience as she could have paid three or four millions thirty-five or forty years ago.

If there ever was a case to which the benign doctrine of Virginia law, that "interest follows the principal as the shadow does the substance," should be applied, we seem to have such a case here.

Nor is there any extravagance in the language of our opening brief upon this motion, when we say that,

> "any settlement which does not require that State to pay interest during the long period of her default and refusal to pay anything, would be not only unjust and inequitable, but iniquitous."

II.

The Wheeling Ordinance provides: that in ascertaining the just proportion of the debt which the new State shall take upon itself, it shall be charged with:

> "all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included in said new State during said period."

There cannot well be any question as to what will be included in the first item of the debit charge against the new State under this language.

It includes all expenditures of whatever kind made by Virginia in any part of the territory embraced in the new State, since any part of the debt was contracted. There will be no controversy as to the earliest date when any part of the debt existing on the 31st of December, 1860, was contracted.

Part of the debt, then unpaid, was created as far back as 1820. So, the period covered by the account will be from, say, January 1, 1820.

There is likely to be some question as to what shall be regarded as under the circumstances, a just proportion of the ordinary expenses to be charged to West Virginia.

As to the criterion on which the apportionment of the expenses of government should be made, if this is to be the population, we respectfully submit that in this case it should be the free population—the citizenship—and not the total of the free and the

slave population. The care and policing of the slaves cost the State little or nothing. Those matters were regulated by their masters on the plantations. Of course, none of them could vote; but upon the "mixed basis" of representation which was partially adopted in Virginia, they counted to some extent in fixing the basis of representation in the General Assembly: that is, five negroes counted as much as three white men, where the mixed basis prevailed.

The debt was contracted solely by the votes of the white population or their representatives. It was expended by them or under laws of their enactment. The taxes were levied exclusively upon the property of the free population; and the revenues were appropriated and expended as they directed, and exclusively for their benefit.

The negroes owed no part of the debt, did not constitute a part of the citizenship of the State during any part of the period when the debt was contracted, or the money realized from it was expended; nor were they any part of the body politic.

Under these circumstances we would submit as a just criterion for such apportionment the white population of the territory embraced in West Virginia, and of the territory still remaining to the Commonwealth, at the times when the expenditures to be apportioned were made.

However, there is not probably, as yet, enough in the record to enable the court to decide this question intelligently; or satisfactorily.

III.

Another and quite an important question which can probably be fairly considered and decided, upon what is now in the record, and which should be decided now, if a just conclusion about it can be reached at this time; is, whether West Virginia shall be charged, in the settlement to be made, with the property or assets which she has received from the Commonwealth?

The Act of the Virginia Legislature at Wheeling, of February 3, 1863, which is printed in the appendix to the opening brief for Virginia on this motion, expressly provides that "the new State shall duly account for the same in the settlement hereafter to be made with this State." See Section 5 of the Act of February 3, 1863.

Counsel for West Virginia deny that these important items shall

be brought into the account; and in order to have any ground on which to base their objection, they contend that the Acts of February 3 and 4, 1863, were not binding upon West Virginia; that her rights were determined by the Wheeling Ordinance, and by the provisions of her first Constitution, and by the Act of May 13, 1862, of the Virginia Legislature at Wheeling, and the Act of Congress approved December 31, 1862, giving the consent of the Congress to the formation of the new State and her admission to the Union; that these Acts were all effective, and the rights of the new State definitely determined by them before the Acts of February, 1863, were passed; and that those Acts of the Virginia Legislature of February 3 and 4, 1863, were not binding upon West Virginia, and imposed no obligation upon her, because she had already, by reason of the consent given by Virginia to her statehood, been absolutely vested with the very rights which the Act of February 3rd, undertook to confer upon her upon conditions.

The answer to this argument, vigorously and ably as it is presented, is complete.

The position of the counsel for the defendant upon this point would find support in the doctrine laid down by Mr. Hall, *if there had been no agreement between Virginia and West Virginia as to the terms upon which the partition of the old State should be made, and the debt thereafter apportioned between the two States;* but neither Mr. Hall, nor any other authority will be found to sanction the proposition, that, where a new State has been erected out of the territory of the old State by treaty or by a convention between the mother State and the new State any such doctrine applies.

The rule in that case logically, and necessarily is, and must be, that where the two States have undertaken to define and prescribe the terms upon which the new State shall be created, the rights and obligations of the two States will thereafter be determined absolutely by the stipulations and provisions of such treaty or convention.

The elementary rule of universal application, that a party will not be allowed to add to, or take from, the terms of a valid written instrument applies with intensified force to a compact between two sovereign States.

The Wheeling Ordinance, which taken together with the first Constitution of the State of West Virginia; the Act of the Vir-

ginia Legislature at Wheeling, of May 13, 1862, giving the consent of the Legislature of Virginia to the formation of the new State under the provisions of that Constitution, and the Act of Congress approved December 31, 1862, giving the consent of Congress to the creation of the new State and to her admission into the Union, constitute a compact; and to this compact no new term can be added, and no term prescribed therein can be taken away.

Now, the Wheeling Ordinance, and the article of the Constitution of West Virginia referred to, are absolutely silent upon the subject of the property and assets of the Commonwealth of Virginia. While the Wheeling Ordinance, with the greatest particularity, undertakes to prescribe and define minutely the terms upon which the new State shall be created, its boundaries, and the rights of property of individuals residing therein, it makes no provision whatever in respect to property held by Virginia in her corporate capacity, whether it be personal or real. As a necessary effect of the terms of that Ordinance, the title and ownership to that property remained, after its enactment, and after the formation of the new State of West Virginia, just where they were vested before the Ordinance was enacted; and that is, in the Commonwealth of Virginia.

As already indicated no new term can be incorporated in, or added to, that Ordinance, without the consent of Virginia; and yet, the learned counsel for the defendant would have the court, by a forced construction to interpolate a new term into this Ordinance which was, as we have a right to assume, intentionally excluded from it by the parties who framed it.

If there is any contract or covenant to which the doctrine of *expressio unius est exclusio alterius* ought to apply, it is to a compact like this between States, affecting the rights of the people of those States for all coming time.

The men who framed the Wheeling Ordinance and the Constitution of West Virginia among whom were evidently lawyers of a high order of ability, intelligence, and learning, must have fully realized the meaning and effect of the Wheeling Ordinance, and must have known that it did not transfer to the new State any title or ownership in respect to any of the property and assets which Virginia owned in her corporate capacity; for we find that they, or some of them, were instrumental in the enactment of the Act of February 3, 1863, which undertook to cure this omission,

which was doubtless an intentional omission, and to vest in the new State the property and assets of Virginia, the situs of which was within the limits of the new State, upon the just and equitable terms that the new State should account for the value of all such property, in the settlement to be made between the two States.

The only settlement to be made between the two States, was the settlement in regard to the public debt; and the purpose of the Act of February 3, 1863, was to provide that the new State should account in that settlement for the value of the assets and property which she should acquire from Virginia under that Act.

The Legislature of Virginia at Wheeling had the right to exercise supreme dominion over the territory and people of West Virginia at the time that the Act of February 3, 1863, was passed; subject only to the limitations of the Constitutions of Virginia, and of the United States; so that the Act of February 3, 1863, was clearly within the competency of the Legislature of Virginia to enact; nor can we be blind to the fact that the portion of the territory of Virginia which was represented by Senators and Delegates in the Legislature at Wheeling, was practically coincident with the territory of the proposed new State of West Virginia; so that it was in fact the representatives of the people who were about to form themselves into the State of West Virginia, who enacted the Act of February 3, 1863.

Upon these grounds, we can fairly claim that the Act of February 3, 1863, was a valid law, and binding upon the people who afterwards constituted the State of West Virginia.

But that Act has still farther sanctions which make it absolutely binding upon the people of West Virginia.

The 8th Section of Article XI of the first Constitution of West Virginia is as follows:

> "8. Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation; and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature." * * *
>
> Article XI, Section 8, 1st West Virginia Constitution; effective June 20, 1863.

We respectfully insist that the effect of this provision of the Constitution was to sanction and continue in force the Acts of February 3 and 4, 1863, both of which were in force within the

boundaries of the State of West Virginia at the time that that Constitution went into operation.

But this Act of February 3, 1863, has received still farther and express sanction and acceptance by a positive enactment of the Legislature of West Virginia. Section 8 of the Act of the Legislature of West Virginia, approved December 20, 1875, Acts of the Legislature of West Virginia, Session of 1875, p. 126, is as follows:

> "8. The Auditor shall institute all the necessary and appropriate measures for the collection of all claims for taxes and other demands transferred by the Commonwealth of Virginia to this State by an act of the General Assembly of said Commonwealth entitled 'an act transferring to the proposed State of West Virginia, when the same shall become one of the United States, all the State's interest in property; unpaid and uncollected taxes, fines, forfeitures, penalties and judgments in counties embraced within the boundaries of the proposed State aforesaid;' passed on the third day of February, 1863."

And therefore, we respectfully, but earnestly, claim that West Virginia is equitably, legally, and justly, bound to account for all property and assets, whether real or personal, which she has received from the Commonwealth of Virginia; in the settlement which it is the object of this suit to bring about.

There is, we think, enough in the record to show that no equitable settlement can be made between the two States upon the basis of the Wheeling Ordinance and the constating Acts referred to, unless there shall be brought into the account with West Virginia a fair charge against her for such assets, money, or property as she has received under the Acts of February 3 and 4, 1863, and upon the fullest examination and consideration which we have been able to give to the subject, we are satisfied that even then the amount with which West Virginia will be chargeable on account of the public debt of the undivided State, will be far less than she ought to have assumed and paid if we have reference to all of these facts, and all of the equities of the case.

It is proper to state here that in so far as any property or money which West Virginia acquired from Virginia, either under the Acts of February 3 and 4, 1863, or otherwise, was property which was acquired by Virginia by the expenditure of money within the limits of the State of West Virginia, or money paid by Virgini, after 1819, the new State will, of course, be charge-

able with the amount so expended or paid by the Commonwealth, under the Wheeling Ordinance, and not under the Act of February 3, 1863, in the settlement to be made between the two States, for the Wheeling Ordinance provides that the new State shall be charged with all expenditures made within its limits by the Commonwealth of Virginia, since any part of the debt was contracted.

Counsel for Virginia will file a modified draft of decree in conformity with the views presented in this brief; which we will respectfully ask the court to consider, and to enter, if they shall approve of the same.

Respectfully submitted,

WILLIAM A. ANDERSON,
Attorney General and as such Counsel for Virginia.

APPENDIX No. 1.

To Reply Brief for Complainant on motion for order of reference in *Virginia* v. *West Virginia*.

The doctrine of the apportionment of the public debt of a State, which is divided into two or more States.

Grotius states the principle as follows:

> "On the other hand it may happen that what has been one State, is divided, either by mutual consent or by hostile force, as the body of the Persian Empire was divided among the successors of Alexander. When this transpires, several sovereignties exist instead of one, each with its own rights; *but if anything had been in common; that ought either to be administered in common, or divided in portions pro rato.*"
>
> Grotius' Book II; Chapter 9; Section 8.

And Puffendorf says:

> "Where a kingdom divides by common consent into two or more distinct Commonwealths, the public patrimony with all the debts and incumberances upon them, ought to be equally shared among them. Tho' indeed when such separations are made by mutual agreement, there is commonly express provision made for such cases."
>
> Puffendorf's Law of Nature & Nations, Book VIII., Chapter 12; Section 5.

Chancellor Kent thus concisely states the doctrine:

> "If a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to

be enjoyed; and those obligations fulfilled, by all the parts in common."

1 Kent's Comm. pp. 25-26.

Phillimore thus clearly states the rule:

"If a nation be divided into various distinct societies, the obligations which had accrued to the whole before division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts."

1 Phillimore International Law, Part II, Chapter 137, M. p. 158.

Pomeroy expresses the rule in the identical language of Mr. Phillimore.

Pomeroy's International Law, Section 74.

Mr. Dana expresses himself as to one phase of the doctrine as follows:

"In the separations and re-arrangements of nations in Europe, special provisions are usually made for the payment of public debts; and the principle seems admitted; that, in case of a division of a State, each new State is bound for the whole debt contracted by the former; and; in the case of a union of states; it seems equally clear that, as the whole must defend the part in war which is the international process of attachment it must practically pay the debt, although the foreign power may look only to the people and land of the State which made the contract. The formation of the new State so alters the nature of all the securities the creditor looked to; that the new State has a general obligation to see that he does not suffer by the change.

See Article 13 of treaty of 1839 for the separation of Belgium; and the treaty of Zurich, ceding Lombardy to Sardinia."

Wheaton's Int. L.—Edited, with notes, by Richard Henry Dana, Section 30, Note 18.

Mr. Halleck, after stating the effect of the dismemberment of a State by the loss of a portion of its territory by foreign conquest, or by the revolt and separation of a province, says:

"§27. The case is slightly different where one state is divided into two or more distinct and independent sovereignties. In that case, the obligations which had accrued to the whole, before the division are, (unless they have been the subject of a special agreement), ratably binding upon the different parts. This principle is established by the concurrent opinions of text-writers; the decisions of courts, and the practice of nations. It was incorporated into the treaty by which the modern kingdom of Belgium was established."

Halleck's International Law & Laws of War; Section 27.

Mr. John Bassett Moore thus states the doctrine:

> "In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for as Story says, 'the division of an Empire creates no forfeiture of previous vested rights of property.'"
> 1 Moore's Digest Int. L. p. 334, citing
> Abdy's Kent, p. 96, and
> Lawrence's Wheaton, 52 (m) 20.

A number of precedents are cited by Mr. Moore in Vol. I, Section 97, pp. 339-365, of his Digest of International Law, giving the terms upon which public debts of States have been divided and apportioned, by conventions, or treaties, between the States affected, in cases where there has been a division of territory by war, conquest; or treaty.

No sanction for the rule prescribed in the Wheeling Ordinance will be found in any of the adjustments of public debts, there recorded by the learned author.

Judge Story declared the following fundamental truth:

> "It has been asserted as a principle of the common law, that the division of an empire creates no forfeiture of previously vested rights of property.
> And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice."
> Mr. Justice Story in *Terrett and others* v. *Taylor and others*, 9 Cranch, 43, 50, citing *Kelly* v. *Harrison*, 2 Johnson, c. 29, *Jackson* v. *Lunn*, 3 Johnson, c. 109.

In *Hartman* v. *Greenhow*, 102 U. S. 672-677, Mr. Justice Field states the rule of international law in the following language:

> "Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject Kent says: 'If a State should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligation fulfilled by all the parts in common.' 1 Com., 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties says: 'In that case the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers; the decisions of courts, and the practice of nations.'" Interna. L., ch. 3, section 22.

And this language was again approved by Mr. Justice Field in his dissenting opinion in *Antoni* v. *Greenhow*, (in which opinion Mr. Justice Harlan concurred), 107 U. S. 769-7, where the following language is used:

> "It is a well settled doctrine of public law, that, upon a division of a State into two or more States, her debts shall be ratably apportioned among them. See authorities upon this subject in *Hartman* v. *Greenhow*, 102 U. S., 677."

The only dissent from the principles thus enunciated by this long line of authorities by any author whose opinions would carry any weight upon such a subject which we have been able to discover is to be found in the dogma of Mr. Hall; in his work on International Law, where that learned author says:

> "§27. When a new State splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question therefore presents itself with respect to the general rights and duties of a new State. What, however, is its relation to the contract obligations of the State from which it has been separated; to property belonging to and privileges enjoyed by the later, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new State?
>
> The fact of the personality of a state is the key to the answer. With rights which have been acquired, and obligations which have been contracted, by the old State as personal rights and obligations the new State has nothing to do. The old State is not extinct, it is still there to fulfill its contract duties, and to enjoy its contract rights. The new State, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other States have contracted, they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made; and it would be unjust to saddle it with liabilities which it would not have accepted on its own account. What is true as between the new State and foreign powers, is true also as between it and the old State. From the moment of independence all trace of the joint life is gone. Apart from special agreement no survival of it is possible, and the two States are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person,

which it has not expressly lost, so that property, and advantages secured to it by treaty, which are enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continue to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcation of boundary, obligations contracted with reference to it alone, and property which is within it, and which has therefore a local character, or which, though not within it, belongs to State institutions localized there, transfer themselves to the new State person. Conversely, of course, the old State person remains in sole enjoyment of its separate territory, and of all local rights connected with it.

* * * * * * *

Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the State, and the like. When a portion of the lands belonging to a commune or to an endowment lies without the boundary of the new State it is only considered that a right to the value of the property is transferred. Convenience may dictate expropriation from the property itself; and it is only then necessary to pay its full value by way of compensation."

Hall's International Law, Sec. 27.

The fallacy of the positions taken by this learned author will be manifest when we reflect, that, if the Wheeling Conventions and Legislatures had chosen to annex, and had annexed fifty or sixty other counties to the new State, so that it would have embraced more than two thirds of the population and territory and actual and potential wealth, public properties, assets and resources of the undivided Commonwealth, the new State would have taken a good title to all of those assets, properties, and resources, free and discharged from any liability whatever for any part of the antecedent public debt of the Commonwealth, if the ordinances and other public acts of the Wheeling Conventions and Legislatures had omitted to impose any obligation upon the new State to assume and pay any part of that public debt.

Such a result would shock the moral sense of mankind; and yet, it would be no more unjust and inequitable than that which would confront us here, if the views of this eminent author are correct, had the Wheeling Conventions and Legislatures failed to prescribe any stipulations, provisions, or conditions as to the apportionment of the antecedent common public debt between the two States.

APPENDIX No. 2.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

Extracts from message of Joseph Johnson, of Harrison, Governor, of Virginia, to the General Assembly of Virginia, January 12, 1852. See Journal, House of Delegates, 1852, pp. 18-19.

"The subject of internal improvement, which for many years has engaged the anxious attention of our people, is rapidly increasing in interest and importance, and will require your most serious and careful consideration. Whether we look to the vast amount of capital already invested by the State in the enterprise, or the appropriations yet required to carry out successfully the schemes already begun, and thereby make them available for revenue and State purposes—or consider the magnitude of the objects sought to be obtained, and the importance of the results anticipated from their completion in the aid they will give in developing the mineral and agricultural resources and the manufacturing and commercial advantages of our State—all will see and be forced to acknowledge the importance of the subject, and the great and growing necessity for energetic and yet judicious action on your part in relation to it. Indeed the works of internal improvement already commenced and in course of construction, and upon which large sums of both public and private means have been expended, are so intimately connected with all the leading interests of the Commonwealth, that every year's delay in their completion will necessarily postpone, at a common loss to the whole people, great and incalculable blessings, and for an equal period of time defer to the State treasury that repletion which the heavy appropriations heretofore made for internal improvement purposes so earnestly demand, and which their final completion cannot fail to effect. Many of our sister States, with less capacity for such enterprises, and possessing natural resources and advantage far inferior to our own, have, under circumstances of great embarrassment, executed works of internal improvement which would do honor to the enterprise of independent nations. Nor have they been disappointed in the individual or State benefit which their works were expected to impart. The citizens of those States feel the superiority of this improved condition of their country, and duly appreciate the increased comforts derived from it.

"If our generous and noble old Commonwealth has been tardy in the execution of those improvements most clearly indicated by the geological structure of the country, and in a proper development of her great physical resources, it is gratifying to consider, that profiting by the example of others,

she may gain much of the loss in time, by wise, prompt and energetic measures hereafter."

Then, after recommending the completion of the James River & Kanawha Canal to Clifton Forge, Governor Johnson says:

"From this point I most earnestly recommend the construction of a railroad, on State account, to some point on the Ohio river deemed most eligible upon a full reconnoissance of the several routes heretofore contemplated, having in view the valuable trade of that river and ultimately a railroad connection with the cities of Cincinnati and Louisville. In connection with this line, I recommend that every proper aid should be given for the speedy completion of the central railroad from Richmond to the point proposed at the present terminus of the canal, and that from Alexandria to Gordonsville. The railroad from the canal to Loup creek shoals would not exceed 150 miles, (to which point steamboats are now accessible), and from which to Guyandotte, should that point be selected as the terminus, it would be about 82 miles, making 232 miles of railroad. The water line by the Kanawha would be about 80, and strike the Ohio 40 miles above Guyandotte—thus giving the section of road between Loup creek shoals and Clifton Forge the double importance of being connected at both ends with water and railroad lines. The best energy of the State should therefore be turned to the speedy completion of this division of the work. There is little doubt that the Alexandria and Orange railroad and the Blue Ridge tunnel may be completed, and the Central railroad and the canal be carried to Clifton Forge by the time the railroad from the latter place to the Ohio river can be finished."

Journal House of Delegates, 1852, p. 21.

APPENDIX NO. 3.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

House Joint Resolution No. 10, Concerning the Virginia Debt.
(Adopted February 7th, 1895.)

Resolved by the Legislature of West Virginia:

That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution.

HOUSE JOINT RESOLUTION NO. 3.

(Adopted January 21, 1897.)

A resolution relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that West Virginia does not owe one cent of the so called "Virginia debt," and that this Legislature is opposed to any negotiations on that subject.

(H. J. R. No. 6.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1899.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this Legislature declines and refuses to take any action in regard to what is known as the Virginia debt, or Virginia deferred certificates, either by considering any propositions of adjustment or settlement, so called, or by authorizing the appointment of any committee or committees having for their purpose the consideration of the same; and that it is the sense of this Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt or certificates.

(S. J. R. No. 2.)

JOINT RESOLUTION NO. 21.

(Adopted January 16, 1901.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That this Legislature declines and refuses to take any action in regard to what is known as the Virginia Debt, or Virginia Deferred Certificates, either by considering any proposition of adjustment for settlement so called, or by authorizing the appointment of any committee, or committees, having for their purpose the consideration of the same.

And, That it is the sense of the Legislature that the State of West Virginia is in no way obligated for the payment of any portion of the said debt, or certificates.

(H. J. R. No. 3.)

JOINT RESOLUTION NO. 3.

(Adopted January 21, 1903.)

Relating to the Virginia debt question.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on that subject. And, *further*, that this Legislature declines, and most emphatically refuses, to take any action in regard to what is known as the Old Virginia debt, or Virginia deferred certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee or committees having for their object or purpose the consideration of same; and that it is the sense of this Legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt or certificates. Nor do we owe any other State or Territory in this Union.

(H. J. R. No. 7.)

JOINT RESOLUTION NO. 3.

(Adopted January 20, 1905.)

Relating to the Virginia debt.

Resolved by the Legislature of West Virginia:

That it is the sense of this Legislature that the State of West Virginia does not owe any part of the socalled Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on that subject.

APPENDIX NO. 4.

TO REPLY BRIEF FOR COMPLAINANT ON MOTION FOR ORDER OF REFERENCE IN VIRGINIA V. WEST VIRGINIA.

"Chap. 78.—An Act giving consent to the admission of certain counties into the new State of West Virginia, upon certain conditions. Passed February 4, 1863.

"1. Be it enacted by the General Assembly of Virginia, That at the general election on the fourth Thursday of May,

one thousand, eight hundred and sixty-three, it shall be lawful for the voters of the district composed of the counties of Tazewell, Bland, Giles and Craig, to declare by their votes whether said counties shall be annexed to and become a part of the new State of West Virginia; also, at the same time, the district composed of the counties of Buckhanan, Wise, Russell, Scott and Lee, to declare by their votes whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Alleghany, Bath and Highland, to declare by their votes, whether the counties of such last named districts shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Frederick and Jefferson, or either of them, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Clarke, Loudoun, Fairfax, Alexandria and Prince William, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the counties of Shenandoah, Warren, Page and Rockingham, to declare by their votes, whether the counties of the said last named district shall be annexed to and become a part of the State of West Virginia; and for that purpose there shall be a poll opened at each place of voting in each of said districts, headed 'For Annexation,' and 'Against Annexation.' And the consent of this general assembly is hereby given for the annexation to the said State of West Virginia of such of said districts or either of them, as a majority of the votes so polled in each district may determine: provided, that the Legislature of the State of West Virginia shall also consent and agree to the said annexation, after which all jurisdiction of the State of Virginia over the districts so annexed shall cease.

2. It shall be the duty of the governor of the Commonwealth to ascertain and certify the result as other elections are certified.

3. In the event the state of the country will not permit, or from any cause, said election for annexation cannot be fairly held on the day aforesaid, it shall be the duty of the governor of this Commonwealth, as soon as such election can be safely and fairly held and a full and free expression of the opinion of the people had thereon, to issue his proclamation ordering such election for the purpose aforesaid, and certify the result as aforesaid.

4. This act shall be in force from its passage."

Act of the General Assembly of Virginia, approved February 4, 1863. Acts of 1863, pp. 65-66.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief in Reply to Defendant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Original, No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

BRIEF IN REPLY TO DEFENDANT.

On behalf of the complainant, an order is asked for referring this cause to a master to ascertain and report—

> "what amount and proportion of said indebtedness and of the interest accrued thereon should in equity be apportioned to, and be now paid by, the State of West Virginia."

The order further provides that the master shall—

> "make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state, or which he may deem desirable to present to the court."

The object of this latter provision is to have stated and presented to the court the several methods or plans which, in the view of the respective parties, properly expresses and illustrates the correct method of ascertaining the "just proportion" of the

public debt of the Commonwealth of Virginia which each party should bear.

The court, having before it the accounts, stated in accordance with the views of each side, may be better enabled to judge of their respective merits and elect between them, and so avoid the delay which would be occasioned by a recommitment of the report.

On behalf of the State of West Virginia it is proposed, in section 2 of the draft of the decree presented by counsel, that the master shall state in his report—

(*a*) The amount of State expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia, at Wheeling, August 20, 1861.

(*b*) The aggregate ordinary expenses of the State government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of the said indebtedness was contracted.

(*c*) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period.

Among the "ordinances and acts of the restored government of Virginia, prior to the formation of the State of West Virginia," passed in the convention which assembled at Wheeling on the 11th of June, 1861, there was one ordinance, passed August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," the ninth section of which ordinance was as follows, *viz:*

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period," etc.

It will be seen at once that the provision of the proposed decree is a wide departure from the Wheeling ordinance, in that it does not even propose to ascertain by the method indicated West

Virginia's "just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861." It was doubtless too apparent to the framers of the decree that the method proposed by the Wheeling ordinance had in fact, as we will show, no sort of connection with such public debt, and the account, stated as there suggested, might well have been taken, had no public debt of Virginia ever existed.

From the plan proposed by the Wheeling ordinance, as from that proposed in the decree offered by the defendant, there is altogether excluded any account of or reference to the public debt of the Commonwealth of Virginia, evidenced by bonds and other evidences of indebtedness outstanding on the first of January, 1861. The only settlement which this method could effect would be a mere accounting between two sections of Virginia, *inter sese*, of the amounts which had been paid into the treasury of Virginia from each section and the amounts which had by the appropriations of their common legislature been expended in each section during the period between 1822 and 1861.

If it should appear from such an accounting that the counties lying west of the mountains, and now constituting West Virginia, had during such period paid into the treasury of Virginia more money than had been expended by the State legislature within said counties, what possible connection could the result reached by that account have upon the outstanding public debt of Virginia? Is there any provision or principle of law under which one county, or any number of counties, in a State can claim that the amounts paid to the State in the way of legal taxes shall not exceed the amounts which such counties receive from the State in the way of legislative appropriations? Can such counties claim that they should not be required to contribute their share of the public taxes toward the payment of the State indebtedness because, forsooth, they have through a period of sixty years paid into the State treasury more money than they have received from it? Coming to the case in hand, we have the request made to this court, in the decree offered by defendant, that the master, who may be directed to ascertain and report to the court what proportion and amount of the public debt of Virginia should justly and equitably be now borne by West Virginia, shall ascertain such amount and proportion by taking the aggregate amount of the taxes and ordinary State expenses collected from the counties constituting West Virginia and the

amounts paid into said counties by legislative appropriation since 1822 and, deducting the smaller amount from the greater, report the balance so found to the court as West Virginia's just proportion of the public debt as of January, 1861.

The court has overruled the demurrer to the bill, and in doing so has stated in effect that the case stated in the bill entitles the complainant to the relief prayed, if such case is established by the proof. Is the case stated in the bill satisfied by the Wheeling ordinance?

The defendant was fully warranted in reiterating again and again in her answer that Virginia has always repudiated the Wheeling ordinance as binding on her, or as affording to any extent a satisfaction of Virginia's reasonable demand that West Virginia should contribute her just and reasonable share of that common indebtedness.

The Wheelingg ordinance is impracticable, illusory, and altogether inadequate.

In suggesting here considerations which warrant us in insisting that the Commonwealth of Virginia cannot lawfully be bound by the ordinances of the Wheeling convention, which provided for the repudiation by the people of West Virginia of their liability to contribute toward the payment of the public debt of Virginia, we must not be understood as criticising in any manner the constitutional status of the State of West Virginia. It is as firmly entrenched and established as any State in the Union. What we do deny and repudiate is the claim asserted, that in matters relating to the pecuniary obligations—legal or equitable—of that State, the acts or ordinances of that convention which assembled in Wheeling in June, 1861, calling itself a convention of Virginia, and which professed to preserve, protect, and defend the interests of Virginia while actually engaged from its outset in providing for the dismemberment of Virginia—that such acts and ordinances, so far as they were designed to relieve West Virginia from her proper share of the puble debt of Virginia, are of any legal, equitable, or moral binding effect on Virginia.

We object to West Virginia's proposed plan of settling the accounts, because—

(1) THE PLAN OF THE WHEELING ORDINANCE AND OF DEFENDANT'S DECREE IS IMPRACTICABLE.

It is charged in the bill and admitted in the answer of defend-

ant that the public debt of Virginia, as of January, 1861, was about $33,000,000, and was evidenced by the bonds and other evidences of indebtedness of the Commonwealth of Virginia issued prior to that date. At the periods when said public debt was created the counties now constituting the State of West Virginia were each represented in the legislature of Virginia and in the executive councils of that State; that such representatives in the legislature advocated and voted for the creation of this debt and the application of its proceeds to the construction of works of internal improvement, which were designed for the benefit and welfare of the entire Commonwealth; that the region now forming West Virginia was the portion of Virginia toward which the greater part of such public works tended, and it was for the development of that region they were primarily designed. Hence it is that we insist that not only on the principles of international law, but on the homelier and more intelligible rules of common honesty and morality, as well as upon legal and equitable doctrines, West Virginia is as much bound as Virginia for this public debt.

The Wheeling ordinance ignores these solemn evidences of the public indebtedness, and proposes to go back to the year 1824, through a perod of nearly sixty years, and inquire into the consideration of all these evidences of a common indebtedness, and into the various objects to which were applied the moneys obtained for them as they were made and issued. It requires the production of the vouchers and evidences of every dollar paid into the public treasury of the money derived from the taxation of the counties now forming West Virginia, and of every dollar appropriated and expended by Virginia within that territory. How far such requirement can be complied with at this time, with fullness and accuracy, it is impossible to tell.

It should be enough to suggest the danger and uncertainty attending such attempt, to remind the court that the State courthouse, in the city of Richmond—the repository of many of the most valuable of Virginia's archives—was destroyed by fire at the evacuation of that city, at the close of the Civil War; and further, that many of the most valuable of the State records and files were ravaged during the period of the military government of the State and during the baleful period of "Reconstruction," when hostile aliens had control and possession of the State government and property. To require now that, in order to correctly ascertain the amount which West Virginia should contribute to-

ward the payment of a public debt, evidenced by bonds to which that State was in effect a party, Virginia should make research through her files and records of nearly sixty years and produce the evidences of the items of receipt and expenditure, so far as the territory of West Virginia is concerned, is a peril and a hardship to which she should not be exposed.

It cannot be claimed that Virginia is in default in the performance of any duty resting upon her to West Virginia. The State officers at the capitol were the common agents of both the litigants here, and both are equally bound by their acts.

It is a fact which should not be forgotten, but to which due weight should be given in any equitable adjustment of the common burden, that it was the voluntary act of the people of West Virginia in withdrawing themselves from the body politic and corporate of Virginia and surrendering all right of participation in her councils and administration of her affairs that has contributed to the present conditions.

But another and more serious objection lies to the Wheeling ordinance as a plan of adjustment. Its evident purpose was to avoid and defeat the very liability to which this bill seeks to hold her. It proceeds on the theory that West Virginia cannot be held for any other amount than the difference between the amounts she—or her constituent counties—paid into the treasury of Virginia and the amount they received from that treasury during the sixty years preceding January, 1861; and also on the theory that those counties should not be held liable for any more of the public debt than was actually enjoyed by them by the extension of the works of internal improvement into or through their territory. It ignores the fact that the liability accrued when the bonds were issued and the money for them was obtained by the State, and not when the works for which that money was borrowed were actually constructed. The construction of the works was arrested by the war. They were not all completed within West Virginia. The war arrested, it did not prevent, the completed construction; *that* was prevented by the secession of West Virginia.

At the close of the war the spirit of energetic activity which the war had quickened found employment in every field of material development. Never in its history had this country known such an era of successful enterprise and development. The vast resources of wealth in timber, coal, gas, and oil would speedily have

secured the capital for the realization of the plans which had been discerned and provided for by the generations of Virginia people sixty years and more before. The works of internal improvement for which this public debt had been created would have been completed, and Virginia's taxable wealth would very soon have been applied to the entire extinction of her public debt; but all this was defeated by the withdrawal of the territory now forming the State of West Virginia; and now that State appears in the unenviable attitude of possessing all the sources of wealth which induced the creation of the public debt—that debt which her people had largely contributed to making—while denying all liability for the bonds by which the debt was evidenced. She is willing to enter upon a settlement as prescribed by the Wheeling ordinance. That ordinance, as we have shown, provides a plan of settlement which omits altogether the public debt.

(2) THE COMMONWEALTH OF VIRGINIA IS NOT BOUND BY THE WHEELING ORDINANCE.

It is true that this court has in one case recognized the restored State of Virginia—the "Pierpont government," as it is called in that case—as the State of Virginia. *Virginia* vs. *West Virginia*, 11 Wallace, 39, was on a bill brought by Virginia "to settle the boundary line between the States of Virginia and West Virginia." The real question presented was the validity and effect of the proceedings by which the counties of Jefferson and Berkeley were transferred in 1866 from the Commonwealth of Virginia to the State of West Virginia. We have endeavored, without success, to obtain a copy of the record of the case, to learn what exactly were the issues presented by the pleadings and the course of the proceedings had in the case in this court. It appears (page 51) to have been argued at December term, 1866, and again, after this court had been differently constituted, at December term, 1870. Justices Davis, Clifford, and Field dissented from the judgment. The case has been rarely referred to in the subsequent decisions of this court. Chief Justice Chase, who sat in the case, did, in *Caesar Griffin's case* (Chase Decisions, p. 412), referring to the State government of Virginia, say:

> "Indeed, it is well proven historically that the State and the government thus organized were recognized by the National Government. Senators and Representatives from the State occupied seats in Congress, and when the insurgent force which held possession of the principal part of the

> territory was overcome, and the government recognized by the United States was transferred to Richmond, it became in fact, as it was before in law, the government of the whole State. As such, it was entitled under the constitution to the same recognition and respect, in national relations, as the government of any other State."

And yet, notwithstanding this solemn judicial declaration as to the validity of Virginia's right to "recognition and respect in her national relations," it appears that on March 2, 1867, Congress, in an "Act to provide for the more efficient government of the rebel States" (14 St. L., p. 428), declared that—

> "Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of VIRGINIA, *etc.*; * * * and
>
> "Whereas it is necessary that peace and good order should be enforced in said states, until loyal republican State governments can be legally established, &c."

By virtue of this act the entire State government of the restored State of Virginia was swept away—executive, legislative, and judicial—and Major General Godfrey Wetzel succeeded to all their functions.

So it seems that this restored State, on which had been poured the annointing balm of national recognition and acceptance, and which was "entitled under the Constitution to the same recognition and respect in national relations as the government of any other State," was now declared by the political branch of the National Government to have "no legal State government existing in it," and the government that did exist in it was totally abolished.

A natural inquiry is suggested: If the State government, which had been created in Wheeling in August, 1861, and removed to Alexandria in 1863, and transferred to Richmond in 1865, and continued in operation continuously until 1867, was then ascertained and declared to be "illegal," and so extinguished, when had it ceased to be a legal government, or when had it ever become a legal government? Surely, in its "national relations," it could not be both legal and illegal, or legal for some purposes and illegal for others.

Whether a State government exists, and whether it is a lawful and valid government, are political questions, and are to be determined by the political departments of the National Government and not by the judicial. The government of Virginia formed

at Wheeling, and continued until after the close of the war, was recognized by the National Government as the true and lawful government of Virginia. In all of its political conduct and relations it must be assumed by the courts to be the true and lawful government of the State. But when it appears, as it does here, that the people of that part of the territory of Virginia which now forms the State of West Virginia were in fact the only people represented in the convention assembled at Wheeling on the 11th of June, 1861, and in the legislatures of Virginia held under the authority of that convention; that the leading object and purpose of those people in assuming the insignia—the title, powers, and authority of the Commonwealth of Virginia—was only to enable them to erect within the territory of Virginia a new State, and to appropriate to its uses all the property of Virginia under their control, and at the same time to absolve themselves from all liability on those bonds which they had united in making, as the evidences of that public debt which they had insisted on creating, then other considerations must apply.

The fiction that the people west of the Allegheny mountains were "the people of Virginia;" that the government which they organized in that region was the government of Virginia; that it became invested with all the powers and authority of the ancient Commonwealth of Virginia, ceases to apply. That fiction has served its purpose; the National Government has recognized this government, for all political purposes, as the Commonwealth of Virginia, and has accepted as valid and efficient the consent given by it to the erection of a new State within the borders of Virginia. Such recognition was the exercise of a power which belonged to the political departments alone. As to the propriety of its exercise the judicial branch is without jurisdiction to inquire. But into the conduct of this government in relation to its civil rights and liabilities—its liability on bonds and contracts, or under the application of equitable doctrines—the judicial courts may inquire, may take jurisdiction, and afford relief. Such courts may inquire into the validity and the *bona fides* of State action. It may ascertain and declare such action to be an impairment of the obligation of contracts. Inquisition may not be made into the motives or the good faith of the law-makers, whether in convention or in legislature, but the actions of these bodies may be annulled or disregarded when they appear to have been procured by fraud, as the judgments of the courts may be without impeachment of the motives of the judge who presided.

In Graham *vs.* Folsom, 200 U. S., 253, this court, speaking of an attempt by a county to rid itself of debt, said:

> "But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of a State, but they will not ignore the effect of its action."

The Wheeling ordinance was ordained by a body of citizens who proclaimed themselves to be citizens of Virginia, assembled in convention to reform and establish her organic law. Their religious duty was to preserve, protect, and ameliorate her material interests; and yet it is manifest that their paramount object was to despoil Virginia of one-third of her territory; to erect upon that portion so cut off a new State, and to endow it with all the money and other property of Virginia found within the limits of the proposed new State. This purpose was actually carried into effect. These things were not conceived and performed to promote the welfare of Virginia. The citizens of Virginia by whom they were done looked not to the welfare of the State whose citizens they were, but to the welfare of that new State, for whose erection they were then providing and the dawn of whose creation was already appearing. The ordinance is entitled "*An ordinance to provide for the formation of a new State out of the territory of this State*," and was passed August 20, 1861. It should be construed, then, in the light of its professed object. Its provisions, so far as they related to the public debt of the Commonwealth of Virginia, and to the ascertainment of the contributive share which the new State of West Virginia should bear, must be construed as designed to secure the interests of West Virginia as opposed to those of Virginia. But one body corporate and politic then existed, but this very ordinance, as its title and body shows, was to partition this existing body and create another body, with opposing and antagonistic interests. The framers of the ordinance were in a little while to become citizens of the new and opposing body. They legislated for their own future interests and not for the interests of Virginia. Hence it was that in framing this section of the ordinance which prescribed a method of ascertaining the portion of the common burden to fall upon West Virginia they ignored the bonds which evidenced the common debt and provided for an adjustment which involves the items of receipts and expenditures between the two sections of Virginia through a period of nearly sixty years.

The fiction of the restored State of Virginia is again invoked

to shield the actual truth. It cannot serve it. It has long ago fulfilled its only mission. It is now too thin and transparent to conceal the truth.

We have already shown, and the attention of the court cannot be too earnestly called to it, that the ordinance, in providing a plan for ascertaining the "just proportion" of the public debt which West Virginia should bear, makes no further reference to that public debt than the words contained in its opening sentence. The plan of ascertainment does not in any way involve the debt. It relates only to the amounts which the two sections of the Commonwealth had paid into the treasury of the Commonwealth and had received from that treasury since 1822. As a plan of ascertaining West Virginia's share of the public debt, it was illusory, disingenuous, and inadequate, and wholly in the interest of the people who framed and passed it.

It cannot be tolerated that one of the parties in interest should be the sole arbiter of the proportion or amount of the common burden which it will bear, or, as contended here, that a plan prescribed by one-third of the people of Virginia should be made the exclusive rule of measurement by which their share of the public debt of the whole people must be ascertained; and this although such one-third had separated themselves, and had met in convention, calling itself the convention of Virginia, which by an ordinance had provided for the erection of a new State within the territory occupied by them, and had by the same ordinance prescribed this rule for the ascertainment of its "just proportion" of said public debt. It is true, as stated in the answer, that Virginia has always denied that the Wheeling ordinance was binding upon her.

We submit that the debt for which West Virginia is liable is evidenced by the bonds and other evidences of indebtedness of the Commonwealth of Virginia prior to January 1, 1861. We have assumed—and no reason had been shown against it—that, taking into the account the population, area, and values of West Virginia, a reasonable and just proportion of the common burden was two-thirds of the public debt as the proper share to be laid upon Virginia and one-third of it as the proper share of West Virginia.

Apportioning the common burden on this basis, it would yet be competent for West Virginia to show on the taking of the account any just grounds that she may have of abatement of the

amount thus ascertained, whether by payments, set-offs, or otherwise. The amount of the public debt is admitted to be about $33,000,000. The exact amount can be readily ascertained. This should form the basis of any accounting between the two States. It is a fixed and certain factor. The liability of West Virginia for a just and reasonable proportion of this debt is not denied. The proportion in which it should be borne by the two States must be determined by some rule which the court may prescribe or which the master may adopt. The result is then readily ascertained.

If the court desire it, the master may be instructed as to the principles, rules, and methods which he must employ in stating and settling the account, or he may be authorized to return with his report such alternative statements of the account as to him may appear proper or as either party to the cause may require

In the argument of counsel for West Virginia in support of the demurrer to the bill it was pointed out that by section 8 of article 8 of the Constitution of West Virginia it was provided that—

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years;"

and that by the act of May 13, 1862, of the legislature of Virginia it was provided—

> "That the consent of the legislature of Virginia be, and the same is hereby, given to the formation and erection of the State of West Virginia within the jurisdiction of this State, * * * according to the boundaries, and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

From these two provisions the conclusion was deduced that a compact had been entered into by the two States, by which the legislature of West Virginia was made the sole arbiter of the fact and the amount of West Virginia's liability.

The court in its opinion (206 U. S., 320) disposed of that contention by saying:

> "When Virginia, on August 20, 1861, by ordinance provided for the 'formation of a new State out of the territory of this State,' and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861,' to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should ascertain the same as soon as practicable, it referred to the method of ascertainment prescribed by the Virginia convention."

the soundness of which reasoning cannot be questioned. The court was dealing with the question before it, which was the demurrer of West Virginia to the bill of Virginia. On the demurrer, all the allegations of the bill were taken for true. It was a fact that such ordinance had been adopted by the convention assembled at Wheeling. It was also a fact that the matters recited were in the acts and proceedings of the legislatures and conventions; but it was even more significantly the fact that the members of the Wheeling convention of August, 1861, and the members of the convention that framed the constitution for West Virginia knew what was in each other's minds, and what had been the acts of each body, for they were the same people, and it was all done in the same convention and at the same time, as appears by the official records (11 Wall., p. 41).

The court, in its opinion on the demurrer, did not decide or intimate any opinion as to the validity, or legal effect, or binding force of the Wheeling ordinance on the people of Virginia. It was manifest from the bill that the Wheeling ordinance was referred to there only as an additional expression by West Virginia people of their liability for the public debt. Virginia had never recognized for a moment that she was bound by an act which had so plainly for its object the casting upon her of the entire burden of the debt. The answer of defendant here complains that Virginia had persistently repudiated all responsibility for and liability under that ordinance.

The True Basis of Virginia's Right to an Accounting.

In paragraph VIII of the bill (Record, p. 10) five grounds are indicated on which the liability of West Virginia rests. The first of these grounds is that the mere partition of the territory created the liability. Writers on international law agree that—

"In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for, as Story says, 'the division of the empire creates no forfeiture of previously vested rights of property.' And so *ex contracio*, where several separate States are incorporated into one sovereignty, the rights and obligations that belonged to each before the union are binding upon the new State; but, as General Halleck points out, of course the rule must be modified to suit the nature of the union framed and the characters of the act of incorporation in each particular case."

1 Wharton, International Law Digest, sec. 5, p. 19, citing authorities.
1 Oppenheim on International Law, p. 122.
Wheaton, International Law, 4th English ed., p. 46.
Hartman v. *Greenhow*, 102 U. S., 672.

In 5 Moore on International Arbitrations, pages 4618-19, the case of the "Tarquin" is reported. On page 4619 it is said:

"This claim was in the nature of a public debt, founded upon the King's decree, and by the rule of international law public debts are not extinguished upon the division of a State into distinct States, whether that division be by war or by mutual consent; but they must be discharged either jointly or severally, according to the principles of justice and equity," &c.

The partition of territory alone, without agreement and without consent, imports an equalization of the burdens which were incident to the territory between the partitioners. The only question is, by what rule shall such equalization be made?

It is charged in the bill, and indeed is matter of public history in Virginia, that the sole purpose had in view in the construction of the works of internal improvement for which this debt was created was the development of the natural resources of the region to the west of the Alleghany mountains. The action of the delegates from that region in the General Assembly of Virginia confirms this.

The answer of the defendant denies this, and affirms that they were constructed for the development of the eastern part of the State. There were no natural resources in the eastern part that could be developed. The seacoast was there, and it was to bring to the coast the timber, coal, and other minerals of the west that the turnpikes, railroads, canals, and bridges were constructed. The reports of the Commissioners of Public Works through many years will attest this.

The enlightened sense of equity and justice throughout the civilized

world has now become crystallized in the rule of international law which is stated above. That is the rule which Virginia asks may be applied here, and not the rule of the Wheeling ordinance, framed by the very people who then and now were guided and controlled by the single purpose of protecting West Virginia from this very liability.

It was not necessary that Virginia should have paid off the entire public debt before it could call on West Virginia for contribution. It was as much the debt of West Virginia as it was of Virginia. Virginia comes into court and invokes the application of those well-settled doctrines of equity of exoneration and of *quia timet*, and prays that the burden may be adjusted by the court in accordance with those doctrines and methods of procedure.

1 Spence, Equity Juris. (marginal), page 662.
3 Pomeroy, Equity Juris., section 117 and notes.

The act "to provide for the funding and payment of the public debt," approved March 30, 1871 (Record, p. 13), recites that—

> "Whereas in the formation of the State of West Virginia, there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas in the ordinance authorizing the organization of said State, it was provided that the said State should take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary; and whereas the people of this Commonwealth are anxious for the prompt liquidation of her proportion of said debt, *which is estimated to be two-thirds of the same.*"

The estimate here referred to, of the proportions in which the "public debt of the Commonwealth of Virginia" should be borne by the two States into which the territory of that ancient Commonwealth was now divided, was not recklessly arbitrarily assumed, but was the result of a careful and intelligent reckoning. The territory and population of each State was considered, and the value of such territory taken into account, embracing therein all those constituent elements, natural and artificial, which enter into and make up the wealth of a State. The seacoast, the navigable rivers, the agricultural lands, with the works of internal improvements, in varying stages of completion, which formed the value of Virginia, and the vast mineral wealth of coal, gas, oil, and the forests of hardwoods of inestimable value that formed the wealth of West Virginia. The elements of wealth

duly considered, it was thought that West Virginia should bear, at the very least, one-third of the common public debt. It is charged in the bill that "West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of mineral and timber which had been known for many years prior to the first of January, 1861, and their prospective values, if made accessable to the markets of the country were understood to be well nigh beyond computation." The answer of West Virginia admits the charge, but avers "that the same was inaccessible, and of very little value on the first of January, 1861." And yet on July 1, 1862, when the restored State of Virginia, through her Senators and Representatives in Congress, was endeavoring to have the new State erected within the territory of Virginia, one of those Senators, Willey, employed as an argument in support of the creation of a new State, the existence of the vast resources of mineral wealth in that territory. He said:

> "Here is an opportunity presented to the Senate to erect northwestern Virginia into a free State, a condition for which she was designed by the God of nature—the richest portion of this broad land in mineral resources—with inexhaustible marble quarries equal to those of Egypt and very similar; rich in inexhaustible fountains of salt and oil, and forests exceeding any of those that ever waived upon Mount Lebanon itself, that have remained from the foundation of the government of the State of Virginia, undeveloped, useless, valueless, simply because we have not been able to organize improvements within and under the control of the western section."
>
> Congressional Globe, second session of Thirty-seventh Congress, 1861-'2, p. 3037.

And on the 14th day of the same month, in the same debate, he said:

> "This new proposed State contains within its towering hills and mountains treasures richer perhaps than can be found within the limits of any other State within this Confederacy, and there they have lain ever since the establishment of this Government, undeveloped, unworked, valueless, and they must continue to remain so unless a different policy is pursued."
>
> *Ibid.*, p. 3317.

It was this potentiality of wealth that those railroads, turnpikes, canals, and bridges were being constructed by Virginia to develop and realize for which this public debt of the Commonwealth was created. It was this vast wealth which was in the view of Senator Willey, in 1862, when in the Senate of the United States he urged it as a strong

ground why the new State should be laid off in the limits and from the territory of Virginia; that such new State would be a free State, and all this wealth of which Virginia would be thus despoiled would become the exclusive property of the new State, and that the provision made by the Wheeling ordinance for ascertaining the just proportion of the public debt of Virginia to be borne by the new State would not embrace or take into account any portion of this public wealth. It was this vast wealth which, in the estimation of Virginia in 1871, imparted so great value to the hilly and mountainous territory of West Virginia that, in computing the just proportion of the public debt which West Virginia in equity and good conscience should bear, she reckoned with extreme moderation that the territory of West Virginia was equal at least to one-third of that of Virginia, and so did she apportion their respective contributive shares of this common liability.

But it is suggested that an account is necessary to ascertain the amount which West Virginia should contribute, and, further, that such account should be taken on the principles of a partnership account.

We cannot perceive in the relations existing between Virginia and West Virginia any of the features which distinguish a partnership. A partnership has been defined by this court to be—

> "a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business with the understanding that there shall be a communion of profits thereof between them."

What was the contract and who were the parties and what were the terms of any partnership when the common debt, here sought to be apportioned, was created? The Commonwealth of Virginia was a political body, a sovereign corporation, a member of the Federal Union when she created this debt, and issued her bonds therefor. The counties of Virginia, which now form the State of West Virginia, were in no sense partners with the other counties of Virginia. They were all members of one body. The welfare of one member was the welfare of the entire body. These counties, by their own voluntary act, seeking their own exclusive selfish interests, procured their separation from the body corporate and politic of Virginia, and, after they had done so, they sought and obtained the political recognition and support of the National Government to gain for themselves separate political existence and autonomy. On the principles of international law, they remained liable for a just proportion of the pub-

lic debt of Virginia. What doctrine or maxim of equity can be invoked to entitle these counties to demand a marshaling of the assets of Virginia? What indeed would be counted as constituting those assets? If a partnership existed, then all the partnership fund constituted the assets and not any particular part of such fund. The debt which is here sought to be apportioned was not created on the security of any particular asset of Virginia. It was created on the faith and credit which the lenders of money extended to the Commonwealth of Virginia. The bonds which the Commonwealth issued were the obligations of the whole State and for which the entire State was liable. They were not the bonds of the counties of Virginia *jointly*. They were the several obligations of one body politic. The debt evidenced by them was the debt of the State sanctioned and imposed by the people of Virginia, through their General Assembly, acting within constitutional limits. *How* the money derived from these bonds was expended by legislative appropriations, or *where* it was expended, are considerations which should not even be inquired into in this proceeding, for it matters not in the present inquiry whether the entire debt of $33,000,000 was expended within the limits of Virginia or of West Virginia, so that it was expended by a legislature in which all parts of the State were fully represented. The expenditure must be conclusively presumed to have been made in good faith and for the welfare of the whole body politic. Two thousand five hundred years ago Aesop illustrated this in the fable of the "Belly and the Members." The liability, or the measure of the liability, of the two States into which the territory has since been divided can in nowise depend upon the amount of the proceeds of the loan which may have been expended in each. If any valid, actual, legal agreement was entered into between the two States, by which the proportion in which they should contribute to the common burden was fixed, or if any means were agreed on by which such proportion should be ascertained, then such agreement must control. But if no such agreement can be shown, then on principles of international law each State remains liable for the whole debt, and the apportionment of the burden between them is a judicial matter to be settled by the courts.

How shall the proportions of this debt to be borne by the two States, respectively, be ascertained? Virginia, in 1871, estimated that it should be borne in the proportion of two-thirds by Virginia and one-third by West Virginia. She formed this estimate by computing the vast undeveloped mineral wealth of West Virginia—her "unsunned

gold"—as making her equal to one-third of the entire value of old Virginia, including therein all the works of internal improvement, completed and uncompleted, that remained within the limits of the present Virginia. But suppose this estimate of Virginia should not be adopted, how should the court ascertain the just proportion? It is suggested that West Virginia should be charged with only so much of the public debt as was actually expended within her borders, and Virginia should be charged with so much of said debt as was actually expended within her borders. But we have shown that whenever or however the amount of money represented by the debt was expended within the limits of old Virginia, it was all expended for the benefit of the whole body of the State. That the counties constituting West Virginia seceded from the old State before the improvements were completed, and thus prevented this completion, and that she sought by such secession and has now succeeded in monopolizing for her own exclusive use all those stores of natural wealth which would have afforded to the old State the basis of taxation by which the public debt could be easily and speedily discharged, surely affords her no equitable ground for an apportionment of liability on such a basis. If an accounting is to be had on the basis of the wealth of the respective States, then in estimating such wealth it will be impossible to ignore or disregard the mineral wealth of West Virginia. Her coal and oil and gas and marble and timber must be taken into the account, not according to their taxable values in 1861, but according to the values which would have been given to them by such an appraisement as would have been made of them in a suit for partition. The present material condition of West Virginia is but the fulfillment of the expectations that were entertained by the people of Virginia a hundred years ago. It was forseen when the scheme of internal improvements was entered upon in 1820. It was foreseen and appreciated by Senator Willey in 1862. It was distinctly appreciated and estimated by the legislature of Virginia in 1871, when it reckoned the just proportion of the public debt of Virginia as of 1861 which should be borne by West Virginia at one-third of the aggregate amount of that public debt.

THE "SPECIAL AGREEMENT" THEORY.

It is claimed on the part of West Virginia (Brief for Defendant, p. 11) that a "special agreement" was entered into between the States of Virginia and West Virginia, by which the method prescribed by the Wheeling ordinance was adopted as the exclusive method of as-

certaining the amount of that "just proportion" which it was declared West Virginia should bear.

The "special agreement" relied on by defendant appears to be that feature of the Wheeling ordinance which prescribes the method for ascertaining what is the "just proportion" of the public debt to be borne by West Virginia. Section 9 of the Wheeling ordinance presents two distinct features, which must not be confounded with each other, viz: (1) A recognition of the liability of West Virginia for a just proportion of the public debt, expressed in these words

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861."

It was this feature that is referred to in paragraph XVIII of the bill, and which defendant, on page 7 of his brief, insists is a recognition by plaintiff of the terms of the ordinance. (2) The method by which such "just proportion" shall be ascertained, expressed in these words—

> "to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

In pointing to the Wheeling ordinance as a recognition of West Virginia's liability for a just proportion of the common debt, section XVIII of the bill cannot be construed as an admission of the validity of the method of ascertainment proposed in the second feature. That section refers only to the "liability" recognized, and it indicates the ordinance as the one "in which the method of ascertaining her liability on account of said debt is prescribed," without in any way assenting to or conceding the validity of such method.

Suppose the second feature of the ordinance had prescribed as the method of ascertaining the just proportion that West Virginia should pay one mill on every thousand dollars of the public debt, or that it should pay one mill on every thousand tons of coal shipped from the State, could it be truly contended that the Commonwealth of Virginia had deliberately consented thereto? Yet, as I have endeavored to show, these supposed methods are not one whit more whimsical and fantastic than the method actually proposed, because the difference between the amount that a county has paid into the State treasury,

in a given period in taxes, and the amount that has been expended within that county by legislative appropriations during that period has no more connection with the public debt of the State than the number of tons of coal shipped from such county during such period can have.

There can be no question as to the power of two States, or of two sections of the same State, to enter into compacts within the conditions existing in the cases of Green *v.* Biddle, 8 Wheat., 1, and Wharton *v.* Wise, 153 U. S., 155, or as to the soundness of the rule stated in Wharton *v.* Wise, p. 173:

> "The consent of Congress to any agreement or compact between two or more States is sufficiently indicated—when not necessary to be made in advance—by the adoption or approval of proceedings taken under it."

But can it be said that Congress ever saw or considered the Wheeling ordinance or ever knowingly adopted any proceedings taken under it? Congress had before it the constitution which had been framed for the proposed new State, and the act of May 13, 1862, purporting to give the assent of Virginia to the erection of this new State. Nothing appears in the constitution as to this method of ascertaining West Virginia's share of the debt. The provision of the constitution appears in article 8, section 8, and is as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

There it appeared to Congress that adequate provision had been made for the payment of West Virginia's "equitable proportion" by requiring the legislature to ascertain the same, and then provide a sinking fund for its payment.

Can it be supposed, in view of the debates that occurred in Congress on the bill for the admission of West Virginia into the Union, that such bill would have become a law if it had appeared in the constitution under which it sought admission that it proposed to ascertain its equitable proportion of the debt by deducting from the amount of taxes it had paid since the first debt was incurred the amount it had received in the way of legislative appropriations? It gained admission into the Union by the method indicated in its constitution. It

now proposes to fall back on a method which would have defeated its effort to be admitted into the Union.

SECTIONS 5 AND 7 OF ARTICLE 8 OF THE CONSTITUTION.

On pages 18 and 19 of their brief counsel for defendant insist that the words "previous liability" in the 5th section and the words "public debt" in the 7th section do not refer to West Virginia's liability to her equitable proportion of the public debt of the Commonwealth of Virginia.

What other *previous liability* of the new-born State existed besides the public debt of the old State? Many of the States of the Union now provide in their constitutions that no public debt of the State shall be created. But counsel for defendant insist that while the State may be thus prohibited from creating *a public debt*, it is not prohiibted from creating *a public liability*, and that when a public liability is created then the legislatures may create a public debt to extinguish the previous liability. It is to be supposed that the court can be favorably impressed by such linguistic jugglery. The liability of West Virginia for a just or equitable proportion of the public debt of Virginia existing previously to the formation of this constitution was recognized by the constitution, and provision was made to meet it. This provision contemplated the issuance of bonds of the new State, but it was intended to leave no room for the creation of any other public debt, and hence it was that in this section 5 of article 8 it was provided that "no debt shall be created by this State except to meet * * * a previous liability of the State," &c. So in section 7 of article 8 it was provided that the legislature may sell all the stocks owned by the State in banks and other corporations, "but the proceeds of such sale shall be applied to the liquidation of *the public debt*," &c. What was *the* public debt?

Note, it is not *a*, or *any* public debt, but *the* public debt. There was and could be but one public debt, and that was the public debt which West Virginia had in common with Virginia, and as part of Virginia previously created.

Counsel argue on page 20 of their brief that because this same provision appears in the later constitution of West Virginia, adopted in 1872, that for that reason it could not have been intended to apply to the public debt of Virginia prior to 1861. It is true that this provision was repeated in several constitutions adopted by West Virginia, as was also section 8 of article 8; but it may be also true that when control of the State passed from the hands of the native-born citizens and into the hands of citizens from other States who had drifted into

West Virginia and had filled all the high offices of the State, then these provisions disappeared from the later-formed constitutions. The reason for such disappearance is not far to seek. Doubtless the hope was indulged that a repudiation by omission of this declaration of liability might soon warrant a repudiation by express disavowal of liability, a stage which, it appears, has now been reached.

Both Virginia and West Virginia in their respective constitutions prohibit the creation of any more public debts. Virginia has learned from experience. West Virginia has taken warning from the exampie before her. But both States have recognized that it might become needful to issue new bonds in order to extinguish the existing debt which rested upon both of them, and hence it was that each State provided that the prohibition should not extend to "previous liability," referring in each case to their espective liabilities for the existing public debt of the old State.

It is evident that West Virginia now rests her entire defense to the case stated in the bill on the recognition by this court of the Wheeling ordinance as a contract between the States of Virginia and West Virginia and now binding on the Commonwealth of Virginia. On the part of Virginia it is submitted that she had no part or lot in that matter. It surely lacked one essential element of a *contract;* the people who proposed the ordinance, and the people who accepted it were the same people. They did not coexist at the same time as parties to the contract. They contracted with themselves at successive stages of their continuing existence. When West Virginia was created Virginia ceased to be in that territory. True, the governor, who was a citizen of one of the counties of the new State, did not relinquish his titular office of governor of Virginia, but moved his seat of government to Alexandria and remained there within the Federal military lines. He assembled a handful of men, who masqueraded as the General Assembly of Virginia, and then on the 11th of April, 1864, organized a Constitutional Convention of Virginia, and adopted a new constitution for Virginia, the 27th section of which is quoted on page 22 of defendant's brief, by which the Wheeling ordinance was held to have no binding force upon Virginia. It was all a grim farce. But it cannot be denied that they had as much legal right to repudiate its binding force on Virginia as they had in August, 1861, to impart such binding force to it. The existing public debt of Virginia in January, 1861, was $33,000,000, as admitted in the answer to the bill. This was the debt of West Virginia, or of the counties constituting it, as much as it was of the other counties of Virginia. If the wealth

of West Virginia was equal to one-third of the wealth of the whole Commonwealth of Virginia, then the equitable proportion of that debt to be borne by West Virginia should be $11,000,000 as of January, 1861, and that amount should now be adjudged to be due by her.

SECTIONS 3, 4, 5, AND 6 OF THE DECREE PROPOSED BY DEFENDANT.

These sections of the decree are also objected on behalf of the complainant on the ground that they seek inquiries into matters that have no apparent connection with the ascertainment of West Virginia's "just proportion" of the public debt of the Commonwealth of Virginia prior to January 1, 1861. The amount of that public debt as of the date named is admitted to be about $33,000,000. The exact amount is susceptible of ascertainment. The only other question is as to the just proportion to be borne by West Virginia. If the proportion heretofore fixed by Virginia, of one-third, is objected to, then it remains for the court to determine, through its master, or in such other way as it may adopt, what the just proportion is. It has been assumed on the part of Virginia that the evidence relevant to such inquiry, which is altogether documentary, consisting of the public records and files of the Commonwealth of Virginia, could not appropriately be laid before the court at this stage of the cause, but would be produced before the master at such times and in such manner as he might require.

Should it be found that one-third of the public debt is the just proportion to be borne by West Virginia, then any inquiry into the manner in which Virginia has settled with her creditors for the two-thirds of said public debt, assumed by her as her just proportion, can have no relevancy to the inquiry here.

The certificates issued by Virginia represent only the bonds which were surrendered by the creditors and are now held by Virginia in trust for the owners of them; as to the one-third set apart as West Virginia's just proportion of the debt evidenced by such bonds, the bill sets forth with minuteness of detail the amount of such certificates, which has been assembled by the committee representing such bondholders, under the plan adopted for the settlement between Virginia and her creditors and under the acts of the General Assembly of Virginia, all of which appear in pages 39-66 of the bill and exhibits, no part of which appears to be denied by the answer of the defendant.

HOLMES CONRAD,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Mr. Holmes Conrad.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant*,
vs.
WEST VIRGINIA, *Defendant*.

In Equity—Original No. 4.

ARGUMENT OF MR. HOLMES CONRAD,
For the Complainant.

Mr. Carlisle: If your Honors please, we desire to have some understanding as to the order of this argument. Major Conrod, I understand, appears as *Amicus Curiae*, and we think we have a right, before we are required to address the Court, to hear a statement from the representative of the State itself also. We do not object to Major Conrad opening the case, but there are three arguments on that side and we think two of them ought to precede us, one of the *Amicus Curiae* and the other representing the State.

Mr. Anderson: That is satisfactory to us.

Mr. Conrad: I did not desire to make the first argument; I am not prepared to do it, but it is the wish of counsel that I should do so, and I am not going to shrink from it.

This bill was filed, as your Honors may remember, to have ascertained the just and reasonable contributive share that the State of West Virginia should pay towards the public debt of the Common wealth of Virginia as of January 1, 1861. That is the object of the bill.

The bill charges that the public debt as of that date was about $33,000,000; the answer admits that allegation. That fixes a very

important factor in this equation; it leaves open, however, a still more important one. The whole debt is thirty-three millions of dollars; here are two States now who, at one time, formed the one State, that contracted this debt. It is admitted there must be an apportionment, and the question is, How shall this debt be apportioned? How, by what plan or method, shall we ascertain the just contributive share of the State of West Virginia? We are halted at the threshold of this inquiry by a statement from counsel for West Virginia. They say that the plan and method has already been fixed and determined by a contract entered into between the two States. We ask them to show us the evidence of that contract and let us see the terms in which it is stated, and how and where it is expressed, and on the eighth page of their brief, signed by C. W. May, Attorney General, I find an answer to that inquiry, which, in the interest of conciseness and brevity, I venture to read. They speak of the admission, and they say:

> "there was a solemn agreement entered into in 1861 between the State of Virginia and the new State of West Virginia, with the consent of the Congress, by which the latter State assumed (as one of the conditions of the assent of Virginia to her becoming a State) a just proportion of the indebtedness of that Commonwealth as it existed prior to January 1st, 1861, the manner of ascertaining which proportion was defined by the ordinance itself.
>
> "The ordinance was, as treated by this Court in the case of Virginia *vs.* West Virginia (11 Wallace, 39), a proposition by the Commonwealth of Virginia to the people of the proposed new State. It was accepted by the constitutional convention of the proposed new State, carried into its Constitution and adopted by the people; and when the State was admitted into the Union by the Congress, with the assent of Virginia, it became a completed compact between competent parties, upon adequate consideration, protected by the Constitution of the United States from impairment by either party."

With a full sense of the responsibility of such a denial, I deny that either one of those four propositions is true. I deny, and will show, I think, that it never was accepted by the constitutional convention of the proposed new State; it never was carried into its constitution and adopted by the people, and it never was protected by Congress, or considered by Congress when it admitted this State. I say I am fully sensible of the responsibility of a denial so direct to four elements of a contract charged so specifically and concisely as is done in that brief.

I may be asked, what is the Wheeling Ordinance of which so much has, and will be said? Let me very briefly recall to the attention of the Court some dates and facts. After the convention in Richmond had passed its ordinance of secession, about one month later, in May, 1861, a number of persons met in the City of Clarksburg, some of them had been members of the Richmond Convention, I believe, all of them were violently opposed to the course adopted by that convention, and those gentlemen issued notices to all the people of the forty-eight counties lying west of the Alleghenies, inviting them to meet in a convention in the City of Wheeling in June, and they met in convention. This convention, assembled in this way, continued until August, 1861. It adjourned from time to time, took recesses, and on the 20th day of August, 1861, it adopted an ordinance, which I will ask your Honors just briefly to follow me in. You will find it in the appendix to the brief of the Attorney General of Virginia. That ordinance is entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State." That was its object; it was an ordinance that contained eleven sections.

Mr. Justice White: Will you be good enough to give me the page you are reading from?

Mr. Conrad: Page 12 in this appendix.

Mr. Justice McKenna: Which brief is it? I find no appendix in my record.

Mr. Conrad: I find it in the brief of the Attorney General, but it is printed elsewhere in the record. I beg the Court's attention now to the fact that of the eleven sections, ten of them relate purely to the formation, recognition and admission into the Union of a new State. Those are political questions with which the judicial department has nothing to do. Those ten sections, I say, are political questions with which the courts have nothing to do, which could not come before this Court, which could not have been restrained by application to any other court. The ninth section, however, does not present a political question; that presents a question of contractual obligation, that presents the question in which private rights of creditors are concerned and contractual obligations of a State are concerned; that presents a question with which political departments are not competent to deal; that presents justiciable questions, questions that are cognizable only by courts. Now, once for all, let me read that or-

dinance, because I will have occasion frequently to refer to it:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

It is useless to read the balance of it. In other words, that ordinance provides that a clerk should make one column with the taxes paid by those forty-eight counties between 1820 and 1861, and add them up. He should then ascertain what was a fair and reasonable share of the ordinary governmental expenses, during that period, and add it to that column. Then in another column, he should add up all the expenditures made by legislative provision within those forty-eight counties during that period and subtract the one from the other, and that, it is said, would be the just proportion of this debt that West Virginia should bear. I just pause to say that that is a statement that could be made between any county in Louisiana, Kentucky, or Massachusetts, and the State of which it forms a part, if no public debt ever existed at all. That recognizes, or involves, at least the county saying, "I will pay no more taxes, because during the hundred years past the taxes which I have paid exceeded the amount of the legislative provisions which have been expended within my borders."

That is the contract; but let us see. That convention, having passed that ordinance, and passed some other ordinances, adjourned *sine die*. This ordinance provided for the calling of a convention to frame a constitution for the new State. That election took place on the 24th of October; delegates were elected to this new convention, and the people of the forty-eight counties voted as to whether or not a new State should be erected, and they carried it overwhelmingly, and delegates were elected to the new convention which met on the 26th of November.

It is said, and this is the first proposition that I have denied, that this Wheeling ordinance, or this provision providing for the debt of the new State, was carried into the new constitution. I say that is not true. Why? Because, in the first place, here is the new constitution, and it is not there. The new constitution

does contain a provision looking to the ascertainment of the share that West Virginia should pay, but it is not this provision; it is a wholly different provision. Let me pause just a moment to bring to the attention of the Court—it is very brief—what this provision of the constitution is. I have read the Wheeling ordinance, the 9th section; now, here is the provision of the constitution.

Mr. Justice Holmes: Where is that to be found?

Mr. Conrad: On page 6 of the Attorney General's opening brief. Here is what the constitution says:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the First day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

There is no provision there, as you will see, about adding up taxes and deducting receipts of legislative provisions, but let us look further. In Section 6 it is provided:

> "That the delegates meet in the City of Wheeling on the 26th day of November next and organize themselves into a convention, and the said convention shall submit for ratification or rejection the constitution that may be agreed upon by it to the qualified voters."

That is the first provision under the constitution. In the 8th section it is provided:

> "That the Governor shall lay it before the General Assembly when it meets, votes cast in favor of the new State and in favor of the new constitution proposed, and the votes for their adoption."

The tenth section provides:

> "When the General Assembly shall give its consent to the formation of such new State, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the Union of States."
>
> "The government of the State of Virginia, as reorganized by this convention, shall retain within its territory all of its powers."

Nowhere do we find in that ordinance, any intimation that the

plan proposed by it for ascertaining West Virginia's share of the debt, shall be considered or entertained or acted upon by the constitutional convention. We find that when the constitution was actually produced, when it was framed by this convention, that it contained no provision whatever such as you find in the ninth section of the Wheeling ordinance. These, with the remaining nine sections, which provide for this new convention, all relate to a political question, all relate to the erection of this new State. That went to Congress, that was considered by Congress, but nowhere we find, as is averred, again, in this brief, that Congress ever considered this provision of the payment made in the Wheeling ordinance for ascertaining West Virginia's share of the debt. On the contrary, we find from the debates that the question was asked on the floor of the Senate, "Virginia owes a large debt; what provision has been made for its payment?" And the answer was, "The constitution contains provision for its payment." "What provision is made for ascertaining West Virginia's share?" "The constitution contains the provision that West Virginia shall pay an equitable proportion of the debt," that was the answer made. Suppose that the constitution had contained in its body, in place of the section I have read, this ninth section of the Wheeling ordinance, that West Virginia's share of the debt that had been contracted forty years before, evidenced by bonds outstanding in the hands of holders for value, should be ascertained by adding up all the taxes that she had paid for forty years and deducting from them all the expenditures, all legislative appropriation within that time, and that should be her share? What if the taxes exceeded the appropriations? The creditors would go without any satisfaction of their debt. Would Congress have admitted the State upon a constitution containing that provision? Would Congress have admitted the new State of West Virginia upon any other provision than that which is expressed in the eighth section of the eighth article of the constitution? Would Congress have considered the matter at all favorably if it had been proposed to turn the creditors over to this system of jugglery that was proposed by the ninth section of the Wheeling ordinance? So I venture to say that not only was this not carried into the new constitution, but it was not considered by Congress. I need not stop to call to the attention of this Court the authorities which show conclusively and define the difference between political and judicial questions. Massachusetts *vs.* Rhode Island; Luther *vs.*

Borden; Georgia *vs.* Secretary Stanton. There the Court has pointed out with a fullness that would be vain to define here the classes of cases that fall under the head of political questions, that are cognizable only by a political department; and justiciable questions, those that relate to questions of contractual liabilities and rights with which the political departments cannot intermeddle and which are cognizable alone by the courts

Counsel for West Virginia in their brief, pages 15 and 16, again say, speaking of this new Convention, the convention that framed the constitution, the convention that met in November, say—

> "It will be noted that this language of assumption is the language of the ordinance except that word "equitable" is used in the Constitution, while the word "just" is used in the ordinance."

Again:

> "It will be remembered that this convention assembled within ninety days after the adoption of the Ordinance. Its sole warrant for assembling was the ordinance. Its authority to frame the Constitution was derived from the ordinance. The ordinance as a whole was a proposition to that Convention and, as a whole, was accepted by the Convention. The Convention complied with all the provisions of the Ordinance. The constitution was framed to meet all the requirements of the Ordinance. It was the basis of the Constitution."

Then, on the next page:

> "If the Convention had failed to comply, in the Constitution, with the requirements of the Ordinance, or had departed in any way from the conditions of Virginia's assent, as stated in the Ordinance, its work would have been nugatory. It was bound by the ordinance to carry into the Contitution the assumption by the new State of an equitable proportion of the indebtedness of Virginia prior to January 1st, 1861."

That statement means this, as I understand it, that the convention that framed the Wheeling ordinance, not only had the power to prescribe, but it did prescribe to the convention which it authorized to assemble, the duties which it was to perform. That it prescribed for it the constitution, it prescribed for it this provision, the ascertainment of West Virginia's share; it provided for the matter of the payment of the debt, and the argument is that if the convention of November that framed the constitution had departed to the extent of an iota from the

prescription of the previous convention, its work would have been nugatory.

There is a discussion between what are called "revolutionary conventions" and "constitutional conventions." It has long been a question how far a convention called for one purpose may exceed that purpose and originate work not contemplated. But the practical question is, "What would happen if it did do it?" The courts take cognizance of it; in one instance, in Pennsylvania they did, where it related to matters of personal liability and contract. But suppose a convention met, called it may be, for one specific object, and being assembled, it went over the limits prescribed for it and made other provisions constitutional, which went into effect; would they, as this brief says, be nullities? If that is true, then all the operations at this convention were nullities, because this very convention, of November 26, actually changed the name of the State. You will find from this ordinance that the new convention was called in November to frame a constitution for the State of *Kanawha;* it is prescribed, actually, that they shall frame a constitution for the State of Kanawha, but yet, when they met there somebody says, "I do not like the name of Kanawha; let us be *West Virginia.*" An objection was made. "You cannot do it, because we were sent here to frame a constitution for Kanawha;" but they did. They did it, and it is West Virginia to-day. Nowhere do you find in this convention that met in November, nowhere do you find in the fruit that came from it, any recognition of a power in the preceding convention to limit it to any specific work. They were told to frame a constitution and they did it; they were not told to frame a constitution with certain prescribed provisions in it; they were not told to frame a constitution incorporating in it the ninth section of the Wheeling ordinance looking to the ascertainment of West Virginia's share. We recognize the fact that if a convention sends out a constitution to be submitted to the people, and sends out, as a part of it, an ordinance, and provides that that ordinance shall be submitted to the people, that that ordinance is a part of the constitution; but where a convention adopts a series of ordinances which are nothing on earth but resolutions, nothing but such resolutions as may be adopted in a legislature; when a convention does that, and at the same time frames a constitution, the ordinances are not correlated to the constitution unless in terms they are appended to it and submitted to the people. Here we find that while this convention in August did adopt an ordinance that provided for the plan, and while under that ordinance the convention to adopt a

constitution was formed and assembled, yet, where this first convention incorporated, among its political articles, one of a contractual nature relating to rights of property which was beyond its competency to deal with, you will find that the convention that met in November ignored and disregarded it, and adopted a provision of its own which is wholly different, essentially different.

It will be said, and it has been said, that this Court has decided upon the validity of the Wheeling ordinance on the demurrer. I need not argue to this Court what it has decided and what it has not; it could not decide upon the validity of the ordinance upon the demurrer. The Court did say on demurrer, in answer to a suggestion made by counsel, that there was a compact by which the legislature of West Virginia was made the sole arbiter of the fact and the amount of the debt; the Court did say that. I can reconcile that; I find that the Act of May 13, 1862, provides that it consents to this new State upon the provisions of the constitution prepared by the convention. I look at the provision of the constitution, and I find it says the legislature shall settle the debt. That may be the reference to this Wheeling ordinance referred to by the Court when it says the legislature shall ascertain the amount. It meant ascertain it according to the provision of the constitution, but that was on a demurrer; to the case stated on the face of the bill; that did not deprive the plaintiff here of the right of coming in and showing that the Wheeling ordinance was invalid, that the Wheeling ordinance had no life, no vitality, could not be recognized or enforced by the courts. On the face of the bill on the demurrer it was taken to be true.

The whole argument here is, that here was a contract, here a proposition it is said, was made by the State of Virginia. We propose to you this Wheeling ordinance with all of its provisions, and it is said that West Virginia has accepted it. Consent? Yes, to be sure. These men stood up on one side of a hall and said, "We propose to you this ordinance," and then they marched across the hall and faced about and said, "We accept the proposition that you have submitted to us." They were the same people, were they not? This whole matter came before Mr. Lincoln's Cabinet and himself, and their views are expressed. The Cabinet stood three to three, six of them expressed views on the question. Will you pardon me if I call your attention to just one word that was spoken by the Attorney General there, Mr. Edward Bates, on this subject? I am reading from a work that is called "The Rending of Virginia." It is an apology, really, for the existence of West Virginia. It contains a vast deal of historical mat-

ter relating to its early history. I have examined seven histories, the names of which I have here, and none of them gives the information that this does.

Mr. Justice White: What is that book called?

Mr. Conrad: "The Rending of Virginia," by Hall. It is not in the Congressional Library; at least, they did not furnish it to me the other day. I do not know where it is published, the name is not given. Here is what Mr. Edward Bates, the Attorney General, said upon this very question of the people who made the proposal and the people who accepted it:

> "And the Legislature which pretends to give the consent of Virginia to her own dismemberment is (I am credibly informed) composed chiefly if not entirely of men who represent those forty-eight counties which constitute the new State of West Virginia. The act of consent is less in the nature of a law than of a contract. It is a grant of power; an agreement to be divided. And who made the agreement? The representatives of the forty-eight counties with themselves. Is that fair dealing? Is that honest legislation? Is that a legitimate exercise of a constitutional power by the legislature of Virginia? It seems to me that it is a mere abuse, nothing less than an attempted secession, hardly valid under the flimsy forms of law."

Do not understand me as questioning the validity of the State of West Virginia. It is as firmly intrenched as any State in the Union, but here it is proposed to carry the consent beyond the mere political question, beyond the matter of consent to the erection of the State, carry it into a consent for the validity of the adoption of this ninth section of the Wheeling ordinance.

There have been some great men in this State of West Virginia, the greatest land lawyers, as we call them, we ever had in the old commonwealth lived on that side of the mountains. Some have survived. Mr. Charles James Faulkner, sometime Minister to France, who represented for many years the West Virginia District in Congress, closely identified in sympathy, in interest, in every way, with that State, was a lawyer of great eminence, a statesman of wide experience, and in 1884 his opinion was asked as to the liability of his State, West Virginia, on this debt, and especially under the Wheeling ordinance, and it may not be improper, with the Court's indulgence, for me to read just a line or two of it. It is a public document, dated March 29, 1884. He says he does not think the State of West Virginia ought to pay more than one million dollars. He was the counsel for West Virginia in the case in 11th Wallace. He was

the counsel for the prevailing side in the case of the State of Virginia v. West Virginia, for the two counties of Jefferson and Berkeley. He made the prevailing argument in that case. Here is what he said:

> "After a careful examination of the case of Virginia v. West Virginia, I cannot perceive that the Court attaches any peculiar legal efficacy to the ordinance of August, 1861. It is true it referred to that ordinance historically, but only for the purpose of showing that even at that early period of our history the counties of Berkeley and Jefferson were contemplated as possible additions to the State of West Virginia. My reasons for supposing that the Court might not regard the ordinance of August, 1861"—
>
> (that is, the Wheeling ordinance—)
>
> "as prescribing a binding rule for the settlement of the debt are, that by the subsequent constitution framed and adopted by the people of West Virginia, this basis of settlement is abandoned, and we are then made to assume an equitable proportion of the public debt of Virginia prior to January 1, 1861, and the legislature is directed to ascertain the same as soon as practicable. Virginia, in giving her consent to the formation of the new State in May, 1862, expressly does so upon the provisions set forth in the constitution of West Virginia. Upon these terms we were admitted by Congress as a State of the Union, and the constitution of 1863, thus ratified by the two States and by Congress, would be more likely to be taken as the basis of the contract than the effete ordinance of August, 1861."

These are not the loose words of an idle man. This is not the unconsidered opinion of a county court lawyer. Here is the opinion of a statesman who was deeply and nearly concerned in the existence of this State, who had maintained at this bar the argument by which he induced the Court, as formerly constituted, to hold the validity of the transfer of those two counties of Jefferson and Berkeley. But why need we go into that? The great ordinance of 1787, which Mr. Webster said, was prepared by Nathan Dane, provided that slavery should not exist anywhere within the limits of the territory embraced within it and that lay at the very foundation of all the States that should be carved thereafter out of that territory. It seemed to permeate and enter into the very foundation upon which all subsequent States could be built; it was a corner stone. "Slavery shall not exist," and yet, when the State of Ohio was admitted into the Union and sent her constitution to Congress, it contained a provision recognizing and allowing slavery, and an objection was made, "Why, this is diametrically opposite to the inhibition of the northwest ordinance."

This Court said, in Strawder v. Graham, in 10th Howard, "The State comes in under the provisions of its own constitution; you cannot look outside of it; you cannot look behind it; you cannot look to what preceded it. This is the final, ultimate expression of its civil and political rights and powers." So, here we have this ordinance that was merged in the constitution framed by a wholly different convention, a constitution that was framed three months later, that was voted upon by the people without reference to that ordinance, that was sent to Congress and there adopted, not upon the ordinance, but upon the constitution that was framed, and I submit, as I have indicated before, that it is reasonable to suppose that if this provision which we find now in the Wheeling ordinance for ascertaining West Virginia's share, had appeared in the constitution that the State never would have been admitted upon the constitution that contained it.

It was argued here on the demurrer that another contract existed than the contract to which I have referred. It was said that the constitution, not the ordinance, but the constitution had provided that the legislature of West Virginia should settle this debt as soon as practicable, and that Virginia, by the Act of May 13, 1862, had consented to it according to the provisions of the constitution, and it was argued that from that contract or compact the legislature of West Virginia was made an arbiter. That argument seems to be implied somewhat in the present brief of the counsel for West Virginia. I will pause only to suggest this, that if you fiind that to be a compact, if you find that the constitution and the Act of the Assembly does actually make a compact binding on these States, enforce it according to its terms. Its terms were that the Legislature must ascertain this "as soon as may be practicable," and that was nearly a half a century ago. Time was evidently made essential. It was not that "the legislature may do it at sometime," but "it must do it as soon as practicable." Time was made of the essence by the very terms of it, and yet I say that nearly half a century has passed and not one step has been taken on the part of West Virginia towards the ascertainment of her just share.

I have had to omit quite a number of views that I intended to present. But one I will present in closing. If we repel the Wheeling ordinance, if the Court finds that the Wheeling ordinance is illusory and impracticable, and that it never formed a part of any contract between the two States, that it never has been agreed upon as the basis for the ascertainment of West

Virginia's share, then where shall we look for a plan, what basis or method shall we adopt? We have stated that the amount of this debt has been practically agreed upon, thirty-three millions of dollars. It is proposed to go into the question here, of how much of it was spent in one State and how much of it was spent in the other State and strike a balance. Can you do that? Would it be just to do that? Suppose that the legislatures of Virginia from 1820 to 1861 had expended the whole thirty-three million dollars in the City of Wheeling, out in the northwest; who could question their right? They were there from every county in Virginia, senators, delegates, representing the people of the entire State. That legislature was the sole repository of power and the sole repository of discretion as to the expenditure of this money. Suppose, as I say, they had spent the whole thirty-three million dollars in the City of Wheeling, would it be just and fair now to say to the City of Wheeling, "You must account for that?" Could not Wheeling say "It was not done by me, by my power; it was done by all the people of Virginia through its legislature?" You cannot say, because this money has been poured into one place, that it was intended to benefit that one place, or that it has done it. Aesop, twenty centuries ago, showed that when complaint was made against the belly that it was idle, that it consumed all the food, and the eyes and the ears and the hands said it must stop, it did stop, and the eye grew dim and the natural force of man abated, and all his members were threatened with atrophy, until the belly said, "It is through the subtle alchemy of nature that the strength on which you live is conveyed to you by all the channels of your body from the food which I digest." And is it not true so of the body corporate and politic? Can you, when a legislature, the sole body clothed with power, puts all the money in one place, Norfolk or Wheeling, can you say it was done there for the benefit of that locality? Over in the State of Virginia, in the county of Albemarle, is a tunnel. When it was built it was said to be the longest in the world, through the Blue Ridge Mountains. It cost a million and a half of money, I believe. Would it be fair, in some adjustment of this sort, to say to that county, "You shall be charged with this." Might it not with propriety say, "It is of no benefit to me; it was put here for the good of the whole body of the State?" Can one section of a State say "There is no railroad constructed through this tier of counties, and I should be relieved from a portion of the public taxation," or "I should not be called upon to contribute to a public debt?" Would not the re-

ply be that "While it is there, it is there for your local benefit, yet it is not there for your local benefit alone; it was put there because, in the wisdom of the legislature, the whole body politic was benefited by that local application." So, I venture to suggest that it would not be fair to enter into any account, charging up improvements, as they are called, on one side, against improvements on the other. Much less would it be fair, when you find, as is charged in this bill, that the representatives in the legislature from West Virginia, these forty-eight counties, to a man voted for this debt through forty years, voted for every appropriation, while the Eastern Virginia people to a large extent voted against it. It would not be fair to yield to this suggestion of settlement, when you find the Chesapeake and Ohio Railroad, just as an illustration, was constructed up to the West Virginia line and then stopped, either by the secession of Virginia from the Union, or by the secession of West Virginia from Virginia, it would not be fair, I say, to say to Virginia, "You are chargeable with all that because all that is in your territory." We say, "It never would have been there if the debt had not been created; the debt would never have been created if you had not insisted upon it; it would never have been created at all if the legislature of Virginia, in its entirety, looking to the interests of the whole State, had not thought it best to construct this road, not to the limit where it is now stopped, but construct it through to the Ohio River, the point to which it was originally destined. I say it would not be fair and equal to halt now and say that the account must embrace all the works unfinished on the Virginia side, and not one dollar of their expenses of construction charged to West Virginia because they are not extended into or through her. They never would have been constructed but for the fact charged in this bill that the mineral wealth was west of the Alleghany Mountains, that all of these railroads, canals, turnpikes, bridges, were built with a view to the development of that wealth; they would not have been built but for West Virginia; they would not have been begun, and not a dollar of debt would have been created, but for the development of that State and of those mineral resources, and it does not come with any show of fairness, just now, for that State to say, "Because, in the Providence of God, there has been a dissolution before these works reached our limits, came into our territory, therefore we are not to be charged with them." I say that it was on account of the whole body politic that these works were begun and this debt created; that its primary object was the development of those improvements, not for the benefit of West Vir-

ginia, I do not pretend, but for the benefit and welfare of the whole Commonwealth of the State.

What is the wealth of West Virginia? How would you settle it? How does the wealth today, how does the revenue producing wealth to-day, compare with that of Virginia? It has been suggested here that when this debt was created there was no wealth in West Virginia. The Almighty had put the wealth there before man was, the gas and the oil and the lumber and the coal were there; that was the incentive to all these enterprises; that was the incentive to all the creation of this debt, and now to-day, when development has occurred, compare the revenues of Virginia with those of West Virginia. All that would have been the tax producing basis with which the Commonwealth of Virginia could have liquidated all this debt. That was what she had an eye to when the debt was created. "I am taking upon my shoulders an enormous debt now, but the time will come when we will develop these mines of hidden wealth, and from that will come a revenue by taxation that will liquidate the debt and remove the burden, and the welfare of the people of the Commonwealth of Virginia will be secured forever. It is proposed to ignore that now, and look at this thing as it stands to-day.

Ah, your Honors, how did it look when Congress was appealed to to create this State; how did it appear then? We have in the records here the arguments that were addressed by the senator from Virginia, senators representing Virginia, John S. Carlile and Waitman T. Willey; they were the senators in Congress when this State was created. John S. Carlile, who had contributed to the procreation of this State, stood by the bedside ready to destroy it upon its birth. He opposed it in the Senate. The Legislature requested him to resign, but Waitman T. Willey remained, and Waitman T. Willey, a Senator, urged the Senate, as a reason why this State should be created:

> "Here is an opportunity presented to the Senate to erect northwestern Virginia into a free State, a condition for which she was designed by the God of nature—the richest portion of this broad land in mineral resources—with inexhaustible marble quarries equal to those of Egypt and very similar; rich in inexhaustible fountains of salt and oil, and forests exceeding any of those that ever waved upon Mount Lebanon itself, that have remained from the foundation of the government of the State of Virginia, undeveloped, useless, valueless, simply because we have not been able to organize improvements within and under the control of the western section."

Again he says:

> "This new proposed State contains within its towering hills and mountains treasures richer perhaps than can be found within the limits of any other state within this Confederacy, and there they have lain ever since the establishment of this Government, undeveloped, unworked, valueless, and they must continue to remain so unless a different policy is pursued."

That was an argument presented to the Senate for the erection of this State, the enormous wealth that was there. That wealth had not been overlooked by Virginia. Since 1820 this debt had been gradually increasing by legislative enactment solely for the benefit of this defendant.

Let me make one suggestion to the Court. I do not know with what pride I can make it, but if anybody supposes that the creation of West Virginia was the offspring of what was called "loyalty," that it was an effort on the part of loyal men to get away from secession, if anybody imagines that, I pray you let me read you just a few words from this same Senator Willey. He says:

> "Mr. President, I desire to correct a misapprehension which I find is prevalent, not only throughout the country, but also here. It seems to be supposed that this movement for a new State has been conceived since the breaking out of the rebellion and was a consequence of it; that it grew out of the abhorrence with which loyal citizens of West Virginia regarded the traitorous proceedings of the conspirators east of the Alleghenies, and that the effort was prompted simply by the desire to dissolve the connection between the loyal and the disloyal sections of the State. Not so, sir. The question of dividing the State of Virginia, either by the Blue Ridge Mountains or by the Alleghanies, has been mooted for fifty years; it has frequently been agitated with such vehemence as to threaten the public peace."

Again, at a later date, he repeats it, and he says that representing the voice of Virginia he asked for freedom, he asked for severance from the eastern section of the State, "to which we have been in bondage for fifty or sixty years."

I bring this to the attention of the Court to remove an impression that may possibly exist and may insensibly control, even an enlightened judicial mind, that here was the result of a war, here was the result of men who were making a great sacrifice for conscience sake, and that burden must not be placed too heavily upon them. I want to call your attention to the historical fact, that these men were not moved, as the Senator says, by any considerations of secession or

non-secession, or loyalty or disloyalty, but they were seizing hold here of an occasion that was passing to realize hopes that had been cherished for sixty years; they were taking advantage of a condition of war, when the voices of the laws were silenced by the clangor of arms; they were taking advantage of that to gratify the expectations and desires and the efforts of half a century, and now, when they have done it, in view of all the legislation that has taken place, in view of the objects of that legislation, in view of the wealth that they have, in view of the fact that they themselves went away from us, seceded, as Attorney General Bates said, seceded, and thereby prevented the execution of these works of internal improvement, it does not do to come now and say that they shall not be called on to contribute because none of these works had as yet been extended into their territory. It does not do for West Virginia to come and say, now, that we must be content to take the difference between the taxes that she had paid forty years and moneys that have been expended in her limits during that period by legislative appropriation. If she could say that, she could say that her share was one mill on every thousand tons of coal carried through the State; she could have said that her share should be $500. Consent to such contract? Who are these people contracting? The State of Virginia and the State of West Virginia. What are they contracting about? They are contracting in order to see how little of a debt one part of them should pay, West Virginia. Who is interested? The bond holders and the creditors. Are they present consenting? No. The two debtors are together here entering into an agreement to defraud the creditors, impair the obligation of their contracts, their bonds, bonds that were issued upon an implied covenant that they should be repaid from the revenues of the State, and they come before this Court and present that contract, and they ask you to enforce it, a contract which, on its face, undisguisedly, if it had any validity or force, was designed to weaken, impair, destroy the obligation of the bonds which the Commonwealth of Virginia had issued.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Mr. Randolph Harrison.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA,

vs.

STATE OF WEST VIRGINIA.

ARGUMENT OF MR. RANDOLPH HARRISON
For the Plaintiff.

Mr. Harrison: If the Court please, the relief which the State of Virginia seeks in this proceeding is the equitable share of the debt of Virginia proper to be borne by West Virginia. West Virginia assumed an equitable proportion of this debt, but she has refused to recognize her obligation, and the object of this suit is to compel her to comply with that obligation. If an equitable result is attained, the method by which it is done would not be material. But as the method by which her proportion of this debt shall be ascertained may have a material bearing upon the result reached, it is important to determine the principles upon which the account between the two States shall be settled.

The Wheeling ordinance undertook to prescribe the method by which West Virginia's portion of this debt should be ascertained. If the Court should be of the opinion that the method prescribed by that ordinance is binding upon Virginia (as contended for by counsel for West Virginia) it will be important to construe its terms. If Virginia is not concluded by the plan of settlement prescribed by that instrument, the debt should be ratably apportioned according to the principles of public law and equity.

The partition of Virginia, whatever the facts may be as to how it was accomplished, has assumed the forms of consent.

Mr. Justice White: What do you mean by "has assumed the forms of consent?"

Mr. Harrison: I mean that the enactments of the so-called State of Virginia, under which her territory was divided and the State of West Virginia was created, have been recognized by all the departments of the government, as the work of Virginia. The Wheeling ordinance, which provided for the formation of the new State, was adopted on the 20th of August, 1861, by a body of men who *assumed* to represent Virginia, and who declared, in the preamble of that instrument, that it was "adopted by the people of Virginia in convention assembled." The same body of men masqueraded one day as a Virginia convention, bestowing her territory, and the next day as the representatives of the prospective State of West Virginia, receiving what they had bestowed upon themselves. In November, 1861, they framed a constitution for the new State, and substantially the same body, in May, 1862, *assuming* to act as the Legislature of Virginia, passed an Act giving Virginia's consent to the formation of the new State out of her territory, under the terms of the constitution which they had framed in the previous November. Thus these people successfully went through the *forms* of giving Virginia's consent to what was done. These forms have been recognized and acted upon by all the departments of the government as effective and binding upon Virginia, and this Court, in over-ruling the demurrer to the bill in this case, seemed to indicate an opinion that West Virginia's proportion of the debt of Virginia must be ascertained by the pursuit of the method prescribed by the Wheeling ordinance. It is due to candor to say that the decision of the Court upon the demurrer seemed to me to convey this intimation. For this reason I wish to consider the terms of that ordinance. Before passing to that subject, however, I submit that if Virginia is not shut up to the plan of settlement prescribed by the Wheeling ordinance, the portion of the debt to be borne by West Virginia should be ascertained according to the principles of equity and justice—that is to say, the debt should be ratably apportioned between the two States. Virginia is interested only in having an equitable proportion of this debt assigned to West Virginia. Any method prescribed, that does not reach that result, to that extent relieves West Virginia of the obligation which she assumed. The Wheeling ordinance is not only an illogical, but it seems on its face to be an inequitable method of apportioning the debt. The

method prescribed has no proper relation to the debt; the account under it can be stated without regard to it, and the amount of the debt would have no influence upon the result. The ordinance contemplates a balancing of accounts between two sections of the old State by charging West Virginia with a just proportion of the ordinary expenses of the State government, and with the expenditures made within the limits of her territory, and deducting therefrom the aggregate amount of taxes paid into the treasury of Virginia during a given period, the balance so ascertained to constitute West Virginia's share of the debt.

Mr. Justice Harlan: Are you alluding now to Section nine?

Mr. Harrison: Yes sir, Section nine of the Wheeling ordinance, is the only section in that instrument which relates to the debt. That section is as follows:

> "Section 9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interests in lands within the proposed State derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

On its face this provision seems not only illogical but inequitable —yet, properly construed and applied it may lead to an equitable result. I am not prepared in advance to say that such would not be the case. Examining this provision in detail, we find its primary stipulation to be:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861."

That defines the obligation which West Virginia was to assume, and is the avowed purpose of the provision.

Then it is provided that this "just proportion" shall be ascertained (1) "by charging to it all the State expenditures within the limits thereof."

Mr. Justice Harlan: "Thereof;" what does that mean?

Mr. Harrison: "Thereof" means the new State—within the

limits of the new State. A question which arises on the threshold is what disbursements shall be included by the phrase "State expenditures." The Court, in advance, might not be able to make any declaration on that subject. Proceeding, the ordinance prescribed (2) "and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted."

What expenses shall be deemed "ordinary" as distinguished from "extraordinary" expenses of the State government? It will not only be necessary to determine what expenses will be classified as ordinary, as distinguished from extraordinary expenses, but it will also be necessary to determine what proportion of the ordinary expenses shall be considered a "just proportion" for West Virginia to bear. On what basis can this "just proportion" be ascertained? Will it be on the basis of the relative population of the two sections, and if so, of the population exclusive of slaves; or, on the relative amount of property in each section; or on the relative cost of government in each section? These are important questions, the decision of which will have a material bearing on the final result. (3) Having ascertained these two items of charge, the ordinance provides that there shall be deducted therefrom the "moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period;" the balance so found to constitute West Virginia's proportion of the debt as of January 1st, 1861. (4) Then again, it will be necessary to determine the time during which any part of the debt was contracted, because the statement of the account is confined to the period "since any part of said debt was contracted." There will be, I presume, no difficulty on this point, as I think it is conceded that the period began about the year 1820.

A further question to be determined in construing the Wheeling ordinance, is whether the balance ascertained and adjudged to be West Virginia's proportion of the debt shall bear interest, and if so, from what period, and during what time.

Another question is whether the property interests and credits, transferred to West Virginia under the Act of the Restored Government of Virginia, passed February 3rd, 1863, and which was not covered by "State expenditures," as specified in the Wheeling ordinance, shall be accounted for in the settlement to be had with Virginia.

If the Wheeling ordinance is construed according to the contention of the distinguished gentlemen who appear for West Vir-

ginia, it would relieve that State of all liability. While they admit that West Virginia did assume a just proportion of the debt of Virginia, it is claimed in the pleadings and in the argument, that she will be relieved of that liability because of the method prescribed of ascertaining it. In the Answer of West Virginia it is claimed that if the debt is apportioned in pursuance of the plan prescribed by the Wheeling ordinance, it will result not only in absolving her from all liability, but will bring Virginia in debt to her in the sum of $560,000; and complaint is made in the answer that Virginia has refused to accept this settlement. West Virginia's view of her liability has also been shown in numerous Acts of her Legislature, which she has filed as exhibits in this case, and in which she solemnly denied any liability to Virginia. Beginning with the year 1895, and continuously since, at every session of her Legislature, resolutions have been adopted ignoring and repudiating her liability for any part of the debt of Virginia. It will be sufficient to quote one or two of these resolutions as specimens:

> "Resolved by the Legislature of West Virginia:
> That it is the sense of this Legislature that West Virginia does not owe one cent of the so-called 'Virginia debt,' and that this Legislature is opposed to any negotiations on that subject." Adopted January 21st, 1897.

> "Resolved by the Legislature of West Virginia:
> That it is the sense of this Legislature that the State of West Virginia does not owe any part of the so-called Virginia debt, and that this Legislature is opposed to any negotiations whatsoever on the subject. And *further*, that this Legislature declines and most emphatically refuses to take any action in regard to what is known as the old Virginia debt, or Virginia Deferred Certificates, either by the consideration of a proposition of adjustment for settlement, or by authorizing the appointment of any committee, or committees, having for their object or purpose the consideration of same; and that it is the sense of this Legislature that the State of West Virginia is in no way or manner obligated, either morally or legally, for the payment of any portion of the said debt, or certificates. Nor do we owe any other State, or territory in this Union." Adopted January 21st, 1903.

In the oral argument of this case on demurrer one of the members of the Court addressed the following questions to Professor Hogg, who appeared for West Virginia:

Mr. Justice Harlan: Does West Virginia admit that she owes anything?

Mr. Hogg: West Virginia has expressed herself in her Legislature as, on the basis adopted, owing nothing.

The "basis adopted" referred to here, is the method prescribed by the Wheeling ordinance.

Mr. Justice Harlan: Does she admit that she owes anything on any account?

Mr. Hogg: West Virginia disclaims any liability to Virginia on any account. Printed record pp. 281-2.

Notwithstanding, therefore, that West Virginia undertook to bear a just proportion of the debt of Virginia, her position before this Court is that the method prescribed for its ascertainment will not only relieve her of that obligation, but will bring Virginia in debt to her. If that is true, then the method prescribed was a sham designed to conceal her real intentions, and to perpetrate a gross fraud upon Virginia, her helpless victim. If such is the effect of the Wheeling ordinance, it is competent for this Court to strip from her the mask that has concealed her real intentions, and substitute for the method prescribed, a plan of settlement that will make her action square with good faith and the dictates of common honesty.

(At two o'clock P. M., a recess until 2:30 P. M.)

AFTER RECESS, 2:30 P. M.

Mr. Chief Justice Fuller: Judge Day is unfortunately absent today, and I wish to vouch him into this case.

Mr. Spooner: We are perfectly willing, if your Honors please.

Mr. Harrison: If your Honors please, I pointed out just before the recess that the construction of the Wheeling ordinance contended for by West Virginia will not only relieve her of all liability, but will make Virginia her debtor. If that be true, then such a method of stating the account cannot receive the sanction of a court of conscience. The contention of Virginia is that if the Wheeling ordinance constitutes a compact, or agreement prescribing the method of escertaining West Virginia's portion of the debt, it should be so construed as to lead to an equitable result, and not to an unconscionable result, as is contended for by West Virginia. To that end one of the propositions for which we contend is that whatever balance may be ascertained under that ordinance to be due by West Virginia, shall

bear interest. West Virginia contends that she is not liable for interest.

Mr. Justice White: Before you come to the question of interest you want to come to the question of principal, and you say that under the agreement as written you would owe?

Mr. Harrison: I say that West Virginia contends that under the agreement we would owe.

Mr. Justice White: Before you come to the question of interest, what do you say is your construction of the Wheeling ordinance? The interest is very immaterial unless you settle how the principal is to be arrived at.

Mr. Harrison: The principal is to be gotten at in accordance with the method prescribed by the Wheeling ordinance, if that is taken as the basis of settlement (1) by charging the new State with all State expenditures within her limits; and (2) with a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and then from the aggregate of those two items is to be deducted the moneys paid into the treasury of Virginia from the counties included within the new State during said period, the result to constitute the principal to be assumed by West Virginia. The method prescribed is arbitrary and a departure from the settled rules that govern in the apportionment of a debt in such a case, and a statement of the account would involve an exhaustive examination of records, documents and vouchers extending back over a period of eighty years. State expenditures would doubtless include public expenditures for internal improvements, but whatever may be included within the phrase "State expenditures" must be charged against West Virginia. She is also to be charged with a just proportion of the ordinary expenses of the State government during the period within which the debt was contracted, down to January 1st, 1861. It is material to determine what constitute ordinary expenses, as distinguished from extraordinary expenses, and then it is necessary to determine what would be a just proportion for West Virginia to bear. The ordinance does not prescribe the basis of ascertaining this just proportion. Counsel for West Virginia ask that it may be ascertained on the basis of population. If population is to be taken as the basis, I submit that slaves should be excluded.

Mr. Justice Harlan: Why not on the basis of voters, three-fifths?

Mr. Harrison: That might be proper; that basis prevailed to some extent in Virginia. But slaves constituted no part of the body politic; they did not vote, or participate in creating the debt, or in expending it; they contributed nothing in the way of taxes, but were themselves, property subject to taxation. If, therefore, population should be taken as the criterion for determining West Virginia's just proportion of the ordinary expenses of the State government, it should be exclusive of slaves. Her just proportion might be ascertained on the basis of property, or on the basis of the cost of government in each section, but I submit that if the view advanced by the other side is adopted, and population be taken as the basis, that it be population exclusive of slaves. Having ascertained the amount in pursuance of the method prescribed, which shall constitute West Virginia's share of the debt, I submit that it should bear interest as of January 1st, 1861, the date arbitrarily fixed by West Virginia. It is contended by counsel for West Virginia that she would not be liable for interest. If not, then the result might be so inadequate as to shock the moral sense and come near leading to the result for which she contends; but if she is made to pay interest on whatever balance may be so ascertainied, the result would be very different. I think the Wheeling ordinance would put upon West Virginia liability for interest. If it is a contract, it is a Virginia contract. It was made by a body of men, who, when the admission of West Virginia was under consideration, were characterized on the floor of Congress as a mass meeting, or a mob. But nevertheless they acted in the name of Virginia and made the contract in her name. I recognize the course of the decisions of this Court, which hold that a sovereign is not liable for interest, except it be a matter of contract, or of statutory declaration, as instanced in the case of the United States *vs.* North Carolina; but that decision was largely rested upon the decisions of the Supreme Court of North Caroline, in which State the common law rule as to interest prevails, the rule at common law being that interest is allowed as damages for the failure to comply with a contract. This rule does not prevail in Virginia. In Virginia interest is allowed as an essential ingredient of the contract, and you can only be relieved of it by an express stipulation to that effect. In Jones *vs.* Williams, decided in 1799, and reported in 2nd Call., Edmund Pendleton, the President of the Virginia Court of Appeals, and one of the great judges of this country, said

> "Interest is allowed because it is natural justice, that he who has the use of another's money should pay interest for it."

In Virginia, therefore, interest is allowed, not as damages for the failure to comply with a contract, but on the ground of natural justice. Following that decision Judge Coalter, in Hatcher *vs.* Lewis, reported in 4th Randolph, said:

> "The interest follows the principal as the shadow does the substance."

That rule of equity has been embodied for more than one hundred years in the jurisprudence of Virginia, and the same rule exists in West Virginia, not only because in her constitution she adopted the body of the laws of Virginia and made them a part of her jurisprudence, but because her decisions follow the decisions of Virginia and rest the right to interest on the ground of natural justice. The authorities are fully cited in the brief of the attorney-general of Virginia. The rule established in Virginia, not by statute but by the decisions of her court, is the law which governs a Virginia contract, and becomes a part of the contract as much so as if it had been written into it, and it would follow that when West Virginia's just proportion of the public debt of Virginia has been ascertained, as of January 1st, 1861, interest inheres in it by virtue of the law governing the contract. There is no decision that holds that a State is not as much bound as her citizens by a rule which is founded in Natural justice. But we are not left to rest our right to interest on the equitable rule which prevails in the State of Virginia. The ordinance provides:

> "The new State shall take upon itself a just proportion of the public debt of Virginia prior to the 1st. day of January, 1861."

Does not that impose an obligation to assume the debt with its burden? The public debt referred to was an interest-bearing debt. It was a debt which West Virginia had helped to create, and her citizens were as fully cognizant of its terms as anybody else in the State of Virginia. Will she now be permitted to say that she did not intend to assume liability for any part of the interest arising under the obligations which represented that debt? If so, she would not assume a just proportion of it. The interest is an inherent part of the debt; it arises under the same contract; it is an essential part of the debt; it cannot be separated from it. Who would pay the interest on the part assumed by West Virginia if she did not pay it?

Her proposition is that she is only obligated to take upon herself a part of the principal of the debt, discharged of any responsibility to pay the interest called for by the obligations which represent the debt. Then she would not do what she solemnly contracted to do. She contends that her liability arises under a contract; if so, I can say in the language of Chief Justice Marshall: "It is a contract clothed in forms of unusual solemnity." Not only does her liability for interest arise under the so-called organic law known as the Wheeling ordinance, but it also arises under her constitution framed in November, 1861, which contains the following provision:

> "An equitable portion of the public debt of the Commonwealth of Virginia, prior to the 1st. day of January, 1861, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and reduce the principal within thirty-four years."

In this provision she not only assumes an equitable proportion of the debt, but stipulates that she would pay the accruing interest on such proportion, and the principal within thirty-four years. If she is bound for interest, as I respectfully submit must be true, how long shall she be responsible for it—during the life of the bonds, or until payment? Her constitution imposed upon her the duty to speedily provide for the ascertainment and payment of her share of the debt. She had it within her power to abridge the period within which she would be liable for interest.

Mr. Justice Holmes: I do not think that the constitution of West Virginia was addressed to Virginia; it was addressed to its own citizens, was it not?

Mr. Harrison: Yes Sir, but the constitution—

Mr. Justice Holmes: Of course it was approved by Congress and all that?

Mr. Harrison: Yes, but Virginia consented to the formation of the new State on the terms stated in the constitution. According to the argument of our friends on the other side the constitution and the Wheeling ordinance, that ante-dated it by three months, together with the Act of Virginia giving her consent to the formation of the new State, and the Act of Congress admitting the State, constitute a contract. Part of that contract was the obligation to pay interest. If it be a contract it must be binding in all of its parts, as is contended for by the gentleman on the other side, except that in discussing in their brief the question of interest, they seek to escape

liability for it on the theory that interest was "outside of the contract." In other words, the compact on which they rely is valid for some purposes, but not effective as to other purposes. It would be only fair and just to require West Virginia to pay interest from the 1st. day of January, 1861, upon the amount found to constitute her portion of the debt, until the same has been paid. She cannot be permitted to solemnly assume an obligation and then repudiate it, or repudiate the larger part of it by neglecting and refusing to perform the duty imposed upon her, namely, to ascertain it and provide for its payment. It would be vastly to West Virginia's interest to postpone the ascertainment of her proportion of the debt, and postpone the payment of it indefinitely, if thereby she is to be relieved of the obligation to pay interest. Her constitution imposed upon her the duty to ascertain her part of the debt as speedily as possible, and to discharge it, principal and interest, within thirty-four years. She has chosen to neglect, and refused to do so. As I said a while ago, if she wanted to abridge the period within which interest was to run, she had it in her power to do so, but she chose not to do it. Now she asks this Court that she may be relieved from responsibility for any part of the interest, and thereby relieved, perhaps, of the larger part of the balance that would be found against her if this account is stated under the Wheeling ordinance.

This ordinance, if the plan of settlement prescribed by it is adopted, should be liberally construed in favor of Virginia, and strictly against West Virginia. Virginia had no part in framing it; it was framed by West Virginia for West Virginia, and if Virginia is to be bound by the plan of settlement prescribed by it, it is no hardship upon West Virginia to hold her to a rigid accountability under it, in order that the result reached may square with her obligation to pay a just proportion of Virginia's debt.

West Virginia would never have been admitted into the Union but for her obligation to pay a just proportion of this debt. When the bill for the admission of that State was pending in the Senate of the United States, there was strong opposition to it. Senator Powell of Kentucky said that if the Cities of New York and Brooklyn, and the Counties in which they are located, were to get up a bogus legislature and call themselves the state of New York, and ask to be admitted and cut off from the rest of the State, he would just as soon vote for their admission as to vote to admit West Virginia. Mr. Crittendon of Kentucky asked if they could lose sight of the fact that the parties applying for admission were the same parties that con-

sented to the admission. The bill passed through Congress on the ground stated by Mr. Stevens of Pennsylvania. He said he would not stultify himself by supposing that they had any warrant in the constitution for the proceeding, but that he could vote for the bill without any compunctions of conscience as a war measure and in aid of the administration's policy in respect to the border States. But even in spite of the pressure of the times, the bill would not have passed without West Virginia's assumption in her constitution of a just proportion of Virginia's debt. It only received a majority of six votes in the Senate, and voting in the negative were Senators Sumner and Wilson of Massachusetts, and Chandler and Howard of Michigan; while in the House nearly the entire Massachusetts delegation, and Mr. Conkling of New York and Mr. Conway of Kansas were recorded in the negative. I state on the authority of Senator Willey, then representing the so-called State of Virginia in the Senate of the United States, and of Senator Sherman, that the bill admitting West Virginia would never have passed but for her constitutional assumption of a just proportion of the debt of Virginia. I ask leave to read an extract from a letter written by Senator Willey to Senator Sherman some years after, and used by the latter in debate on the floor of the Senate when that subject was under discussion. The extract is as follows:

> "I have a pretty distinct recollection that while the application for admission was pending before the United States Senate, you suggested to me this very matter, and that when I pointed out to you the clause in the constitution which I have above quoted, you expressed your satisfaction and stated to me that it removed one of the difficulties which had been embarrassing you; and I say to you now, what I have said to the people of West Virginia, that but for that clause in her constitution, the State would never have been admitted. I say further that in my opinion no honest man, or honest party, in West Virginia or out of it, will deny the obligation of West Virginia to pay an equitable part of the public debt of Virginia."

After quoting this extract, and after reading the eighth clause of West Virginia's constitution, Senator Sherman said:

> "But for this stipulation in the constitution of West Virginia, which was submitted to the Senate at the time of the passage of the bill to admit that State, it never would have been a State of this Union." Congressional Record, Vol. 12, 47th Congress, p. 450.

I am justified, therefore, in stating as an historical fact that the

bill admitting West Virginia into the Union would never have passed through Congress but for her constitutional obligation to assume a proportion of the public debt of Virginia, and if Virginia is to be held to an accounting under the terms of the Wheeling ordinance, it is at least fair and reasonable that the mind shall incline to liberality in construing its provisions, so that the result may best accord with justice and common right. I ask, therefore, that if the Court feels constrained to require this account to be stated under and in pursuance of the terms of the Wheeling ordinance, that the balance found against West Virginia as of the 1st. of January, 1861, a date which she arbitrarily fixed, may bear interest from that period until settlement is made.

Another question involved is whether West Virginia is liable to account for the property which was transferred to her by the Act of the Restored Government of Virginia of February 3rd, 1863. That Act provided that "all property, real, personal and mixed, owned by, or appertaining to this State, and being within the boundaries of the proposed State of West Virginia when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof, situated within the said boundaries, and now vested in this State, etc., and shall include the interest of this State in any parent bank, or branch doing business within the said boundaries," etc., enumerating at great length a great body of property. In the Fifth Section of that Act it was provided that "if the appropriations and transfers of property, stocks and credits, provided for by this Act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this State."

There was no settlement to be had with Virginia except the settlement of this debt question. It is contended, however, that this Act ought not to put any liability on West Virginia because it was passed after Virginia had given her consent to the formation of the new State, but this Act was an essential part of the transactions which resulted in the creation of the new State, and its terms were expressly assented to and accepted by West Virginia in an Act passed by her Legislature in 1875, which expressly recognized the foregoing Act by its title and date, and required the Auditor to ascertain and state the property which had been acquired under and in pursuance of that

Act. This Act is quoted and referred to in the brief of the Attorney-General of Virginia.

In the brief of counsel for West Virginia one reason assigned for exempting her from liability to account for the property which passed under the Act of February 3rd, 1863, is that those grants were made "mainly to afford a ground for the claim that the property which had passed by the separation, should be accounted for in the settlement hereafter to be made." Surely it can hardly be said that the members who composed that Legislature, who were prospective West Virginians legislating in the name of Virginia for their own benefit, would be interested in passing an Act which would create a claim against themselves. Why impute to that body a sinister purpose in passing that Act? Might they not be given credit for a good motive? Does West Virginia deny them credit for a good motive lest it might subject her to some liability under that Act? West Virginia seems to feel no pride of ancestry when it conflicts with her pecuniary interest. Escape from pecuniary liability is dearly purchased at the price of violated faith. The Answer of West Virginia expressly admits liability under the Act of February 3rd, 1863, notwithstanding the ingenuous arguments of counsel to escape from it. On page 8 of the Answer it is said:

> "Respondent denies that she is chargeable for, or on account of the transfer of said property, except the stocks of companies, or corporations, and the credits," etc.;

and then the Answer takes the ground that this property, credits, etc., are of little value and would not count for much in the final result. I submit that in an accounting under the Wheeling ordinance the value of this property should be ascertained and carried into the account as part of West Virginia's just proportion of the public debt of Virginia.

The dismemberment of Virginia cannot be justified on the ground that she was more deserving of punishment than her sister States of the Confederacy. There was no ground for distressing her by penal enactments that would not apply equally to her sister States who were associated with her. Indeed her people were devoted to the Union, and her voice was for peace to the last; and yet she has been singled out of all the rest to have administered to her, in addition to what the others received, a punishment that struck down at once her prosperity and her pride of empire. She has been robbed of the power to pay her debt to innocent third parties scattered all over the North and abroad, who purchased her obligations when her credit

stood higher than any other state in this Union with the possible exception of her sister Commonwealth of Massachusetts. They were involved in the common ruin which was brought upon Virginia. She has been despoiled of one-third of her territory, by far the richest part of it, teeming with material resources that surpassed the wealth of the Incas—and all of this without her consent. West Virginia has profited by this. Is it any hardship upon West Virginia to require her now to do what she promised to do? She solemnly took upon herself the obligation when she inaugurated the proceedings that resulted in the dismemberment of Virginia and the distress brought upon her and her innocent creditors, that she would do a just part by them. Now she should be required to do it. And yet, gentlemen appeal to this Court to aid West Virginia by adopting a plan for the ascertainment of her liability, which, instead of putting upon her the burden which she assumed, would relieve her of it. I ask that the plan which shall be prescribed by this Court for the ascertainment of the proportion of Virginia's debt to be borne by West Virginia, may be a plan that will reach the result which she promised should be attained, namely, the assignment to her of a just and equitable proportion of that debt.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Hon. John C. Spooner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant.*
v.
WEST VIRGINIA, *Defendant.*

IN EQUITY.

Original No. 4.

ARGUMENT OF HON. JOHN C. SPOONER, FOR THE DEFENDANT.

Mr. Spooner: May it please your Honors, the argument on behalf of the Commonwealth of Virginia has taken a very wide range. Many things have been stated by counsel as to purposes or attitudes of men nearly fifty years ago, which I have no means of knowing. I am somewhat surprised by the line of argument which has been pursued here. I have no harsh words to say of Virginia, nor do I think there is any justification in history for harsh words of West Virginia or the people who participated in her erection as a State, The act of the Wheeling convention and the acts which succeeded that convention, and the contract proposed by that convention and afterwards accepted by the State of West Virginia, are to be considered with reference, of course, to the situation at the time the transaction occurred.

At the Wheeling convention there were only two counties of Virginia represented, as contradistinguished from what afterwards be-

came West Virginia; there were two. The others were under a jurisdiction, not of the United States, but hostile to the United States, the officers of Virginia, and this Court has long ago drawn a well defined distinction between the state and the government of a state, so that it is not accurate to speak of the restored State of Virginia, as is sometimes done here. State is indestructible. There was no government of Virginia under the Constitution of the United States when the Wheeling Convention assembled. The ordinance of secession had been adopted in convention; it had not yet been voted upon by the people of Virginia, as I recollect it, at the date of the Wheeling Convention. The Capitol of the Confederacy has been moved from Alabama, Montgomery, as I recollect it, to Richmond, and there was no government of Virginia as a State in the Union. It is historically true, and will not be disputed, that the people of West Virginia were loyal to the Constitution of the United State and to the Union. They were not, as I have understood it, to any great extent slave owners or in favor of that institution. Of course, it was said on the argument of the demurrer that the Wheeling Convention was a revolutionary convention. True, but there was a State and the government of that State had abdicated, and were the people powerless to reofficer and rehabilitate that State? *Arma inter leges silent,* and the time comes when acts in such circumstances retain in them a validity which is as concrete as is attributable to any. The people of that part of Virginia had a right, in the situation, to organize en masse to the end that the government of Virginia under the Constitution might be reorganized and rehabilitated. That is not all, I suppose, which influenced those men, and I dwell upon it for a moment only. It is to be supposed that at that time grave doubt existed, which legitimately might, in the minds of the West Virginia people—I call them West Virginia people, but there was no West Virginia,—but in the minds of the Virginians who dwelt in what now is West Virginia, for fear the effort to take the state of Virginia and other states out of the Union might prove successful, and they were quite to be pardoned for not being willing if that misfortune should have occurred, that they should be taken under another government.

Now, Mr. Justice Harlan suggested, on the argument of the demurrer, in answer to the suggestion and the statement that it was a revolutionary convention, that there was a great deal of revolution in the air at that time, and that is true. This argument arose upon the decree tendered by the Commonwealth of Virginia which, I am

frank to say—I was not connected with the case at that time—seemed to me, from what I have known of it, to be based upon the entire misconception of the fundamental principle which should govern the case, and upon the bill, when I came to look it over, I had not supposed the validity of the Wheeling Ordinance was attacked. This bill, if the court please, asserted it, is based upon it largely, as to the property embraced by the acts of February 3 and 4, 1863. It was rested upon legislative recognition that implied obligation by the utilization of the property covered by it. But the bill set out two main grounds upon which the liability of West Virginia to account was rested. The first one was this, first the area of the territory now known as the state of West Virginia formed about one-third of the territory of the commonwealth of Virginia when this public debt was created, and its population included about one-third of the original state at the time of its dismemberment, and the state of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory. That is the international law basis, as our friends understand it, and as it may be.

> "*Second.* The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861."

Mr. Justice Holmes: What is that you are reading?

Mr. Spooner: From the bill, the second ground upon which the liability of West Virginia is rested in this bill. This volume here contains the bill and exhibits, the demurrer and the report of the arguments on the demurrer, and the briefs, and the opinion delivered by Mr. Chief Justice Fuller,

> "in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union."

The ordinance is quoted also in the bill in full, and declared upon as a basis of liability as emphatically as ever any compact or contract was declared upon in a bill in equity or an action at law. There is

not a word in the bill, from beginning to end, impeaching the validity or the binding force and effect of the Wheeling ordinance.

The two grounds of relief which I have read to Your Honors are incompatible. It would seem to be thought not, but they are absolutely antagonistic, the liability on the basis of international law and the liability on the basis of the ordinance. On the argument on the demurrer attention was called to the rule of international law, and this occurred. I am reading from page 9 of my brief:

> "One of the learned counsel for the complainant read, on the argument, from the opinion of Mr. Justice Field, who wrote for the court in *Hartman vs. Greenhow* (102 U. S., 672) this sentence:
>
> 'Where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them.'
>
> counsel added, 'That is in *Hartman vs. Greenhow.*'
>
> Justice Harlan: 'Please read that again.'
>
> Mr. Conrad: 'Where a state is divided into two or more states in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them.'
>
> Counsel added: 'That is an opinion of this court that has received no dissent.'"

After a word of tribute to Mr. Justice Field, to which no one in this country would dissent, he said:

> "But aside from this the quotation read from Mr. Justice Field did not in the slightest degree correctly put before the Court the view which he must be deemed to have entertained. We supply the deficiency, quoting all that he said:
>
> 'Writers on public law speak of the principle as well established that, where a State is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On this subject Kent says: "If a State should be divided in respect of territory, its rights, and obligations are not impaired; *and, if they have not been apportioned by special agreement,* their rights are to be enjoyed and their obligations fulfilled by all the parties in common." (1 Com., 26); and Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: "In that case, the obligations which have accrued to the whole before the division are, *unless they have been the subject of a special agreement,* ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts, and the practice of nations." (International Law, c. 3, Sect. 27).'

Mr. Justice Field continues:

'In *conformity* with the doctrine thus stated by *Halleck*, both States—Virginia and West Virginia— have recognized in their constitution their respective liability for an equitable proportion of the old debt of the state, and have provided that measures should be taken for its settlement.'"

In *Antoni vs. Greenhow* (107 U. S., 769), Mr. Justice Field said:

"It is a well-settled doctrine of public law that, upon the division of a state into two or more states, the debt shall be ratably apportioned among them (*See authorities upon this subject in Hartman v. Greenhow* (102 U. S., 672, 677)."

Phillimore, after quoting both Grotius and Kent, says:

"If a nation be divdied into various distinct societies, the obligations which had accrued to the whole before the division are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts;"

and Sir Sherston Baker in "First Steps of International Law," page 36, says the same thing.

When this decree proposed by the commonwealth of Virginia was presented, it was entirely silent upon the ordinance. As to the first provision we do not care as to the amount of public debt of Virginia as it existed on the first day of January, 1861. Second "what amount or proportion of said indebtedness and of the interest accruing thereon should, in equity, be apportioned to and be paid by the State of West Virginia," a provision entirely ignoring the ordinance upon which the bill, without challenging its validity, had based the right of recovery, incompatible with the international law basis, if the ordinance constitutes a binding agreement or compact between Virginia and West Virginia.

On the other hand, the decree proposed by the Commonwealth of West Virginia provided for an accounting on the lines of the ordinance. Now, your Honors, there was nothing said in that brief that was intended to suggest, as my friend, the Attorney General—if I may refer to him as the Attorney General—has said, that this Court was controlled by any rules in the exercise of its original jurisdiction. It is, of course, indisputable that the Court makes such rules for the conduct of a cause as it deems wise and in the interest of justice and orderly procedure, but we thought that two lines of investigation proceeding, not only upon absolutely different, but absolutely antagonistic principles, one under the Ordinance involving an investigation of the items indicated in it for forty years, and another, at the same time, proceeding upon a basis which was not defined at

all, but proposing to cast the whole case at large into the hands of a master with no indication by the court as to the principle which should govern the investigation, which would be a burden of labor, take indefinite time, cost a great deal of money, and that neither investigation would help the court in determining which of the two should be adopted, therefore we felt that the court, before referring this cause to a master to state an account, should determine, if it might do so upon the record, if there is no evidence to enable the court to determine whether the Ordinance is binding upon the two States. There is no dispute as to the manner in which this compact came about, and if it is binding, that obviously is the principle which should govern, so far as that is concerned, the accounting.

This case has been full of astonishments. There is handed to us today a proposed decree on behalf of the Commonwealth of Virginia, to a portion of which only we would care to protest. The decree states:

> "What is the just amount and proportion of said debt, including the interest thereon, which should now be apportioned to, and paid by, the State of West Virginia? Such amount and proportion of said debt the master will ascertain by charging against West Virginia:
>
> "(1). All expenditures made by the State of Virginia within the territory which now constitutes the State of West Virginia since any part of said debt was contracted.
>
> "(2) Such proportion of the ordinary expenses of the government of Virginia since any part of said debt was contracted as was fairly assignable to the counties which were erected into the State of West Virginia."

That is not in the language of the Ordinance, but I do think that the difference might not be very substantial, except that the one would be illuminating to a master, but the other has words which might confuse him. So that this proposition here tendered is for an accounting on the basis of the Ordinance.

Mr. Justice White: What is that paper you are reading from?

Mr. Spooner: I am reading from the amendment to the decree proposed by the Commonwealth of Virginia.

Mr. Justice McKenna: Is the only objection you have to it the use of words which you say would be confusing?

Mr. Spooner: No sir, that is not the only objection we have to it.

Mr. Justice White: Is that all of it you are reading?

Mr. Spooner: No, I have read the two items that relate to the Ordinance. It continues:

"In ascertaining this, the master will take as the basis or criterion upon which the apportionment of said expenses shall be made the average total population of Virginia, excluding slaves, as nearly as the same can be determined from the United States Census for each of the decades in which such expenses were incurred and paid."

I do not know that we should object to that. If population is to be made the basis of accounting, extending through forty years, it ought to be averaged, in justice. This is substantially as we proposed, with the amendment as to slaves, and it should be averaged on the basis of several ten year federal censuses, including slaves as part of the population.

"From the aggregate of the amounts thus ascertained, the master will deduct all moneys paid into the treasury of said Commonwealth from the counties included within the State of West Virginia during said period."

There is the last clause of the Ordinance again, so that we may be excused if, remembering the allegations of the bill, remembering the very explicit and strong statement by the Attorney General of Virginia, who was not only counsel for Virginia but the law officer of the State, in the argument of the demurrer, in which he asserted a position as to the Ordinance which I do not think differs from his position now except in one respect. Your Honors will find, on page 324 of the record, in the argument of Mr. Anderson, the following:

"MR. ANDERSON: In the 11th Wallace case it was established that the Wheeling government was the government of Virginia, and the effect of that decision was to uphold the validity of what is known as the Wheeling ordinance.

"Now instead of letting these questions be settled upon the principle of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment. We have to concede that we cannot go behind this, that we must accept it.

"Section 9 of the ordinance, giving the consent of Virginia to the formation of the new State, reads as follows:

"MR. JUSTICE HARLAN: What are you reading?

"MR. ANDERSON: From the Wheeling Ordinance quoted at page 3 of the brief of the counsel for the plaintiff. Section 9 of the ordinance reads as follows:

"'9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Com-

monwealth from the counties included within the said new State during said period.'"

"That is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of this new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards, in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitutes a primary obligation and lies at the very foundation of the right of West Virginia to be a State.

We may be pardoned, I think, a little surprise that the validity of the Ordinance should be so vehemently attacked here as has been done today.

Mr. Justice Harlan: When you refer to the consent of the Legislature of Virginia, do you allude to the act of May, 1862?

Mr. Spooner: There was a later act, after the adoption of the amendment which was required by the Congress, an amendment to the constitution.

Mr. Carlile: December 6, 1862.

Mr. Spooner: But this, to which the Attorney referred in the brief—we had not then discovered this other act—was the act of the Legislature of Virginia of May 13, 1862, upon which Congress acted in admitting West Virginia into the Union.

Mr. Justice White: What was that act? What page is it?

Mr. Justice Harlan: Page 438.

Mr. Spooner: I have it here:

"'That the consent of the legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brooke and Ohio (and many other counties), according to the boundaries and under the provisions set forth in the constitution of the said State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861.'"

Mr. Justice Harlan: That does not refer, I believe, to the Ordinance, does it?

Mr. Spooner: No sir.

"'Be it further enacted That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with the certified original of the said Constitution and schedules, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union.'"

It is true, and stated in this connection, that the convention which framed the constitution—we have the proceedings here, they are very dignified—repudiated the Ordinance of the session. They declared the necessity and the right that their State should have a government, and they announced their purposes in the movement and set forth at length the Wheeling Ordinance and appointed a committee to communicate to the Congress to urge the Congress to admit the State into the Union.

Mr. Justice Harlan: This was the convention of November, 1861?

Mr. Spooner: Yes sir, the convention which framed the constitution.

Mr. Justice Harlan: That is the constitution that contained those words "equitable proportion of the public debt?"

Mr. Spooner: Yes, your Honor, and the record of Congress shows that the Ordinance and the constitution, of course, and the proceedings of the convention which rehabilitated Virginia were sent to the Congress, were presented in the Senate and referred to the Committee on Territories of which Mr. Wade was the chairman.

Mr. Justice White: And yet, it being before Congress, as far as the obligation to pay a just proportion of the debt was concerned, the method was not reported by Congress.

Mr. Spooner: I do not know that it was. I do not remember any discussion on the subject except that Mr. Crittenden of Kentucky, as I recollect it, inquired whether provision had been made for the assumption of any part of the debt, and was informed that it had not, that it was in the constitution, and my associate called my attention to this document, which we deemed it would be proper to bring to the attention of the court, Miscellaneous Document No. 99, Senate, which embraces all the proceedings of the Wheeling meeting.

Mr. Justice Moody: The Wheeling Ordinance was not treated by Congress as the consent required by the constitution in the formation of a State.

Mr. Spooner: No, the Wheeling Ordinance was an enabling act, so far as it could be made an enabling act; it was a proposition, which this Court held in the case of Virginia *vs.* West Virginia, made by the convention to the people of West Virginia. It provided for the calling of a constitutional convention; it provided for the erection of the State out of the boundaries of the State of Virginia, designating the counties. It contained this provision, that the new State "shall take upon itself a just proportion of the public debt of the Commonwealth prior to January 1, 1861," to be ascertained in the way provided. Delegates were elected and the convention was held, and the constitution was adopted and submitted to a vote of the people, and adopted by the people. The legislature of the rehabilitated State of Virginia enacted, then, a law consenting to the erection of the new State and its admission into the Union under her constitution.

Mr. Justice White: Under *the* Constitution.

Mr. Spooner: Under the Constitution.

Mr. Justice White: Of course, I do not know what you are proposing to discuss now; you have directed attention to a very serious matter, the averments of these bills admitting the Wheeling Ordinance as the criterion and rule by which this can be determined. You quoted those averments in the bill, and the counsel this morning took a contrary stand; I do not know whether the State did or not, because the gentleman who opened this case was speaking as an *amicus curiae*. You have stated, too, as I understand from your argument, that the bill proceeded upon a contributory theory. It propounded the international rule as the method, and then it asserted the Wheeling Ordinance as the method. Irrespective of this question of the admission of the State and the statements made in argument, and so on, are you proposing to discuss the original question?

Mr. Spooner: I am proposing to discuss the question as to whether the Ordinance is the original agreement.

Mr. Justice White: I am listening to you as intently as I know how, and I have a thought that has been running in my mind that I would like to suggest to you. You speak of the agreement between the States, or contract. The Constitution forbids a contract between States or a compact between States, except with the consent of Congress. In view of that provision of the Constitution, can there be any agreement between States which has not been sanctioned, and if that be true, are we not to deduce the sanction

of Congress from the constitution as submitted to Congress and as recognized by that body? If that be true, and there were conflict between the Ordinance and the provisions of the constitution, must not the provision of the constitution dominate, and must not the consent of the two States be confined, and confined alone, to that agreement which finds its sanction and proof in the constitution of the State submitted to Congress? I do not know whether I make my thought clear.

Mr. Spooner: Answering the questions separately, it is undoubtedly true.

Mr. Holmes: I would like to refer you, as bearing on that, to one case you have not mentioned in your brief, the case of Wedding *vs.* Meyler, 192 U. S., 582, where the so-called Virginia compact was dealt with, under which the new States on the other side of the Ohio were called into existence. There, the preliminary act of Virginia, the statute of the United States assenting to that preliminary act of Virginia and the subsequent adoption of the constitution of the new States were held *ipso facto*, to make the new States.

Mr. Spooner: It seems to me, of course, to be true, that a contract cannot be properly made between two States without the consent of Congress, nor can a State be erected lawfully out of the territory of another State without the consent of the State and Congress. This assent and compact, of course, until the Congress admitted West Virginia into the Union as a State, that question was raised in this case of Virginia against West Virginia, reported in the 11th Wallace, and in the other case, but Virginia was held by this Court to be under that government a State competent to consent to the erection out of her territory of a new State and its admission into the Union. It was a proposition and an acceptance that amounted to nothing efficient until the Congress had consented to it. It then became a valid compact.

Mr. Justice White: It cannot be that the consent of Congress was expressed with a condition.

Mr. Spooner: I will get to that question. The condition was one which could not relate in anywise to the compact. It did not depart from the Ordinance in any respect.

Mr. Justice White: One moment. If I, for instance, were sitting on a court, and it was proposed to carve out a new State, and I said to myself, "Under my office and with the sense of the obligations which result from a public debt, no agreement between

these States to carve out another will ever be recognized or voted for by me which does not adequately provide for a just distribution of the public debt," and a provision is inserted in the act which ratifies, providing for that just distribution, but the compact itself provided for no distribution, would the compact stand and be, as a compact, directly repugnant to the act?

Mr. Spooner: Certainly not. Congress could not make the compact, but this is academic so far as the change in the Virginia constitution was concerned, because afterwards the Virginia legislature repeated its consent.

Mr. Justice Harlan: How, in what way?

Mr. Spooner: It passed another act.

Mr. Justice White: Referring to the Wheeling Ordinance?

Mr. Spooner: Neither referred to the Wheeling Ordinance.

Now, if your Honors please, I will take up this question as to which, it seems to me, the argument on the other side is unintentionally misleading, and I go now to discuss very briefly the question whether the 8th article of the constitution of West Virginia did not import into it article 9 of the Ordinance. It is too late to discuss the proposition that the Ordinance was the act of Virginia; that has been settled, I take it. That Ordinance provided:

> "That the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained"—

Why is that omitted? Upon what theory does the learned counsel read a part of the sentence—it is all one sentence—and omit the remainder of it? If it read: "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," that would present an entirely different case to the court, but it does not read that way. It reads this way:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained."

Mr. Justice Harlan: Just there, Senator, do you think the effect of those words in the Ordinance is to make a provision inconsistent with the constitution in that regard?

Mr. Spooner: Not all, I think they are to be read together.

I think where the proposition had been made and accepted, and the language of the court in 11th Wallace is instructive on that subject, that they are to be read together, and that where a proposition had been made by the State of Virginia to erect herself into a new State, erect a new State out of the territory of Virginia upon condition that she should take upon herself a just proportion of the public debt of the Commonwealth of Virginia prior to the first of January, 1861, to be ascertained in a specific manner, and the convention provided for by that Ordinance meets, having complied as to the election, and all that, with the requirements of the Ordinance, and in an article, article 8, provides that the State shall assume an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, I think that was the end of the assumption by the constitution of liability.

Mr. Justice Harlan: You would have the constitution read, then, as if those words "to be ascertained," etc., had been inserted in the constitution?

Mr. Spooner: Exactly, your Honor. If I made a tentative agreement with my learned friend and assumed an equitable proportion of a certain indebtedness in the settlement of some matter between us to be ascertained in a particular way, and should evidence my agreement by a bond to be executed later, and I executed a bond assuming an equitable proportion of that indebtedness and agreeing to discharge it, I think the two would, of necessity, be read together. I think the definition of what was agreed between us should constitute an equitable proportion.

Mr. Justice White: Suppose there was a third party having absolute power over your ability to contract and the power of your minds to meet depended upon his assent, and he was concerned merely with seeing that an equitable proportion was assumed, and when he came to ratify that contract, he said, "You shall assume an equitable proportion," but did not give any reason or any expression of opinion as to the method by which it could be shown; in other words, he put the general obligation without any expression of the method, and it all depended upon his consent.

Mr. Spooner: That goes back to the question whether this Ordinance should be held to be an invalid one, that is, entirely ineffective—

Mr. Justice White: Until Congress assented to it, yes.

Mr. Spooner: (Continuing) in its relation to the constitution.

Mr. Justice White: Until Congress assented to it.

Mr. Spooner: Until Congress assented to it. That would seem to depend upon whether the Ordinance is to be read as incorporated in section 8 of the constitution.

Mr. Justice White: I want to call your attention to another thing which occurred to me this morning. That act of Virginia to which you refer, that subsequent act, as ratifying in express terms, refers, not to the Ordinance, but says "as stated in the constitution."

Mr. Spooner: Virginia, your Honor, recognized this Ordinance by law after the war.

Mr. Justice White: I did not know anything about that, that is why I asked it.

Mr. Spooner: The foundation of her refunding act was recognition of this Ordinance.

Mr. Justice Harlan: Are the proceedings of that Wheeling convention in print?

Mr. Spooner: Yes sir, I think they are, they are in the Library.

Mr. Justice Harlan: Are you able to say whether there is anything in the proceedings directly referring to the Ordinance?

Mr. Spooner: I have not examined them. I tried to find the proceedings in the Library to which I have access, but I could not find them. It has been recognized by Virginia as having been imported into the constitution. Your Honors will find many places in the bill and in the exhibits to the bill, legislative recognition by Virginia that the Ordinance was imported into the constitution. It cannot be thought that the convention intended to assume in the constitution a larger liability than was embodied in the act of Virginia which led to the calling of a convention and led to the adoption of the constitution.

Mr. Justice Holmes: I do not suppose there is any doubt that if that Ordinance alone had been passed and thereupon the convention had been called, simply purporting to call the State of West Virginia into existence subject to the approval of Congress, and Congress had approved, and that was all, and nothing whatever had been said about that clause, that thereupon, by the coming into existence of West Virginia, there would have been a contract made between the new State and the old.

Mr. Spooner: I think that is very clear from the decision in Green *vs.* Biddle, and also in the case in 11th Wallace. In 1871, when the legislature of Virginia passed this first act, the refunding act (page 24 of my brief) under which it declared that it was liable for two-thirds of the debt on the basis of international law, and proceeded to issue a great many millions of dollars of certificates to be accounted for by West Virginia as her portion of the debt, including the Ordinance, in the preamble they say:

"Whereas, in the formation of the State"—

This is not the voice of counsel, this is the voice of Virginia after carpet-baggism had passed away and she came to her own--

> "Whereas, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and
>
> "Whereas, in the ordinance authorizing the organization of such state it was provided that the said State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary; and
>
> "Whereas, the people of this Commonwealth are anxious for the prompt liquidation of her portion of said debt,"

recognized by the legislature of Virginia as of efficiency, and the foundation of West Virginia's liability to account on the basis of the Ordinance. There are so many recognitions of it from first to last, and today counsel criticized West Virginia for some of her adverse legislation. There is much to be said in criticism, in a friendly, decent way, of the conduct of Virginia toward West Virginia preventing an adjustment upon the basis of the Ordinance. So that, if the Court please, it seems to me, in view of this detailed agreement or proposition from Virginia of what would, in her judgment, be accepted as a just proportion of her contribution, that it cannot be ignored, and that West Virginia can be said to have assumed at large, without any reference to the Ordinance whatever, an equitable or just proportion of the indebtedness. Counsel are very accurate when they say that this Ordinance does not deal in terms with the debt; that is true, it is no assumption of any part of the debt as such. West Virginia never agreed, if this Ordinance is to be read as part of the con-

stitutional provision, to assume any portion of the debt as such. All that can be said of the Ordinance, if it be binding, there is no reason to suppose that West Virginia would have accepted Statehood if it had been the understanding that she should be liable upon the basis of international law for one-third of thirty-three millions of dollars then due by Virginia to her creditors, evidenced by her bonds. My learned friend who spoke before me spoke about what a trap this would have been for West Virginia, supposing she had assumed in her constitution, what had been agreed between Virginia and her convention should constitute her equitable contribution to West Virginia on account of her debt, rub out the Ordinance, obliterate it, treat it as it never had existed and as if, independent of it, there was a mere absolute agreement or compact on the part of West Virginia to bear an absolutely indefinite portion of the debt.

This Ordinance is called by our friends one of the constating instruments which underlies the existence of the State. Is it not? It defined the boundaries of the State, it continued the laws of titles in the new State; it perfected the conditions which must be embodied in the constitution. Was it necessary to repeat, in section 8 of article 8 of the constitution, the Ordinance? Is there any theory compatible with the method employed by judicial tribunals in dealing with contracts to dislocate entirely from the constitutional provision the Ordinance or proffer? The court said, as to the boundary, in the case in 11th Wallace, that it was a proposition made by Virginia to the people of West Virginia, and was accepted by the convention and became subject to the approval of Congress, a contract or compact between the States.

The Chief Justice, in the opinion on the demurrer, reads the Ordinance and the constitutional provision together. True, it was in deciding against the contention that West Virginia had entered a compact with Virginia, under which she, West Virginia, was to be the sole arbiter in determining the amount under the Ordinance. The court is asked to ignore absolutely, in construing this constitutional provision assuming an equitable proportion of the debt, the Ordinance, which has not seemed to us possible. It was perfectly competent, and it was not unreasonable, either, at the time of it, that the condition defined in the Ordinance should have been imposed. Your Honors will remember that it is alleged in the bill and admitted by the answer that the thirty-three millions of dollars of bonds, or nearly all, were issued by Virginia for the purpose of constructing public works, and it is ad-

mitted in the bill that very much the greater portion of the money was expended in what is now Virginia. It is alleged in the answer that a third of it was expended in what is now West Virginia, or I should say, three million dollars of it. It would not be an unnatural or unreasonable thing, it having been a debt created for works of internal improvement, the greater part of which, very much greater part of which, upon a division of the two States would remain within the limits of Virginia, canals, railways, and other public works, that she would charge to West Virginia all the money expended within her limits for works of internal improvement, because they would remain within the limits of the new State. If that was their view, they could not be criticised as imposing a condition of assent which was, in itself, unjust, and the ordinary expenses of the government, a just proportion, for forty years, were, in addition, to be charged to West Virginia. If it had been adjusted seasonably, if your Honors please, it would not have seemed an unfair proposition. But in the lapse of years for which both, so far as delay is concerned, have been responsible, West Virginia's development has made her very rich, so far as taxable values are concerned, and as the answer alleges, great deposits of minerals have been developed in Virginia, and the Virginia today, in point of wealth, is not the Virginia of 1861, in spite of all the waste and loss incident to the war.

We do not agree upon the question of interest. I have thought that question did not now arise. If the accounting is to be under the Ordinance, it certainly does not now arise, and testimony need not be taken in regard to it, nor need the court, as it would not without further argument, pass upon it. It is not necessary, in order to a full ascertainment of the liability under the Ordinance. No interest was to be paid under the provisions of the Ordinance. No interest was to be paid on the moneys expended by Virginia in what are now the limits of West Virginia. No interest was to be charged on the ordinary expenses; no interest was to be credited to West Virginia on the third item with which she was to be credited, all moneys paid into the treasury of the Commonwealth from the counties now a part of West Virginia from 1820 to 1861, so that if the Ordinance is to govern, the constitution read in the light of the Ordinance as we contend it should, this accounting can go on, and the question of interest will arise later, because if interest is to be paid, it is agreed among us all it is to be paid on the amount found due under the Ordinance if the Ordinance is to govern. The Attorney General says in his brief

which is, of course, an able presentation of his view, served on us yesterday, at page 6:

> "While the basis of settlement prescribed by the Wheeling Ordinance is, as we have always considered it, arbitrary and inequitable, we have never taken the position that that Ordinance, reasonably and fairly construed, and taken and applied together with the Act of the Restored Government of Virginia of February 3, 1863, and section 8 of Article VIII of the Constitution under which West Virginia became a State, was not binding on both States."

Counted upon in the bill, admitted by the law officer of the Commonwealth in his argument, embodied in the decree which is proposed as an amendment as to govern the accounting, the dispute being only as to the question of interest, and restated in a strong way in the brief of the Attorney General, it would seem to us that the binding effect of the Ordinance was not open to question in this Court.

Now, if your Honors please, we should want some time to file a brief upon this question of interest, if it shall become necessary. It was briefly discussed in the argument which we filed in connection with the statement that we did not regard it is necessary at this time to decide it, which we still assert, but if it is to be decided, I deny utterly the contention of the learned counsel on the other side that that constitutional compact, that compact, in other words, created by article 8 of the constitution, can be construed as any agreement upon the part of West Virginia to pay interest. The vice of the argument on the other side seems to be in assuming that West Virginia, by her constitutional provision, if the Ordinance were omitted, took upon herself a part of the debt as such. I will not say, if the Ordinance were omitted, but what was to be ascertained under the 8th section of the constitution. It would probably be on an international law basis, as they understand it, population and territory; that would not require very much ascertainment, but all that they are required to do under this constitutional provision. I think it is argued in the brief, that the provision that the legislature of West Virginia should ascertain as soon as practicable the amount and should make provision for a sinking fund for the payment of accruing interest thereon, and the principal when due, excludes absolutely the notion that West Virginia was contracting to pay any back intetrest or accrued interest as contradistinguished from accruing interest. There is not only a philological difference, but there is

a legal difference between the two which has often been recognized by the courts.

Mr. Spooner: At the adjournment of the Court I was speaking of the liability of West Virginia to pay interest.

I had called the attention of the Court, I think, to paragraph 6 of the interlocutory decree now proposed by Virginia, after having remarked that as to the remainder of the proposed decree there was very little difference between the State of Virginia and the State of West Virginia as to the main contention. It is asked that the Court will instruct the master thus, after making the accounting under the Ordinance, and also taking an account of the value of the property granted to West Virginia by the act of the Virginia legislature of February 4, 1863:

> "The balance thus ascertained, with interest thereon from the 1st day of January, 1861, until the same shall be paid, will be the amount and proportion of the debt of the Commonwealth of Virginia existing before that date, assignable to West Virginia and which that State should pay."

To that, upon any hypothesis, we object. As I said yesterday, the Ordinance, whether it be taken as a compact or as an agreement between the two States definitive of article 8 of the constitution, that is, as to what would constitute the equitable proportion which West Virginia should contribute to the State of Virginia, said nothing about interest, nor is there anything in the constitutional provision, section 8, which bears, we think, the construction contended for in the brief of the distinguished Attorney General. Article 8 of the West Virginia constitution provided:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for part of the debt as such, bearing interest as it did, but was to assume the payment of a sum of money to be ascertained upon a basis defined in the Ordinance, to be paid by West Virginia to Virginia. She might pay it to her creditors or she might do otherwise if she chose. That payment by West Virginia was to be on account of the public debt; it was to relieve her of her share of any burden of the public debt."

Now, if I may call the Court's attention again to this language:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the yeare one thousand eight hundred and sixty-one, shall be

> assumed by this State; and the Legislature shall ascertain the same,"

that is, the equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861. That proportion was what was to be ascertained:

> "and provide for the liquidation thereof,"

the proportion to be ascertained as between Virginia and West Virginia, which West Virginia shall pay to Virginia,

> "by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

The theory of the learned Attorney General is this, that this amount being ascertained, the State of West Virginia is bound under this constitutional provision, or under the Ordinance, as he reads the Ordinance into the constitution, and Virginia treats it as a binding compact or definition of what was to constitute an equitable proportion, just as we do, the interest on the same thus ascertained is to accrue from the first day of January, 1861. Upon what theory? Upon the theory, so far as the brief indicates, that West Virginia had assumed an equitable proportion of the debt, and the debt was an interest bearing debt and therefore West Virginia assumed to pay an equitable proportion of the debt ascertained in this way, and interest from the date of the secession of Virginia. There are many authorities in the brief in support of the proposition that under the laws of Virginia, between private parties interest goes with the debt; it follows as the shadow follows the substance, but there are no authorities in the brief in support of the proposition that under the laws of Virginia the Commonwealth of Virginia pays interest, or that the Commonwealth of West Virginia pays interest, except where the sovereign has contracted to pay interest, either by agreement or by an enactment by law. I did not have time to run through all the authorities, but I have examined such as I could, and I found that as early as 1831 the supreme court of Virginia had stated in an opinion that in a particular case, which was a tobacco warehouse case, there was no liability for interest. There had been other cases, apparently, under that system, in which the State officer had been charged with interest, the party defendant representative of the State, and the State had paid interest, but it is expressly declared in the opinion that the general question whether the State is liable for interest, except by express agreement, is not decided, and I was unable to find, as far as I have examined, any authority for the proposition that

without agreement or statute either Commonwealth, either sovereign, was bound to pay interest.

But it is perfectly clear to me that the distinguished Attorney General misconstrues this constitutional provision upon which he relies as a compact or contract, the constitutional provision as constituting an agreement in execution of which the court would require interest on the portion ascertained from the first day of January, 1861. That would not be implied; it especially would not be implied where the language of the provision is such as to exclude it, and the language of this provision is such as to exclude it: "shall be assumed by this State, and the Legislature shall ascertain the same as soon as it may be practicable and provide for the liquidation therefore." It has never been liquidated, never has passed from the realm of liability through the status of debt: "ascertain it and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest."

At the adjournment yesterday I was remarking upon the difference, both in law and philologically, between the word "accrue" used in such a connection, and the word "accruing." I had this brief but half a day before the case was called, and found a decision in 159 Pennsylvania, Gross v. Partenheimer, where the question was precisely presented to the court. The statement of the case is very brief. In April, 1893, plaintiff agreed to purchase from defendant a lot for eight thousand dollars, payable five thousand dollars in cash on delivery of deed, and the residue by plaintiff's assumption of a mortgage for three thousand dollars then on the lot, plaintiff to pay also the accruing interest on said mortgage not exceeding six months. The six months' interest from date of mortgage to February 26, 1893, was past due and unpaid, and to avoid foreclosure proceedings, plaintiff was compelled to pay the same. He then brought suit to recover the amount thus paid, the vendor claiming that the vendee was obliged to pay it under the agreement. The court said:

> "This contention hinges entirely on the proper construction of the clause in the contract of sale, above referred to, wherein the plaintiff agrees to pay 'the accruing interest on said mortgage not exceeding six months.' There is nothing in the affidavit of defence that can in anywise aid or control the construction of this clause. If 'accruing interest' means interest which, according to the terms of the security, was due and unpaid at the date of the contract, the defendant's construction should prevail; but, we cannot agree that these words mean any such thing. Such a construction would be strained and wholly unwarranted by the language em-

> ployed. As generally understood, 'accruing' interest means running or accumulating interest as distinguished from accrued or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it accruing interest. When we refer to interest heretofore payable, but still remaining unpaid, we speak of it as overdue interest, arrears of interest, or interest in arrear, just as we speak of rent in arrear. We are therefore of opinion that the words 'accruing interest' do not refer to, nor in any manner embrace any part of the six months' interest which was then overdue and unpaid. That interest was an incumbrance on the lot, which the defendant was bound to remove. He refused to do so; and the plaintiff, who was compelled to pay it in order to prevent foreclosure of the mortgage, etc., is entitled to recover the amount thus paid with interest from date of payment. The learned court was clearly right in adjudging the affidavit of defence insufficient and entering judgment against defendant for the amount claimed by plaintiff."

I will take no more time upon that, but I have this further to say on this question of interest, and it bears on the suggestion which I made to the Court yesterday, that it is not necessary now to determine the question whether the sum, when found due on an accounting under the direction of the Court, bears interest or not, or from what time it bears interest, because, even if the construction contended for by the distinguished Attorney General were correct, or be sustained by the Court, on the obvious face of this case, the interest could not be demanded from the first day of January, 1861. In 1866 the State of Virginia brought a suit against West Virginia in this Court; not to be reprobated for it; it had a perfect right to do it, but it brought a suit to have determined the counties of Virginia, what counties were in Virginia. That cause was depending in this court undecided until 1871, and it needs no argument to show that until the boundaries of West Virginia were determined, until it could be known what counties were in West Virginia, it would be absolutely impossible, under the Ordinance, and I am speaking on the assumption that the Ordinance will be read with the constitution, thereby making definite what otherwise would be indefinite, and what the parties evidently intended should thereby be made definite, so that by the act of Virginia an ascertainment was deferred and rendered impossible until 1871, and the court will find in the papers in the bill and exhibits, and otherwise, various occurrences and facts which delayed and rendered impossible for years by Virginia an ascertainment by concurrence of the two States in the amount under the Ordinance or otherwise.

Mr. Justice Holmes: I do not think I quite appreciate that argument. If you put it as if it is entirely clear about the ascertainment of the boundaries, on the same principle that you announced a little while ago that the State of Virginia, however much diminished, remains the single debtor on the public debt, why does not the State of West Virginia, however bounded, remain the single contractor on the contract that your are assuming existed?

Mr. Spooner: Oh, I am arguing on the basis of it coming under the Ordinance.

Mr. Justice Holmes: Yes.

Mr. Spooner: And under the Ordinance the first item is all expenditures made by Virginia.

Mr. Justice Holmes: I did not follow that; I see now.

Mr. Spooner: During the forty years within the limits of West Virginia as to the ordinary expenses, a third of the moneys paid into the treasury during that period from the counties of West Virginia.

Mr. Justice Holmes: Yes, I did not understand that at first.

Mr. Spooner: So much for that. I cannot take the time to discuss further the question as to the relation of the Ordinance and the constitutional provision. I have not been able to change my conviction that the two must be read together. If the Ordinance had contained no provision in regard to the assumption of any part of the debt, it is not to be supposed that the constitution would have contained any assumption of an equitable proportion of the debt. It was in the Ordinance as to the debt as it was in the constitution, the clause that follows this provision about the debt in the same section 9:

> "All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the State of Virginia."

That was carried into the constitution. Our view is that it was no more carried into the constitution than the Ordinance was, as to the debt, by the general language of assumption, and I agree entirely with the suggestion of his Honor, Mr. Justice Holmes, and we had argued it in the brief, that the direction of the legislature to ascertain the debt and the provisions which follow as to establishment of a sinking fund are not a part of the assumption of the new State: That assumption was complete with the first sentence and it, we claim, was an assumption of a proportion which had been defined between the parties. The remainder of it was an injunction by the constitution of West Virginia upon the legislature of West Virginia. If the Or-

dinance has nothing to do with this constitutional provision, if it is to have no influence in the determination of the controversy here, then the equitable proportion of the debt assumed by West Virginia in the constitution was not pursuant to a proposition made by Virginia in the Ordinance to the people of the proposed new State, nor a condition nor assent to the erection of the proposed new State. It was a purely voluntary assumption by West Virginia. If a purely voluntary assumption by West Virginia, it can be recovered upon only, or reliance be put upon it only, as West Virginia assumed it, and if the Ordinance is left altogether out of consideration here, it is almost an irrefutable proposition that when the legislature of Virginia passed the act consenting to the admission of the State under this constitution, it was agreed that the proportion of that debt which West Virginia was to bear, I mean the sum which West Virginia was to pay on account of that debt to Virginia, was to be ascertained by the legislature of West Virginia. Call it a compact or not, that contention was made to the court on the argument to the demurrer, and the court overruled it. The court said it was not a compact, but the court defeated it by a resort to the Ordinance, and the court, in the opinion delivered by his Honor the Chief Justice, said that the Ordinance, being *in pari materia*, the Ordinance being read in connection with the constitutional provision, that where the constitution provides that the legislature shall ascertain, it means that the legislature shall ascertain as provided by the Ordinance.

Now, your Honors, one thing further. This controversy has lasted a great many years. The nearer Virginia and West Virginia can come together in this cause, looking to the elimination of the harassment and cause of bitterness which this unsettled affair has caused through many years, the better. I called the attention of the Court yesterday to the attitude of the pleadings on the subject of the Ordinance, and I quoted from the Attorney General's argument when the demurrer was pending before the Court. I called attention, in addition, to the fact, which ought not be forgotten, that the decrees about which we differed, so far as Virginia was concerned, have been practically withdrawn, and the decree now tendered by Virginia is, except as to the matter of interest, and perhaps one or two matters upon which counsel could doubtless agree, in accordance, substantially, with our contention and the contention of West Virginia. The learned Attorney General says, in his new brief, on page 6:

> "We are constrained to recognize the following propositions as true:
>
> "(a) That the State of West Virginia could have no legal

birth or existence without the consent of the Legislature of Virginia.

"(b) That the only Legislature of Virginia which ever gave its consent to the formation of West Virginia, was the Legislature of the Restored Government which, sitting at Wheeling on the 13th of May, 1862, gave its consent to the formation of the new State, 'according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th of November, 1861.'

"(c) That the Act giving such consent and the Legislature which passed it, depended for their validity upon the validity of the Wheeling Ordinance under which the Restored Government of Virginia was organized."

That is true.

Mr. Justice Holmes: What are you reading from?

Mr. Spooner: I am reading from page 7 of the Attorney General's reply brief, the brief which accompanies this new draft of the interlocutory decree.

"(d) That said Convention, and its acts, and the Government which it established, have been legitimated, by recognition by every department of the Government,—by the President of the United State in his official intercourse and dealings with the Governor and officials of said Restored Government, by approving the bill for the admission of West Virginia, and by his proclamation announcing the admission of the new State into the Union; by the Congress of the United States in the admission of Senators Willey and Carlisle elected by the Legislature of the Restored Government, by the passage of the Act approved December 31, 1862, admitting West Virginia into the Union, and by other acts; and by the United States Supreme Court, by its decision in Virginia v. West Virginia, 11 Wallace, p. 39, in which the Wheeling Convention and this very Wheeling Ordinance and the Wheeling Legislature of Virginia, are recognized as being a Convention, and Ordinance, and a Legislature of the Commonwealth of Virginia."

No man speaking for West Virginia could more strongly state our position than the learned Attorney General states it.

"We are forced by these considerations to conclude that it is too late now to question the binding effect of the Wheeling Ordinance."

And in addition to that, as I brought to the attention of your Honors yesterday, the legislation of Virginia, the first refunding act,

in its preamble referred to this Ordinance as the congenital liability, the foundation, the fundamental liability of West Virginia in respect of the contribution which she has to make to Virginia.

I suppose we may have liberty to file additional briefs if it is desired.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Hon. John G. Carlisle.

IN THE SUPREME COURT OF THE UNITED STATES.

VIRGINIA *VS.* WEST VIRGINIA.

ARGUMENT OF HON. JOHN G. CARLISLE.

For the Defendant.

Mr. Carlisle: If your Honors please, as this argument is upon a motion to enter a decree of reference, many questions, or at least several questions, which might be open for discussion on a final hearing of the case on its merits, are not open now, and so it seems to me that this discussion must be confined to very narrow limits.

A great deal has been said, not only in the oral arguments, but in the briefs, in regard to the alleged delinquency of West Virginia in the matter of making a settlement, and she has been somewhat severely criticised by counsel on that account. The facts are, as the Court judicially knows, as a matter of history, that on the 17th of April, 1861, the State of Virginia, or at least a large part of the people of Virginia, in convention passed an ordinance to secede from the Union, and a war ensued between the Government of the United States and the State of Virginia and the other States united with her in the South, which continued until 1865. Of course it was not possible for West Virginia to settle the debt, or to take any steps towards its settlement, during that period. All the records, all the vouchers, all the documents, of every kind, relating to this pupblic debt and having a bearing upon the question as to West Virginia's just proportion of it, were in the possession of a hostile government; they were at Richmond, in Virginia, the capital of the Confederate States and the capital of the State of Virginia, and were wholly inaccessible to West Virginia.

At the close of the war, in 1865, the only government existing in Virginia was what was called the restored State government, which embraced only a small part of the territory, and for a long

time during the existence of that government it was impossible to make a settlement of this debt.

Then, in 1867, Congress passed an act declaring that this provisional, or so-called restored State government, which had continued and was the only one that was existing at that time, was illegal and unconstitutional; that it was no government at all, and a military government was established in its stead; and that state of affairs continued, I believe, until January, 1870. In addition to that, as has already been stated by my associate, Virginia brought an action in this Court in December, 1866, to determine the boundaries of the two States, and until those boundaries were determined, it was impossible to make any settlement under the terms of the Ordinance. That suit was decided by this Court in March, 1871. Immediately after that, as the Court will see from the answer filed by West Virginia, which gives a complete history of all the efforts that have been made to adjust this debt, West Virginia began to take action and to appoint commissions from time to time. One of these commissions went to Richmond and requested the auditor of the State to furnish copies of the vouchers and records, which he refused to do; and his letter refusing the request is exhibited with the answer. From 1873, after West Virginia had made these efforts to get into communication with Virginia, asking for commissions to be appointed by Virginia, and after she had made the effort to secure the necessary evidence upon which she could make a settlement, neither of the States took a single step towards the settlement of this debt until 1894. The reason was that Virginia was settling with her creditors at two-thirds of the debt and interest, and the claim that West Virginia was liable for one-third was an effective weapon with which she could beat down the demands of her creditors. So she took no steps whatever from 1871 to 1894, although West Virginia had, after 1871, and up to 1873, endeavored to secure a settlement. But in 1892 Virginia had completed the settlement with her creditors for two-thirds of the debt, and then she began to move in regard to a settlement with West Virginia; and what did she do? Her legislature passed a joint resolution on the 6th of March, 1894, which provided for the appointment of commissioners to settle the debt with West Virginia. That was the first step taken by Virginia since 1871 with regard to this matter. But it was provided in that resolution:

> "But said commission shall not proceed with said negotiation until assurances satisfactory to the commission shall

have been received from the holders of a majority in amount of said certificates, exclusive of those held by the State through the agency of the board of education and sinking fund commissioners, that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State of Virginia which has not been assumed by the present State of Virginia. But said commission shall in no event enter into any negotiation thereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof."

That was the only kind of negotiation proposed by Virginia, and was in fact no negotiation at all. It should not be entered upon except upon the basis that old Virginia's share of the debt was only two-thirds. Of course, if her share was only two-thirds, it followed necessarily that West Virginia's share was one-third. That part of the resolution has never been repealed to this day. There was a joint resolution passed in 1900 which authorized the same commission to bring a suit or to make a settlement, but this clause of the joint resolution passed in 1894 was not then repealed and has never been repealed, either in terms or by implication.

Some resolutions were read yesterday showing that West Virginia had refused to enter into negotiations. The first resolution ever passed by the legislature of West Virginia refusing to enter into negotiations with Virginia with relation to this debt was passed in 1895, after the passage of the resolution of Virginia which required her to enter into negotiations upon the basis I have stated. Here is the resolution:

"House Joint Resolution No. 10, Concerning the Virginia Debt. (Adopted February 7th, 1895)."

That is just eleven months, almost to a day, after Virginia had passed the joint resolution requiring negotiations to be conducted on the basis that she owed only one-third of the debt. It reads:

"That this Legislature hereby declines to enter into any negotiation with the debt commissioners, or commission appointed under a joint resolution, adopted by the General Assembly of Virginia, in the month of March, 1894, looking to the settlement of the Virginia debt question, on the basis set forth in said joint resolution."

Afterwards there were others declining, but all of them, as I have stated, were passed after this arbitrary basis had been laid down by the State of Virginia, which precluded free negotiation and fixed the amount substantially which West Virginia was to pay.

Mr. Conrad: Mr. Carlisle, you know that the Virginia Legislature has frequently, by joint resolution, denied that any liability for any part of this debt existed.

Mr. Carlisle: Yes, under the Ordinance; I was going to speak of that. In 1871 when West Virginia appointed a commission which, as I have said, went to Richmond, but could get no information, it then assembled at Parkersburg—

Mr. Conrad: To be entirely accurate, that commission called upon the auditor of Virginia to furnish them full copies of all records. The auditor said he had no clerical force with which to make the copies and no money with which to do it, but that the books were all open to that commission and they could make any copies they wanted.

Mr. Carlisle: I am not now criticising Virginia; I am simply accounting for the delay about which complaint has been made. The commission went there and attempted to secure these copies from the auditor, and he did not furnish them. I am not saying whether he was right or wrong, but it is a fact which produced delay; and then this commission reported the fact to the West Virginia Legislature, that it had attempted to procure the copies, and being unable to do so, it had proceeded to make an investigation itself as best it could, with such information as it had; and that commission found that West Virginia was indebted about $953,000, I think. Then, in 1873, Virginia having been quiet all this time, the Legislature of West Virginia—

Mr. Justice Peckham: What year was that when the $900,000 accounting was made?

Mr. Carlisle: 1871, but that settlement was not made upon the basis of the Ordinance. The Commission reported, but no attention was ever paid to it by the Legislature of West Virginia, as it did not conform to the Ordinance, and the commissioners themselves reported that it was incomplete for want of the necessary data.

In 1873, two years after that report, when Virginia was still silent and inactive, the Legislature of West Virginia passed a joint resolution directing the finance committee of the Senate to make an investigation of this matater, and its report is attached

to the answer. It undertook to follow the Ordinance, but I must say frankly that it did not follow it in all respects, and the result of its investigation would not be satisfactory to me personally. It found what was stated by counsel for the plaintiff yesterday, that upon a settlement West Virginia would be entitled to credit—not that Virginia would owe West Virginia, because she has no claim against Virginia—but that West Virginia had over-paid $512,000, not $560,000, as was erroneously stated yesterday. That report was made to the Legislature, and thereafter the Legislature of that State passed several resolutions, denying any indebtedness at all, if a settlement was made under the Ordinance.

Mr. Conrad: It does not limit it to a settlement under the Ordinance, it denies any liability whatever.

Mr. Carlisle: I have the answer here. The answer states—it is quite long and I will not detain the Court by reading from it—but it states that West Virginia is now ready and willing, and has always been ready and willing, to settle the debt under the terms of the Ordinance. This Senate committee had as its chairman Mr. Bennett, who was the auditor of the old State of Virginia for several years before the war, and all through the war, up to the evacuation of the City of Richmond in 1865. The ex-auditor of the State of Virginia, who was more familiar with the financial records of the State than any other man, was the chairman of this committee of the West Virginia Senate which made this investigation, and the report to which I have just referred was signed by him. After that, the Legislature of West Virginia denied that the State was indebted to Virginia on account of the public debt.

This is, in brief, the history of the attempts to settle this debt between the two States, and I submit to the Court that when your Honors read that history, as it is set out in the answer, you will not be disposed to criticise West Virginia very harshly. I think I was justified in making the statement that old Virginia did not want West Virginia's just proportion of that debt ascertained, or settled, or made public, until she had settled with her creditors in 1892, upon a basis of two-thirds; it was an argument to the creditors to induce them to scale down their claims against old Virginia herself, which they did.

My associate has gone over this case so thoroughly that I am at a loss to know what topics I ought to take up. It is now conceded by the Attorney General, the official representative of the

State of Virginia, the plaintiff in the action, that the Ordinance is valid and must govern in the making of the settlement. That would seem to eliminate all discussion upon that question, and yet some suggestions have been made in the argument which it may be proper to notice. I want to call the attention of the Court, however, before passing to that, to one other point.

Mr. Anderson: I hope my silence will not be construed into an acquiescence in the correctness of that statement.

Mr. Carlisle: I will not read your statement again; it has already been read by my associate. It is as plain an expression as can be made in the English language.

Mr. Anderson: I stand by that.

Mr. Carlisle: That is all we ask. We will be perfectly satisfied if the Court will stand by the propositions so clearly stated by the Attorney General who officially represents the plaintiff. I want to call the attention of the Court, however, to one statement made by the Attorney General which is very forcible and ought to be conclusive upon one point; and it is absolutely correct. It is this: The Attorney General has spoken of the act of Virginia of May 13, 1862, and he might have stated there, as he does afterwards state in his brief, that there was another act passed by the Virginia Legislature on the 6th day of December, 1862, after the House of Representatives in Congress had passed the bill for the admission of West Virginia, with the provision in it that the constitution should be changed with reference to the subject of slavery. On the argument on the demurrer considerable stress was laid upon the fact that the constitution which was before the Legislature of Virginia, when that body passed the act of May 13, 1862, asking for the admission of the State, had been changed afterwards by Congress. Our reply to that was that it was not changed in respect to anything connected with the Ordinance, that it was changed simply by requiring the new State, by a vote of its people, to prohibit slavery or provide for a gradual emancipation of the slaves; but that act with that provision in it had passed the House of Representatives, and while it was pending in the Senate, the Legislature of Virginia on the 6th day of December, 1862, passed a joint resolution and sent it to the Senate of the United States, asking that body to pass the act for the admission of the State of West Virginia into the Union with this change in it, so that the argument which was made here, even if it had any force, cannot be urged now, because Virginia approved of the admission, agreed to the separation and the ad-

mission of the State into the Union, after that change had been made in the bill pending in Congress. The Attorney General says:

> "That the Act giving such consent and the Legislature which passed it, depended for their validity upon the validity of the Wheeling Ordinance under which the Restored Government of Virginia was organized."

The very body which Congress recognized as competent to give the consent of Virginia to the creation of a new State within the limits of her territory, depended for its validity, according to the Attorney General, upon this Ordinance; but this is now controverted by one of the counsel who has addressed the Court. It is neither controverted nor admitted by the counsel who addressed the Court yesterday, and who stated all his propositions hypothetically. One of the counsel denies the validity of the Ordinance absolutely and assails it, not because it is illegal, not because the Government which passed it has not been recognized by all the political departments of the United States, but because it is unfair, he says; and another reason—

Mr. Conrad: Oh, no.

Mr. Carlisle: And because, as I understand him it was substantially enacted and promulgated by the same men who formed the new State, or who controlled the new State, and who adopted the constitution of the new State; but we submit that is a matter which this Court can not take into consideration.

Mr. Conrad: That is a matter with which the plaintiff itself had no power to deal.

Mr. Carlisle: With all due respect to my friend, I do not think we need argue that question. Section 9 is a part of the Ordinance just as much as any other section, and as the Attorney General says, the whole structure of the restored Government which followed depended for its validity upon the validity of this Ordinance, not a part of the Ordinance, but the whole Ordinance, and the whole Ordinance was before Congress when the act for the admission of West Virginia was passed. I have in my hand the report made by the Committee on Territories to the Senate of the United States to which the bill had been referred, and the copy of the Ordinance in full accompanies the report.

It has been suggested, rather than argued, that perhaps Congress did not give its assent to the Ordinance, because it was not recited in the act of Congress for the admission of the State or referred to in it. If that was a sound argument, then no part of

the Ordinance is valid, because no part of it is referred to in the act of Congress; but this Court has said that it is not necessary that an act of Congress providing for the admission of a new State into the Union, when it has been formed within the limits of another State, and a compact exists, should restate the provisions of the compact. The act of Congress admitting the State into the Union under a constitution formed in pursuance of this compact, was necessarily an approval and ratification of the entire compact and of every step that was taken in the process of forming the new State, and especially when it is shown by this official document, of which the Court will take judicial notice, that the Ordinance was before the body which passed the act as reported to it by one of its committees. This Court has held that the consent of Congress may be given previously to the compact, or it may be given afterwards, and that it may be inferred, from the mere act of admitting the State into the Union. There can be no force in the argument that the whole Ordinance was not approved by the act of Congress when it admitted the State into the Union which was created under that Ordinance.

Mr. Conrad: Ten sections of the Ordinance had already been completely executed when this matter was before Congress. It was the 9th section alone that remained executory, and of that Congress took no notice.

Mr. Carlisle: The act of admission took no notice of the others, either.

Mr. Conrad: Because they were executed.

Mr. Carlisle: My argument is that the Ordinance is a whole, and that Congress did not, by the admission of West Virginia into the Union, approve a part of it and reject the remainder. As has been stated here very forcibly, by one of the counsel for the plaintiff, the Ordinance was the genesis of the State government; it was the foundation upon which the whole proceeding was based; it was before Congress, and knowing what the compact was, knowing what all the provisions of the Ordinance were, the State of West Virginia was admitted into the Union as a State upon an equal footing with the other States.

Mr. Justice Harlan: When did the Ordinance and the constitution ever get any validity?

Mr. Carlisle: The constitution was submitted to the people and adopted by their votes.

Mr. Justice Harlan: It did not, then, become a valid instrument.

Mr. Carlisle: No, not until Congress admitted the State into the Union. There were people there and a constitution was framed for their future government, but the constitution was not in force, because there was no state yet. The constitution and the ordinance took effect only when Congress admitted a State into the Union.

Mr. Justice Harlan: The Ordinance took effect immediately, by what authority?

Mr. Carlisle: By the authority exercised by the Wheeling convention.

Mr. Justice Harlan: By what authority did it act?

Mr. Carlisle: The people of West Virginia—the history of the matter is well known—assembled; they called themselves the people of Virginia, because it was Virginia; a large part of the people of Virginia in that troublesome time finding that they had a government at Richmond which had severed its political relations with the general Government and with the other States which were adhering to the Union, finding themselves without a government with which they could have communication, finding themselves with a government hostile to themselves, waging war against them, determined that they would create the restored government, they would create another government to take its place, and all the political departments of the Government having recognized it, it is too late now for us to inquire by what authority they assembled.

I may be devoting too much time to this Ordinance, especially in view of the admission made by the Attorney General, as I understand his admission, but the Ordinance is of vital importance in this case, because it lies at the very foundation of the whole controversy; it is the bed-rock upon which the State of West Virginia is founded, and if it is invalid, West Virginia is not a State in the Union. This Court said in the case of Green *vs.* Biddle, when an argument was made that Congress had not approved the compact between the State of Kentucky and the State of Virginia:

> "Now, it is perfectly clear that although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State without the assent of Virginia or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed by a solemn act the consent of that body to the separation. The

terms and conditions, then on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescense, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of Congress without which Kentucky could not have become an independent State; and then it would follow that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true."

Henry Clay was the attorney who insisted, on the argument of that case, that the compact had not been assented to by Congress.

Mr. Conrad: Was Congress concerned in any other feature of this Ordinance than that which gave the consent of Virginia? Need it have looked to any other?

Mr. Carlisle: It has been argued here that if there had not been an assumption of a just share of the public debt, the State would not have been admitted into the Union. It has been argued elaborately that that was the only condition inquired about on the floor of Congress.

Mr. Conrad: That is in the constitution, not in the Ordinance. I asked the question, would Congress have admitted this State into the Union if the constitution had not provided for the debt? The question that I now venture to ask you is, would Congress have looked any further into this Ordinance than to see that Virginia had consented?

Mr. Carlisle: I suppose it would have looked at the whole Ordinance.

Mr. Conrad: Chief Justice Taney, in a dissenting opinion in the Wheeling Bridge case, said not, that Congress would not look to the compact clause between Kentucky and Virginia, making the Ohio a free river.

Mr. Carlisle: Yet the Court held it was a valid compact.

Mr. Conrad: Oh, yes, but Congress could not be supposed to have looked to that feature at all in that case; that was a dissenting opinion, to be sure.

Mr. Carlisle: Certainly, but the court in that case decided that it was a good compact, whether Congress looked at it or not. Congress passed an act for the admission of Kentucky, with the con-

sent of Virginia, and there was a compact between the parties. I do not propose to go over the ground again to show how the compact in controversy in this case was entered into; that is known to the Court, and besides, it is stated fully in our briefs. In the case of Wedding *vs.* Meyler, 192 U. S., 573, 582, it is said:

> "Under article 4, section 3, of the Constitution, a new State could not be formed in this way within the jurisdiction of Virginia, within which Kentucky was recognized as being by the words last quoted, without the consent of the legislature of Virginia as well as of Congress. The need of such consent also was recognized by the recital in the act of Congress. But as the consent given by Virginia was conditioned upon the jurisdiction of Kentucky on the Ohio river being concurrent only with the States to be formed on the other side, Congress necessarily assented to and adopted this condition when it assented to the act in which it was contained. Green *vs.* Biddle, 8 Wheat. 1, 87. Thus, after the passage of the two acts, it stood absolutely enacted by the powers which between them had absolute sovereignty over all the territory concerned that when states should be formed on the opposite shores of the river they should have concurrent jurisdiction on the river with Kentucky. 'This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?' Pennsylvania *vs.* Wheeling & Belmont Bridge Co., 13 How., 518, 566."

It seems, therefore, to be a well recognized rule in this Court that Congress, by the admission of a State into the Union, approves and ratifies the steps which have been taken to create the State.

Mr. Justice White: Let me ask, for information, is there any act which concerns this case particularly? Is there anything done by Congress which would have been construed as a condition of the State of Virginia as organized, and as an approval of this compact prior to the act of Congress which admitted West Virginia into the Union?

Mr. Carlisle: Any action of Congress on that particular subject?

Mr. Justice White: Yes.

Mr. Carlisle: Not that I know of. They had admitted John S. Carlisle and Mr. Willey as Senators from the restored State, and quotations have been made here from their speeches in that body. Representatives from the restored State had also been admitted to seats in the House.

Mr. Justice White: Not before the adoption of the constitution?

Mr. Carlisle: Yes, before the adoption of the Constitution of West Virginia.

Mr. Justice White: Before the adoption of this constitution by Congress, the ratification and admission of this constitution?

Mr. Carlisle: Yes, they went further.

Mr. Conrad: Senators from Virginia, not West Virginia, were received in Congress on the 25th day of July, 1861.

Mr. Carlisle: Several months before this constitution was framed.

Mr. Justice White: That answers my question.

Mr. Conrad: But the State had been recognized before that by the Secretary of War, some time before.

Mr. Carlisle: Yes. The restored State was represented in the Senate and in the House, before the Ordinance of 1861 was passed, but your Honors will bear in mind that the consent of the legislature of the State is not required by the Constitution of the United States to make a compact with other States. The consent of the legislature of the State, however, is required to form the new State, to create the new State within its territory. The constitutional provisions are separate.

Mr. Conrad: Mr. Lincoln denied that. You will find, in Nicolay and Hay, the action of the cabinet upon this matter, the 6th volume of Nicolay and Hay.

Mr. Carlisle: The Constitution of the United States provides that:

> "No State shall, without the consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into an Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

There is nothing about the legislature giving consent to a compact. The States may make compacts by conventions, as Kentucky did, I believe, when a compact was made with Virginia. The constitutional convention in Kentucky accepted it and put it in the constitution of the State. The other clause is different; it provides that Congress may admit new States into the Union from time to time, but that no State shall be created out of the territory or within the jurisdiction of another State without the consent of the legislatures of both States. So that the validity

of this compact does not depend upon anything that the legislature of Virginia did or could do to affect it, except that perhaps the legislature might have taken some action to withdraw the proposition made to West Virginia before it had been accepted, or before it had been fully carried out; but that is a question which does not arise in the case.

The substitute decree now proposed by the Attorney General for the plaintiff follows the Ordinance almost strictly, except that it uses the words "fairly borne," which, I suppose, mean the same thing.

Mr. Conrad: I have never had the opportunity of examining that; I never heard of it.

Mr. Anderson: That is on the basis that it is made on the Wheeling Ordinance.

Mr. Carlisle: You say it ought to be made on that basis?

Mr. Anderson: No.

Mr. Carlisle: Well, I so understand it, and I must stand on that opinion, which I think is correct.

Mr. Conrad: Has that been filed?

Mr. Carlisle: I do not know.

Mr. Conrad: It has not been shown to me.

Mr. Chief Justice Fuller: Is that not the pamphlet that was put on the files here a few days ago? What is that?

Mr. Carlisle: This is a proposed substitute for the second clause of the decree heretofore presented by the State of Virginia.

Mr. Justice White: Has that been handed to us?

Mr. Carlisle: I do not know, sir; I saw it first yesterday morning. The Attorney General says he sent it to my house several days ago, but I was absent and did not see it.

Mr. Anderson: In the event that the Wheeling Ordinance shall be adopted by the Court as the basis of settlement.

Mr. Chief Justice Fuller: Do you wish that to be looked at and examined by the Court?

Mr. Anderson: I wish to use this in argument, if your Honor please.

Mr. Chief Justice Fuller: Let it be distributed.

Mr. Anderson: It has been handed to the Court.

Mr. Carlisle: I have here what my associate read from; it was a brief. This is a separate and distinct paper, which is offered now, as I understand it, as a substitute for the second clause of the decree heretofore proposed by Virginia. The de-

cree originally proposed, as your Honors will perceive, throws the whole question open before the master; it does not state any basis at all upon which he shall make the settlement, but leaves him to decide all questions of law; not only to take the account, but decide upon what basis the account shall be taken, and provides that either party, at his own expense, may have him take alternative accounts. That is to say, if West Virginia wants an account taken under the Ordinance, she would have a right to go to the master and deposit money—I think $3,000 is what Virginia has to deposit—and have him take the account under the Ordinance. West Virginia would be at the expense of that; old Virginia would be to no expense. She holds the contracts of the owners of the certificates in which they bind themselves to defray all expenses in connection with this proceeding. This substitute provides that the master shall ascertain:

> "What is the just amount and proportion of said debt, including the interest thereon, which should now be apportioned to, and paid by, the State of West Virginia? Such amount and proportion of said debt the master will ascertain by charging against West Virginia:
>
> "(1) All expenditures made by the State of Virginia within the territory which now constitutes the State of West Virginia since any part of said debt was contracted.
>
> "(2) Such proportion of the ordinary expenses of the government of Virginia since any part of said debt was contracted as was fairly assignable to the counties which were erected into the State of West Virginia."

It is substantially the Ordinance, except instead of using the words "justly" or "equitably" it says "fairly," which, I suppose, means the same thing.

Mr. Anderson: Yes.

Mr. Carlisle: Then as to the ordinary expenses, the proposed substitute provides:

> "In ascertaining this, the master will take as the basis or criterion upon which the apportionment of said expenses shall be made the average total population of Virginia, excluding slaves, as nearly as the same can be determined from the United States Census for each of the decades in which such expenses were incurred and paid."

Our decree, which we have proposed as an alternative to their original decree, provides that the whole population shall be taken into account, not excluding slaves. There were comparatively very few slaves in that part of the territory which afterwards con-

stituted the State of West Virginia, whereas they constituted a very large part of the population in Old Virginia. Government is for people; it is the duty of the government to protect the people to govern the people, and we think that the true rule is to take the entire population. Slaves had to be governed by the law as well as the white population. In fixing the basis for representation in the House and Senate of Virginia three-fifths of the slaves were included. Therefore, the voters in that part of the territory which now constitutes the State of Virginia had far more power in the legislature than the same number of people living in that part which now constitutes West Virginia could possibly have, because of the fact that nearly all the slaves lived within the limits of what is now Virginia.

Then the proposed decree provides that the master shall ascertain the interest which West Virginia shall pay on her proportion of the public debt. I do not want to repeat the arguments made by my associate, and yet I think it proper to make one or two suggestions on that subject. The method of settlement agreed upon and embodied in the 9th section of the Ordinance has no relation to the actual amount of the public debt.

Mr. Justice McKenna: Say that over again.

Mr. Carlisle: I say that the method of settlement provided for in the 9th section of the Ordinance has no relation to the amount of the public debt of Virginia existing on the first day of January, 1861. In other words, it is wholly unnecessary, in making a settlement under the terms of that Ordinance, to ascertain what the amount of Virginia's public debt was on the first of January, 1861. If Virginia, on that date, only owed five millions of dollars, the Ordinance would be the basis of the settlement, and the amount which West Virginia would be found liable for would be just the same, except that if the debt had been larger, Virginia might have expended a larger sum of money in West Virginia with which that State would be charged in the settlement; but West Virginia did not assume to pay the creditors, but she assumed to pay Virginia a certain sum of money to be ascertained in a certain way.

Mr. Justice White: Then, if that provision for settlement has no relation and does not concern itself at all with a just proportion of the public debt, which you say is the case, is there not an absolute incompatibility of the constitution with the provision of the Ordinance?

Mr. Carlisle: This Court has said they must be read together.

Mr. Justice White: That is not answering the question, saying the question has been decided. I take it that the demurrer does not foreclose the question; I am asking it as a generic question, if it be that the method provided in the Wheeling ordinance has no relation and no concern with a just proportion of the public debt, then is the necessary induction from that that there is an irreconcilable conflict between the constitution and the Wheeling Ordinance?

Mr. Carlisle: Unless, if your Honor please, I am right in my contention that the two papers must be read together, and that the legislature was to make the settlement according to the method prescribed in the 9th section of the Ordinance; if that is true, there is no conflict. If you do not take them together, there may be a conflict between them, and West Virginia then would have voluntarily assumed to pay a just proportion of the public debt without regard to the Ordinance. What I mean by saying that the method of settlement has no relation to the public debt is this, that suppose the master should find the public debt of Virginia on the first day of January, 1861, was one hundred million dollars; West Virginia would not be required to pay a cent more under this method of settlement than she would if it was ten millions of dollars, because a certain result is reached by this calculation, and whatever that result is, it fixes the amount that West Virginia is to pay, without any regard to the amount of the public debt. The parties, when they entered into this contract, knew what the public debt was; it was about thirty-three millions of dollars. Now, they concluded that the public debt being thirty-three million dollars, or thereabouts, a settlement made upon this basis would result in charging West Virginia with her just share of that debt.

Mr. Conrad: They propose to ascertain, under the Ordinance, what a just or equitable proportion was, by deducting the amount of appropriation and the amount of taxes.

Mr. Carlisle: Oh, no, charging West Virginia with State expenditures and her just proportion of ordinary expenses.

Mr. Conrad: That is the Wheeling Ordinance.

Mr. Carlisle: Of course, the Court knows what the Ordinance is. Therefore, while we do not object to the provision in the decree that the master shall ascertain the amount of the public debt on the first day of January, 1861, it has no bearing whatever upon the settlement, no bearing whatever upon the amount which West Virginia may be found liable for, and the counsel on the other

side agree to that. West Virginia, then, did not agree to pay a part of the public debt to the creditors or a part of the public debt to Virginia; she agreed that because there was a public debt which had been incurred by Virginia while she was a part of that State, she would pay a certain sum to Virginia, which would be ascertained by the method prescribed in the Ordinance. In other words, it was a primary obligation to the State of Virginia to pay her whatever might be found by this process. Does that bear interest until it is ascertained? Can you go back to 1861, including the ten years when there could be no settlement made, and charge West Virginia interest on this liability, not a debt, because the debt begins when the sum is ascertained, and West Virginia's constitution provides for that, as has already been shown; the legislature was to ascertain the amount and provide for the payment of the amount ascertained, with interest thereon, not that the legislature should ascertain what interest had accrued upon the sum which had not yet been ascertained, during the last forty-five years, but provide, by creating a sinking fund, for the payment of the principal and interest which should accrue upon it after it had been ascertained.

The doctrine that a State is not liable for interest, unless it has expressly contracted for it by a statute or otherwise, is so well settled in this country that it is hardly necessary to cite authorities. I have a long list of authorities here which I will not take the time to read. However, I will call the attention of the Court to them.

Mr. Anderson: Furnish us a copy of that.

Mr. Carlisle: I would like to have them in the record.

Mr. Anderson: You can furnish us a copy of them.

Mr. Carlisle: This list of authorities begins with the case of United States *vs.* North Carolina.

Mr. Chief Justice Fuller: Will you hand that to the clerk?

Mr. Carlisle: Yes sir, I will do that; the gentlemen on the other side will probably desire to see it.

Mr. Chief Justice Fuller: And have copies for each member of the Court.

Mr. Carlisle: They are all on one sheet; it was prepared for a brief.

Mr. Chief Justice Fuller: One for each member of the Court is enough.

Mr. Carlisle: I can have it printed, then.

Mr. Chief Justice Fuller: Yes.

Mr. Carlisle: Yes sir, I will do that.

Mr. Justice Moody: I would like to ask a question for my own information. If I understand you correctly, you agree to the form of the decree proposed by the State of Virginia with three exceptions, first, the amount of the public debt; second, the question of interest upon the balance found due; and third, the question of including the slaves in a basis of settlement. Otherwise than those three things, you do not contest the decree proposed by the State of Virginia?

Mr. Carlisle: And I do not really contest that that part which directs the master to ascertain the amount of the public debt, because it is not material and it is easily ascertained. The statement of Mr. Justice Moody is correct as to my position with reference to this proposed substitute, but there are some things in the original proposition made by the State of Virginia to which we object. For instance, that provides, as I have just said, that the master may take alternative accounts, provided the party who asks for them pays for them, and because, under that decree, everything is cast before him without any rule for his guidance whatever, and it provides also that the acts and the public records of the two States shall be competent evidence before the master. We have no objection to that except to this extent: the State of Virginia adopted an ordinance on the 17th of April, 1861, by which, as I have said before, it severed its political relations with the United States Government and with the other States adhering to the Union, and after that date, whatever Virginia did was *ex parte*, so far as West Virginia was concerned; practically West Virginia was no longer a part of that State, and her acts since that time ought not to bind West Virginia.

Mr. Anderson: We simply want to introduce them as evidence.

Mr. Carlisle: You say they may be objected to as immaterial, but they must be admitted if they are immaterial. I understand it to be a fact—I state it subject to correction—that in 1861 or 1862, after the State had passed the ordinance of secession, a commission, or some official of the State, made out a very long and complicated account of the public debt and the expenditure of the money. Am I correct?

Mr. Conrad: Mr. Bennett, to whom you have referred, has made an official report as Auditor of Virginia, down to September, 1862, which leads to quite different results from the report he made later.

Mr. Carlisle: Yes, of course. Mr. Bennett was at that time

an official of the State of Virginia, but we think that some period ought to be fixed after which the public acts and records of the State of Virginia should not be received as evidence against West Virginia, because the two States were in fact entirely separate after April 17, 1861.

Mr. Conrad: They became separate in June, 1863.

Mr. Carlisle: It seems to me that the question of interest is one which cannot only be appropriately postponed until the final hearing of the case, but ought to be postponed. When the master has found the amount and reported to the Court, it will not be difficult then for the Court to decide whether it shall bear interest. There is no interest to be counted on the money expended in West Virginia, no interest to be counted on her just proportion of the ordinary expenses, no interest to be counted on the money which she paid into the treasury; the master will simply take the original sums and include them in his report.

Mr. Justice White: Let me ask you a question. I do not know that it has any concern with what you have said, but there is some claim made in the original application made by Virginia for a decree, concerning some property passing under some act. Is that necessarily involved in what you have said?

Mr. Carlisle: I am much obliged to your Honor for calling my attention to that. I had thought Mr. Spooner fully discussed that question. Your Honor refers, of course, to the acts of February 3 and 4, 1863, which were passed by the legislature of Virginia after Congress had passed the act admitting West Virginia into the Union. One of those acts simply directs the proper official of the State, the auditor, I think, to pay over to West Virginia certain amounts of money then in the treasury of the restored government of Virginia. That act says nothing about a settlement with West Virginia for that money, and in fact, it was West Virginia's money in this sense, it was money which had been collected by the restored government of Virginia from the counties which now constitute the State of West Virginia. It was in the treasury when Congress passed the act for the admission of the State into the Union, and the legislature of Virginia provided it should be paid over to West Virginia; it was her own money. The act shows this; the other act purports to transfer to West Virginia certain property.

Mr. Conrad: All property of every description, real and personal.

Mr. Carlisle: Yes; real and personal. The public land I sup-

pose, you have reference to. That act provides that this shall be accounted for in the settlement hereafter to be made with West Virginia, which, I presume, means the settlement under this Ordinance. Our contention is, and I think we are fully sustained by the authorities on international law, that the mere fact of the separation of the State from the mother State, unless there was some provision to the contrary in the original agreement or compact, conferred upon the new State the public property within its limits, that that was a part of what Virginia consented should be taken into the new State.

Mr. Justice White: Let me ask you, was this public property, used for the purpose of governmental business, Mr. Carlisle?

Mr. Carlisle: I suppose so; it says "buildings," and mentions other property also.

Mr. Justice White: It was to be land which the State used?

Mr. Carlisle: Yes, it says "lands;" and several other things, buildings and lands and roads, bridges and uncollected taxes.

Our contention is that as to the public property owned by Virginia within the limits of the new State it passed by operation of the separation itself to that State, the land, the charitable institutions, the roads, the bridges, and there was some stock in banks localized within the State of West Virginia; there is some doubt in my mind, and there has always been, whether Virginia's shares of stock in banks located in West Virginia, the old State not being the sole proprietor of the bank, would pass by the mere act of separation, but the public property localized did pass, unquestionably, and all the effect that this act of 1863 has, is as evidence of title; it does not confer title. West Virginia had the title by reason of the separation. This decree, the first one proposed by Virginia, provides that the master shall take that property into account, and I suppose, charge West Virginia with its value as if this act passed the title, or in other words, as if this had been the first time West Virginia acquired it. We say that if West Virginia is to account for this property at all, or any part of it, it is to be accounted for under the terms of the Ordinance. That is to say, West Virginia is chargeable with the money which old Virginia expended within her limits during the time that this debt was created, which might include whatever money Virginia expended within the territory which now constitutes West Virginia, in procuring this property.

Mr. Justice White: That would cover, undoubtedly, the court houses and other things, but I am speaking of land, now; for in-

stance, land that Virginia owned from her colonial times, which passed to her as a sovereign.

Mr. Carlisle: That passed by virtue of the separation, according to most of the authorities on international law, and especially Hall. Your Honors will find it in his work, I think section 27, page 58—I have a long extract from it here, but will not read it. All those things go along with the territory; they go to the new State, and why should they not? What would be the situation if they did not? The State of Virginia would own the court houses and the charitable institutions and the roads and the bridges in West Virginia; and the public lands if there were any. West Virginia would have no jurisdiction over them. One State would own all this property in another State and control it absolutely under its own laws, without regard to laws of the new State. Virginia would continue to administer, I suppose, the affairs of the charitable institutions, continue to keep the bridges and roads in repair. It seems absurd that such consequences could legally follow the consent to the formation of a new State. It must go out as a State and must come into the Union endowed with all the rights and privileges of a sovereign State over the territory within its limits, and if Virginia owned territory there, it went to West Virginia just as the public lands in Texas would have gone to the United States by the annexation if the act of Congress had not provided that the old State or Republic could retain them.

Mr. Conrad: Do you contend that the settlement provided for in the acts of the Assembly can be made within the terms of the Wheeling Ordinance?

Mr. Carlisle: I think there is no doubt of it. I understand your argument is that it would not be a fair settlement, but I will not discuss that.

It has been argued that the provision contained in the constitution of West Virginia assuming an equitable proportion of the public debt is inconsistent with the Ordinance of the Wheeling Convention on that subject. Now, the Ordinance provided that the new State should assume a just proportion of the public debt created prior to the 1st of January, 1861, to be ascertained, first, by charging to the new State all state expenditures within her limits during the time when the debt was being created; second, by charging to the people of the new State, or to the new State, their just proportion of all the ordinary expenses of the whole State during the same time; and third, by crediting the new

State with all the money paid into the State treasury from the counties included in it during the time the debt was being created.

Mr. Justice White: If the words "ordinary expenses" be construed as relating merely to the ordinary expenses for carrying on the government, and exclude all the sums spent by the State of Virginia for public works and public improvements—

Mr. Carlisle: Within her own borders.

Mr. Justice White: Within the borders of the State, her own borders, West Virginiia being a part of her territory, and thereby, under the calculation now made by West Virginia, brought Virginia out $500,000 in debt to them, you say she had no claim for it; your conception is that that coincided with and was coincident with an obligation to pay a just proportion of the debt?

Mr. Carlisle: It is a part of the Ordinance, whatever construction the Court may put upon it.

Mr. Justice White: That question addresses itself to whether Congress in recognizing the situation, may not well have said: "I will not ratify unless there is a just proportion paid," and thereby eliminated that thing, which, in the very nature of things, was destructive of the obligation to pay a just proportion. Of course, I am not dealing now with the admissions of the State of Virginia made at the bar by the Attorney-General in the briefs.

Mr. Carlisle: Of course, the only way Congress could say that would be in its legislation; we have no means of ascertaining what Congress thought about it except from the act passed by that body admitting West Virginia into the Union under that constitution. What some member of Congress may have said upon the floor in expressing his own individual views is wholly immaterial here; in fact, I do not know what they did say.

West Virginia is to be charged, then, with all the State expenditures made within that territory by the State of Virginia during the period that this debt was being created, and her just proportion of the ordinary expenses of the State during the same period. The court will see that such a provision, of course, makes West Virginia account for every dollar expended there for internal improvements within her limits. Therefore, we are obliged, under the terms of this Ordinance, to separate ordinary expenses from other expenses, because if you first charge West Virginia with all the money expended by the State of Virginia within the counties now composing that State, and then charge her with her just share of all the ordinary expenses of the whole State, you

may charge her twice for a large sum of money, because a large part of the ordinary expenses were also paid in those counties. So you have to separate them. The first class means, of course, those expenditures that we call "extraordinary expenses," expenses for internal improvements, for charitable institutions, for bridges and roads and various other things of like character. Then West Virginia is to have credit for the money she has paid in. That is the Ordinance, and it has been suggested that the provision of the constitution, article 8, is inconsistent with that, and is an absolute assumption of a just and equitable proportion of the public debt of Virginia without regard to the Ordinance or the method of ascertaining it. Now, I submit that this Court has taken a different view of it. This Court said, in its opinion overruling the demurrer, on page 433 of the printed record:

> "The Act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia,"—

That is not the case now. It is admitted now, in the brief recently filed, that the legislature was properly called by proclamation by the governor.

> "but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided 'for the formation of a new State out of the territory of this State,' and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861,' to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its Legislature should 'ascertain the same as soon as practicable,' it referred to the matter of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the 'Legislature shall ascertain' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained."

This Court did not treat that provision in the 8th article of the constitution of West Virginia as voluntary, or as a new and independent assumption of a just proportion of the public debt of Virginia.

Mr. Conrad: Was that question before the Court at all on demurrer, or argued before it?

Mr. Carlisle: Undoubtedly, because we argued that under the constitution of West Virginia, which we contended, and in which contention we were overruled, that the constitutional provision formed a part of the compact. Our argument was that Virginia had made a proposition in the 9th section of the Ordinance and tendered it to West Virginia; that when West Virginia's convention assembled, which was the first time that State could speak upon the subject, it accepted that proposition with the addition to it, that the Legislature of West Virginia should be the tribunal to ascertain her just proportion of the debt, and that Virginia, subsequently by the passage of the act asking for the admission of West Virginia into the Union under that constitution, had agreed to this additional clause which the West Virginia convention had inserted in it. So we argued that the compact consisted not only of the 9th section of the Ordinance, but of the whole of the 8th section of the West Virginia constitution, including that part of it, of course, which provided that the legislature should ascertain the just proportion. Now, the Court discussed that very question, and said that the legislature was to ascertain it in the method prescribed by the Virginia convention, and that the legislature was not to sit as a court, as a tribunal, and hear the evidence and make the investigation by its members, but that it was to provide for the settlement "in the method prescribed." The Legislature could have appointed a commission, or it could have authorized the Governor alone, or any other official, to make the settlement, but it must be made in the method prescribed by the Ordinance. So, there is no inconsistency between the Ordinance and the constitutional provision as interpreted by the Court.

The second clause of the 8th article of the constitution of West Virginia, as has already been stated by my associate, constitutes no part of the assumption of the debt. That clause was simply a delegation of authority and a direction to the Legislature as to what it should do, that is, it should ascertain the State's equitable proportion of the public debt and provide for its payment by the creation of a sinking fund sufficient to pay the principal and interest within thirty-four years. The argument which I am trying to answer, if correct, would result in this, that, the Ordinance being out, because it is invalid, West Virginia's constitutional convention, being under no obligation to do it all, as it was not a condition upon which the new State was to be formed, or a condition upon which Virgina was to give her consent to its formation, voluntarily assumed to pay a just proportion of the public

debt. As was well said this morning, if that is true, then that provision constitutes the whole assumption, and what West Virginia volunteered to do was to pay her just proportion of the public debt to be ascertained by her own legislature and provided for by her own legislature. If the Ordinance is out, there is nothing in the case, except the 8th section of the constitution, pledging West Virginia to pay her just proportion of the debt. It is true some argument has been made as to her liability under international law. I do not know where our friends on the other side found any international law to the effect that the obligations of a State divided should be apportioned ratably between the two parts according to territory and population; that is the argument—

Mr. Conrad: Not mine.

Mr. Carlisle: The argument on the demurrer; it is also relied on in the bill.

Mr. Conrad: No, I wrote the bill. I will say there are four grounds stated in that one section of the bill that relate to an admission of liability alone, and this is instanced as one of the incidents to liability. That is the first section of the Wheeling Ordinance, that the State shall assume a just proportion.

Mr. Carlisle: How can this Ordinance be taken as a valid admission if the Ordinance is not valid?

Mr. Conrad: Because a man may make an admission in a deed that is fraudulent as to grantee and as to creditors. There is a solemn admission in the recognition of debts.

Mr. Carlisle: It is alleged that the new State included one-third of the territory, and one-third of the population. Now, in the books on international law, I venture to say that the words "territory" and "population" cannot be found anywhere in connection with the adjustment of the debts under such circumstances as exist here. They are not found in any of the quotations you made, Mr. Anderson; they are not found in any of the books I have read. What the authorities say is that, in the absence of an agreement on the subject, all debts shall be apportioned ratably without stating what the basis of apportionment shall be. Of course, each case would depend upon its own circumstances. But all the authorities are that if there is a special agreement, that rule does not apply, and Mr. Hall says, in his work on international law, that the rule does not apply in a case where a state or nation is divided and the old State still remains, or, as he expresses it, when its personality still continues. There, he says,

the new State goes out free from all the old obligations, but he admits it is a sound doctrine when applied to a case where a State or nation is so destroyed that all its parts are separated and the old State disappears, and then its separate parts, which represent the old State, must divide the pre-existing debts among themselves in the proper proportions.

Mr. Conrad: Some of the authorities hold that each party is liable for the entire debt.

Mr. Carlisle: I have seen no such authority.

Mr. Conrad: I ventured to cite them in the brief I have filed.

Mr. Carlisle: Let us see what you have cited. I know what you cited, the case of the division of the Persian Empire.

Mr. Conrad: No, I do not go that far back; I did not think Alexander's generals were called upon to pay any part of the debt, if there was any.

Mr. Carlisle: I think you did, Mr. Conrad. I do not want to make any missfatement, but I am quite sure I saw that in one of the briefs.

Mr. Conrad: I saw that somewhere, but it is not in my brief.

Mr. Carlisle: I think I saw it in your brief, but I may be mistaken. It was certainly in one of the briefs; it may be in the Attorney General's brief. It was a case, where, during Alexander's wars, the Persian Empire was divided, and ceased to exist.

Mr. Anderson: Grotius.

Mr. Carlisle: Yes, you quote from Grotius. There the old State was extinguished entirely, and the new States represented the whole of it, and of course they were responsible for the whole debt; they took the place of the old State.

In conclusion, I repeat the West Virginia constitutional provision cannot be regarded under the decision of this Court, or logically, I think, upon the historical facts connected with this subject, as constituting the entire compact. It was simply an acceptance of Virginia's proposition, with the addition to it that the Legislature of West Virginia should ascertain the debt and provide for its settlement, in the method prescribed by the Ordinance. The State of Virginia, in her constitution, had the same provision; that is, she had a provision that her legislature should provide for the settlement of the debt, but that did not take the place of the Ordinance, which, as we insist, is still in full force and must govern in making the settlement.

MEMORANDUM FOR DEFENDANT.

Showing State Not Chargeable with Interest.

It will be observed that in paragraph II of this draft of a decree the master is not only directed to ascertain the amount and proportion of said indebtedness, but "of the interest accrued thereon."

Counsel for the defendant object further to this paragraph because there is no legal ground for directing the ascertainment of interest. The State of West Virginia has not obligated herself in any manner for the payment of interest. The principal is well settled that a State is not liable to pay interest unless it has expressly contracted to do so.

In support of this proposition this Court, in United States *vs.* North Carolina, 136 U. S., 211, said:

> "A State is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by lawful contract of its executive officers."

Following the principle thus announced by this Court, many of the State courts have laid down in distinct terms the same proposition. Among the decisions of these courts are the following:

> Sawyer *vs.* Colgan, 102 Cal., 293; 36 Pac., 583.
> Hawkins *vs.* Mitchell, 34 Fla., 421, 422; 16 So., 316.
> Molineux *vs.* State, 109 Cal., 380; 50 Am. St. Rep., 50; 42 Pac., 34.
> Flint, etc., R. R. *vs.* Board of State Auditors, 102 Mich., 502; 60 N. W., 971.
> Carr *vs.* State, 127 Ind., 204; 22 Am. St. Rep., 624.

In Carr *vs.* State, 127 Ind., 204, 22 Am. St. Rep., 624, this principle is announced as one of the points decided:

> "A sovereign State is not bound to pay interest unless it has contracted to do so."

The court, in the course of its opinion in this case, says:

> "In the case of State *ex rel. vs.* Board, etc., 36 Ohio St, 409, it was held that in the absence of a promise to pay interest none can be recovered against a State, and that a State is not within the provisions of a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute unless it is expressly named, and in support of its conclusion cited these cases: Trustee,

etc., *vs.* Campbell, 16 Ohio St., 11; Joselyn *vs.* Stone, 28 Miss., 753; State *vs.* Kinne, 41 N. H., 238; Attorney General *vs.* Cape Fear, etc., Co., 2 Ired. Eq., 444; Auditorial Board *vs.* Arles, 15 Tex., 72; State *vs.* Thompson, 10 Ark., 61. In Wightman *vs.* United States, 23 Ct. of Cl., 144, the general rule was stated, and it was said: 'Hence there is no law fixing a rate of interest for all classes of the public debt, and a long-established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment.' It was held in the case of Tillson *vs.* United States, 100 U. S., 43, that a statute referring a claim did not authorize a recovery of interest, in the absence of words expressly providing for the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is, that there is no right to coerce the payment of a debt due from a sovereign, and, of course, a sovereign may impose limitations upon its liability."

In a note appended to this case as reported in 22 American State Reports, at page 448, we find the following:

"With respect to the obligation of the State to pay interest upon its indebtedness, the principal case is well established by other authorities upon the same subject. In nearly and perhaps all of the States there are statutory provisions providing that moneys, after they become due, shall, in the absence of express contract to the contrary, bear the rate of interest specified in such statutes; but, acting under the old common-law rule that the king or sovereign is not bound by a statute unless expressly named therein, it has been uniformly held that these statutory provisions respecting interest did not apply to any obligation either of the State or of the national government, and therefore that interest is never allowed upon such obligations, in the absence of some special statute clearly manifesting the intention of the sovereign to be bound for the payment of interest upon the particular obligation or class of obligations under consideration (United States *vs.* North Carolina, 136 U. S., 211; State *vs.* Thompson, 10 Ark., 61; State *vs.* Board of Public Works, 36 Ohio St., 409; State *vs.* Bank of Washington, 18 Ark., 554; United States *vs.* Sherman, 98 U. S., 565; United States *vs.* Bayard, 127 U. S., 251; Tillson *vs.* United States, 100 U. S., 43; *In re* Gosman, 17 Ch. Div., 771; Attorney General *vs.* Cape Fear N. Co., 2 Ired. Eq., 444; Bledsoe *vs.* State, 64 N. C., 392; Trustee *vs.* Campbell, 16 Ohio St., 11; Joselyn *vs.* Stone, 28 Miss., 753; Wightman *vs.* United States, 23 Ct. of Cls., 144)."

Supreme Court of the United States.

OCTOBER TERM, 1907.

Argument of Hon. William A. Anderson,

Attorney General of Virginia,
for the Complainant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

In Equity.—Original No. 4.

ARGUMENT OF HON. WILLIAM A. ANDERSON,

Attorney General of Virginia, for the Complainant.

Mr. Anderson: If your Honors please, a large portion of the time of the distinguished counsel who last spoke in this case (Mr. Carlisle) was consumed in discussing questions which have little or nothing to do with the merits of the cause. The questions which he discussed at great length related to the occasion of the delay in bringing about a settlement between the two States. The proposition he attempted to maintain was that West Virginia was no more culpable than Virginia for this delay. I cannot see that that has any bearing, directly or indirectly, upon the important issues of this case; but if I were disposed to go into a discussion of that matter, I think I could satisfy your Honors, and I think a careful examination of the record will convince your Honors, that the gentleman is mistaken in his position.

He says that the reason that West Virginia has taken no steps towards the settlement of this debt since 1871 is because of Virginia's attitude to the question. That statement is in conflict entirely with the allegations of his answer. At pages 14 and 15 of the defendant's answer the defendant makes the following averment:

"The State of West Virginia has never receded from the

provisions contained in section nine of the Wheeling Ordinance with reference to the settlement of this respondent's just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a State; and the resolutions adopted by her Legislature in recent years in which she declared that she did not owe the State of Virginia anything on account of said public debt were based upon the said report of the Senate Committee made in 1873 as aforesaid, and upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance as the just and true one upon which a settlement between the two States could legally and equitably be made."

If your Honors please, as stated in the answer, the reason why there has been no settlement of this debt has been that West Virginia, or one house of her General Assembly, appointed a committee of its own body to examine into this question, and that committee (in 1873) made a report, ostensibly upon the basis of the Wheeling Ordinance, which ascertained, not only that the State of West Virginia did not owe anything on account of the debt, but that the State of Virginia owed the State of West Virginia over $500,000; and because Virginia would not agree to a settlement upon that basis, West Virginia has refused to negotiate with her. I leave that proposition where the answer of the defendant has placed it.

Now, if your Honors please, it will be my effort, as rapidly and concisely as possible to direct the attention of the Court to the essential issues now presented to it upon this motion for a decree for an account. In the first place, I would ask your Honors to carry in your minds what is the basic principle of our suit, what is the controlling ground upon which the plaintiff, throughout the litigation, through the pleadings and in the argument, has invoked the jurisdiction of this Court. That is, that having failed, after patient and exhaustive efforts to bring about an amicable settlement with West Virginia, Virginia has been constrained, for her own protection, as well as in the discharge of her duty to the common creditors of Virginia and West Virginia, to resort to this Court for relief; and what is the relief that we ask? It is that West Virginia shall be required to account equitably for her just proportion of the common debt. It is an equitable claim that we are asserting here; it is West Virginia's equitable liability which we insist is the measure of her responsibility. I know that it will be the province of this Court to reach a result in this case in

accordance with justice and equity, and that neither technicalities nor quibbles will be allowed to deter it from coming to a conclusion, if it is possible to reach one, which is in accordance with the principles of equity.

It may be that counsel, in the argument of the case, have been in some instances, perhaps, inaccurate in stating the conclusions of law which they have deduced from the facts in the record; but if that be so, the Court will not hold them or their clients bound by an erroneous deduction of that kind.

The distinguished counsel who have spoken for West Virginia have repeatedly said that I, as the law officer of Virginia, have conceded the validity of the Wheeling Ordinance. That is true. I cannot be uncandid with this Court or with the learned counsel. I have said more than once, and I frankly say now, that under the averments of our bill and upon the indisputable facts of the case, I am constrained to the position that the Wheeling Ordinance, viewed from the standpoint of today, was a valid enactment.

Mr. Justice Peckham: Was a valid enactment?

Mr. Anderson: The Wheeling Ordinance was a valid enactment. The Wheeling Ordinance was adopted by a convention, sometimes called a "mass meeting," undoubtedly a revolutionary body, but a body which, though at the time that it sat and enacted this Ordinance, if the issue could have been made up then, must have been held to have been an illegal convention, a body which was, in fact, so far as it could be regarded at that time as a convention of Virginia, a mere fiction. But that body and its acts have been recognized by every department of the Federal Government, directly or indirectly, and it has been recognized by the government of Virginia.

Mr. Justice Harlan: What body?

Mr. Anderson: The Wheeling convention that framed this Ordinance; that convention or its acts have been recognized.

Mr. Justice Harlan: How did the United States ever recognize that mass meeting.

Mr. Anderson: The United States recognized the acts of the Legislature of the restored government of Virginia, which depended for its existence and its organization upon the acts of the Wheeling convention. There could have been no legal legislature of the restored government of Virginia unless there was a legal Wheeling convention to create it. It was a legal fiction, if your Honors please, but by this post-natal recognition, what was a mere

fiction, has become a legal fiction, possessing all the force, if not all the virtue, of a legal verity. But while this is true, I have never committed my mind to the proposition that the Wheeling Ordinance taken by itself, controlled this situation. Disjointed remarks having no reference to this main question precisely, which have been made in the argument of this case, and in the briefs which have been filed, could not be construed into an unqualified admission as to the meaning and effect of the Wheeling Ordinance. Speaking for myself I can say that I have never acknowledged or believed that the Wheeling Ordinance, taken by itself, prescribed the terms upon which the settlement should be made between the two States.

There has been some divergence of views between the distinguished counsel who appeared on behalf of some of the ultimate beneficiaries of any recovery here, and myself, a divergence of views which it seemed to be impossible to reconcile, but the questions propounded by his Honor, Mr. Justice White, on yesterday, which went to the very heart of this case, confirm me in the view that there is no necessary antagonism between the conclusions and results of Major Conrad's main argument as presented yesterday in this case, and the views which I have maintained and which I shall endeavor to present to this Court.

The position taken by Virginia in reference to the Wheeling Ordinance and its effect will be found stated in the complainant's Bill, paragraph 10, (page 6 of Attorney General May's compilation of the record in this case), and in paragraph XVIII of the Bill, (page 11 of Attorney General May's compilation), in both of which the Ordinance is set out and relied upon as one of the grounds of recovery but not the only one; and in paragraph X of the Bill, in which Section 8 of Article 8 of the first West Virginia Constitution, and in paragraphs VIII and IX of the Bill, in which the Acts of the Wheeling Legislature of February 3rd and 4th, 1863, are alleged and relied upon.

The fallacy of the position of my distinguished friends is that they have ascribed to me the concession, which I have never made, that the Wheeling Ordinance prescribes the only ground upon which the settlement can be made. If they had read my opening brief, filed upon this very motion, they would have found their mistake; if they had read the bill in this case carefully, and the opening brief of Major Conrad and myself, filed upon the demurrer, they would have found their mistake; and if they had read my reply brief filed in this case in the last few days, they

would have found they were in error. It is not true, as I view the law and the facts of this case, that the Wheeling Ordinance dominates the situation as to the basis upon which the settlement shall be made, unalterably and irrevocably. As the counsel for plaintiffs have always claimed, the Wheeling Ordinance, section 8 of article 8 of the Constitution of West Virginia, and the act of the Wheeling Legislature of February 3, 1863, must be taken together, must be read together, as prescribing the terms upon which the settlement shall be made.

Mr. Justice Harlan: If they are to be read together, how do you get out of the case the purpose of this settlement, to ascertain the rights of the parties, those words "to be ascertained," and so forth, in the Ordinance?

Mr. Anderson: If your Honor pleases, I think that that question can be answered. The considerations that I was about to present, I think, furnish an answer to it, and a conclusive answer.

I said "read together, taken together." When two acts passed by the same legislative body, or by different legislative bodies having jurisdiction of the same subject, are enacted with reference to that subject, and there is a conflict between them, I would like my learned friend (Mr. Carlisle) to inform me which of those acts would prevail? As legislative enactments they are all valid; none of them could be impeached. But the last is inconsistent with the first, or the first is in conflict with the last. In that condition of things I state it as an elementary, incontrovertible proposition of the law as to the construction of statutes, that the last statute would prevail and supersede the first.

Now, if your Honors please, what was the dominant purpose according to its own expressed language, of the Wheeling Ordinance? The language of that Ordinance is, that the new State shall take upon itself "a just proportion of the debt of the Commonwealth of Virginia existing prior to January 1, 1861." That is the controlling mandate of that enactment. The subsequent and subordinate provisions and details of that enactment must be construed by a court of equity so as to lead to the result which was the purpose of the enactment.

But suppose I am mistaken in that—and I hardly think that I can be—here was this organic law of the Commonwealth of Virginia.

Mr. Justice White: What do you mean by "this organic law of the Commonwealth of Virginia?"

Mr. Anderson: I mean an ordinance of a convention that purported to be a convention of the sovereign people of Virginia.

Mr. Justice White: Oh, yes; I beg your pardon.

Mr. Anderson: It did not have the weight of a constitution; it did not tie the hands of the Legislature of Virginia, whose powers were only limited by the Constitution of the Commonwealth of Virginia at that time, and which, according to the decisions of the Supreme Court of Appeals of Virginia, repeatedly enunciated, was supreme and omnipotent, except where its powers were limited by some express provision of the Federal or State Constitution, or by necessary implication from some express provision of those Constitutions.

And so matters stood in that way on and after the 20th of August, 1861. On the 26th of November, 1861, a convention convened pursuant to that Ordinance, in the City of Wheeling, for the purpose of framing a Constitution for the State of West Virginia. Acting for West Virginia, that convention could undoubtedly when its acts should have been sanctioned, by the vote of the people of the State of West Virginia, with the consent of Virginia, have altered the Wheeling Ordinance. I am indebted to the pertinent inquiries of the Honorable Judge, Mr. Justice White, for the suggestion which confirms this view.

They could alter the Wheeling Ordinance, and they did alter it in a material particular.

Mr. Carlisle: You mean to say that they could do it after West Virginia had accepted the Constitution.

Mr. Anderson: No, I say if they chose to do it in that Constitution, and the people of West Virginia at the polls sanctioned that Constitution, and the Legislature of Virginia sanctioned it and gave their consent that the new State should come into the Union under its provisions, they could have wiped out the Wheeling Ordinance and abrogated it, or they could have amended it, and they did amend it. They constituted the supreme law making power of both States, and to their concurrent act was added the sanction of the Congress of the United States, without which the Constitution, the creation of the new State, and the compact arising from the Constitution and the consent given by Virginia to the admission of the new State to Statehood, would have been nullities, or abortions.

Is there any fallacy in that proposition? Is it possible for human ingenuity successfully to attack it?

If I am right, then the Wheeling Ordinance must be taken and read, as this Court has said it should be, in connection with section 8 of article 8 of the Constitution of West Virginia.

We must apply the Wheeling Ordinance, carry it out if it can be done, without conflicting with the provisions of the subsequent enactment.

If the two enactments can be made to stand together, they must be made to stand together; but if there is an irreconcilable or a substantial conflict between them, the first enactment goes down and the last stands; and so, if, when we come to apply the requirements of the Wheeling Ordinance and carry out the scheme of the Wheeling Ordinance, in stating this debt, it shall be found that any such result is reached as was reached by the Senate committee of the General Assembly of West Virginia, in 1873, the Wheeling Ordinance will have been shown to be in conflict with the essential requirements of the 8th section of the 8th article of the West Virginia Constitution which provides that the State of West Virginia shall assume an equitable proportion of the public debt of the Commonwealth of Virginia existing before the first day of January, 1861.

And so here I am glad to discover that my honored friend, Major Conrad, and myself, come together. We differed as to the validity of the Wheeling Ordinance; we do not differ at all as to its legal effect, if it shall, when applied, lead to an unconscionable or inequitable result.

If it should turn out, upon applying the scheme of the Wheeling Ordinance, that only one-tenth of this debt would be assigned to West Virginia, it would be an inequitable result. There is no man who is familiar with the facts of this case, the history of this debt, the relations of West Virginia to it and of Virginia to it, who must not say that any such result would be inequitable, if not iniquitous. If it should be ascertained that one-fifth of the debt was the proper portion of West Virginia, when you apply the scheme of the Wheeling Ordinance, if that one-fifth bears interest, as the original debt bore interest, I am not prepared to say that it would be an inequitable or an unconscionable settlement, or in conflict with the dominant provisions of the Wheeling Ordinance and of section 8 of article 8 of the Constitution. I am very hopeful that some such result will follow a fair and reasonable application of the provisions of the Wheeling Ordinance, because I am firmly convinced that the makers of West Virginia, in framing that Ordinance, builded fairer than they knew.

Mr. Justice Moody: I do not see how your present position is consistent with the amended proposal that you filed for a decree, and I will just point out my difficulty, and then perhaps you can clear it up, because in the original decree you propose that the master should find what would be the equitable amount and the proportion to be paid. Now you propose to strike out that paragraph and substitute a direction to the master to make a finding which is based exactly on the Wheeling Ordinance. How do you reconcile your present position with that amended paper?

Mr. Anderson: I wish merely to offer that amendment for consideration and adoption by the Court, in the event that they shall adopt the Wheeling Ordinance as a basis of stating this account.

Mr. Justice Moody: Then instead of this being a substitute, you propose this as an alternative?

Mr. Anderson: That is a correct statement of my purpose. The caption of that decree is erroneous. It was an error on my part to which I do not wish to be committed, nor desire my client to be committed. I do not ask that that paragraph of the decree shall be substituted for paragraph II of the original draft, but shall be an alternative or additional direction or paragraph; or if it be treated as a substitute, a substitute only in the event that the Court shall decide that the settlement must be made on the basis of the Wheeling Ordinance and the constating enactments.

If my learned and distinguished friend, (Mr. Carlisle), if he will allow me so to style him, will examine the principal brief of counsel for complainant upon this demurrer in this case, at pages 227, 228 and 229 of May's compilation, and will examine my opening brief upon this motion, at pages 5 and 6, and also at pages 7 and 8, and my reply brief on this motion at pages 16, 17 and 18, he will find that the statements of my position there are entirely in accord with the position which I now occupy, and which I am satisfied, with a clearer vision than I ever saw it before, is the correct position to take in this case.

I will now briefly address myself to the terms of that proposed alternative direction to the master, and the residue of my argument will be largely directed to this view of the case.

As has been repeatedly said by counsel for complainant in this case, as was said by myself upon the argument on the demurrer, the Wheeling Ordinance, upon its face certainly prescribes an arbitrary and an inequitable scheme for the settlement of these ac-

counts. After a somewhat exhaustive investigation of the authorities and of the history of this question, I have been unable to find any precedent or authority anywhere that sanctions any such scheme of settlement for ascertaining the liability of two Commonwealths which have been formed out of one original Commonwealth. In the appendix to the reply brief for the complainant I have quoted a large number of those authorities and there are others that I have examined. Not one of them sanctions any such principle as is embodied in the Wheeling Ordinance as a basis of settlement. So that I feel justified in saying that the requirements of that Ordinance are in conflict with the common law of the civilized world, and contrary to all the precedents established by the nations of the earth in dealing with this subject. I say also, without any likelihood of contradiction, that upon its face it is contrary to common right.

As counsel have already shown in the case, more ably than I could possibly do, there is no principle of justice or equity which is satisfied by the terms of the Wheeling Ordinance. If this be true, it goes without further argument that that Ordinance must be strictly construed, so as if possible to give it an equitable effect; that it must be construed liberally as to Virginia, who was not, as a matter of fact, its enactor; that it must be construed strictly against West Virginia, who was to be the beneficiary under it.

Not for that reason only must it be so construed, but because it is contrary to common law and to common right.

I need not cite many of the numerous authorities for that proposition. I will, however, call attention to Brown *vs.* Berry, 3rd Dallas; Shaw *vs.* Railroad Company, 101 U. S., 557; New York *vs.* Wheeler, 48 N. Y., and a large number of other cases cited by Mr. Enlich, at section 127, and referred to in my brief, sustaining this rule.

But we have more conclusive authority than those adjudications. We have repeated decisions of the Supreme Court of Virginia before the formation of West Virginia, and which constituted a part of the body of the laws of West Virginia, and decisions also of the Supreme Court of Appeals of West Virginia to the effect that where a law is contrary to common law, and particularly where a law is contrary to common right, it will be strictly construed so as if possible to give it an effect which will not operate an injustice and a wrong. Those cases are cited on page 14 of my reply brief.

What I claim is that, conceding, for the purpose of argument, that the Wheeling Ordinance can stand, notwithstanding its conflict with section 8 of article 8 of the Constitution of Wset Virginia, that the principle which a court of chancery and a court of conscience will adopt in administering such an Ordinance, is that the enactment will be interpreted and applied so as not to defeat the dominant equitable purpose declared upon its face, *ut res majus valeat quam pereat.*

Mr. Justice Holmes: Suppose I should be of opinion, as you and Mr. Conrad both seem to be, that the Wheeling Ordinance was a swindle in its inception and was gotten up in fraud of the rights of Virginia, and that among other things it put in a provision that was intended to bear down hard upon Virginia, but I now find myself in the position that I am bound to carry out that Ordinance, am I, because of the principles of equity or anything of that sort, to give the words any meaning other than that which I honestly believe they bear? Am I not to construe it as those who intended to put the screws upon you meant to have the thing come out?

Mr. Anderson: No, if your Honor pleases, in that case all I claim is you would have, in construing it and applying it, to give Virginia the benefit of any reasonable doubt; that is what we ask.

But in that connection, and in farther response to the suggestion of his Honor, Judge Holmes, I think it perhaps proper to emphasize more than I have done the position that I have taken, and which seems to me to be unanswerable, that if this Ordinance does not result, if you apply the scheme which it prescribes, in assigning to West Virginia an equitable proportion of this debt, that then the settlement must be made under section 8 of article 8 of the Constitution, so as to satisfy the paramount requirements of that section. My friends admit that that is a compact in one part of their brief, for one purpose, but deny that it is a compact for another purpose. They are guilty of the same inconsistency, if I understand their position, which they inaccurately ascribe to us.

On page 10 of their brief, at the bottom of the page, after quoting Mr. Justice Field on the subject of the proper apportionment of a debt between two sovereignties formed out of one divided Commonwealth, it is said:

> "It is apparent that Mr. Justice Field, in the clause last above quoted, referred to the special agreement."

What special agreement? The agreement which is stated in their brief as being, "evidenced by section 9 of the Ordinance and the first clause of section 8 of Article VIII, of the West Virginia Constitution."

If those two enactments constituted a compact or a special agreement for one purpose, I would like to know by what process of reasoning they would not operate to create a contractual relation for all purposes. And I would like still more particularly to know, how they can show that, if that concurrent action would constitute a contract, the fact that the Legislature of Virginia gave its consent by the act of May 13, 1862, to the formation of the State of West Virginia under the provisions of that first West Virginia Constitution, did not constitute a compact.

That transaction is defined still farther as a special agreement on page 11 of their brief; and my distinguished friends say on page 8 of their brief, and I agree with them in the proposition, that where a State has once committed itself to an agreement of this kind, particularly where it has received the approval and consent of Congress, as this compact has, it cannot withdraw from it afterwards by repealing the Constitution, or the enactment by which that contract was created.

Now, I pass on rapidly to discuss other important questions, the first of which will arise and have to be decided by this Court no matter which basis of settlement is adopted, whether we are constrained to make this settlement under the Wheeling Ordinance, or under the Wheeling Ordinance and the constating enactments; or to make it under section 8 of article 8 of the Constitution.

That question is—and it is one of the most important this Court will have to adjudicate in this cause—whether West Virginia is bound to pay interest, and if so, from what time, and until what time she will be required, as a matter of equity and justice, to pay interest? This interest question is necessarily an exceedingly important one, because where a debtor has been in default and refused to carry out and perform his obligations for forty years, the interest necessarily amounts to a great deal more than the principal. It is, therefore, a most important question in this case. And in this connection, without dilating upon it at all, because my colleague has already discussed it fully and cited the authorities which are given in our reply brief, we must remember that this was a Virginia contract, and that the rule in Virginia in regard to the liability of a debtor to pay interest is different from

the common law rule, and different from the rule prevailing in North Carolina. In North Carolina, I understand the rule to be, as was stated by this Court in U. S. *vs.* North Carolina, 136 U. S., 211, that interest was allowed in that State, as it was at common law, as damages for the detention of money. In Virginia it is allowed as an inherent and essential incident of the contract, and as due upon the principles of natural justice and equity. That principle has been repeatedly enunciated in Virginia as shown by the authorities cited in our reply brief, and there is nowhere any contrary ruling.

Mr. Justice White: Whether that be true or not true, how does that question arise? That is a mere computation of interest. The matter that will go to the master is an examination into the facts. The matter of the interest is a mere arithmetical calculation if the amount should be found to be due, and what is the necessity of us now considering the matter of interest at all?

Mr. Anderson: It is necessary to find out how much is due at any given time.

Mr. Justice White: The question of calculating the interest, how much is due, is a mere arithmetical calculation, and it does not take any great service of the master to do that. Anybody can calculate that.

Mr. Anderson: That can be done when the amount is ascertained, but the question has been raised, and it is important that it shall be decided.

Mr. Justice White: That is raised because you asked a decree concerning the interest. What I am asking you is, what in the world has the question as to when the interest shall begin to run on an amount to be found due to do with the question of sending this to a master? That is a matter that can be calculated by a school boy, if the principal is fixed and the rate of interest is fixed.

Mr. Anderson: That is true, if your Honor pleases, but our friends on the other side deny that any interest is due, and we want the principle settled.

Mr. Justice McKenna: If you claimed it as damages, you would not be entitled to it as damages until the decree was passed.

Mr. Anderson: We claim interest here as a part of the contract. We claim, first, that it is an inherent incident, and is essential incident, to any contract under the laws of Virginia, under

which interest is due not as damages for the detention of money, but as an obligation of justice and good conscience.

Mr. Justice Holmes: Are you sure this contract is a Virginia contract, a contract by Virginia with another State?

Mr. Anderson: I think it is a Virginia contract. At the time this contract was written, the new State had not been created. It became a contract with the creation of the new State.

Mr. Justice Holmes: Was that not merely an offer?

Mr. Anderson: If your Honors please, the law of West Virginia is identical with the law of Virginia on that subject, as settled by the cases which I have cited in the reply brief.

Mr. Justice White: You submit a lot of propositions here about what the master should do, what he should find, which involves some matter, of course, of serious consideration. In order to arrive at the proper amount due, your master has nothing to do with what interest it shall bear or when it shall bear interest. That is a mere matter that can be fixed.

Mr. Anderson: I will not follow that question further. My colleague has argued it fully, and it is very fully discussed in the brief. If the Court does not decide the question now, it will be reserved for future consideration and future argument; but I had hoped it would be decided now.

Mr. Chief Justice Fuller: The question is whether if we do not decide it now, we shall be privileged to listen to another argument on the question of interest, so can it not be decided now?

Mr. Anderson: I cannot conceive, if your Honor pleases, any facts that can ever be put into this record that can throw any light on that question that are not in the record now. It can be decided now as well as it can ever be decided.

Mr. Chief Justice Fuller: I do not insist upon it.

Mr. Justice Holmes: I do not wish to have it assumed that I may not be prepared to deal with that question, as well as others, at the present moment; I have not made up my mind.

Mr. Anderson: I will only say that under its language the Wheeling Ordinance requires West Virginia, the new State, to take upon itself, what? A particular sum of money, as the distinguished counsel (Mr. Spooner) has argued, a lump sum of money, as he argues? No, but to take upon itself a proposition, "a just proportion," of the debt of the Commonwealth of Virginia.

Mr. Justice Harlan: As of what date?

Mr. Anderson: As of the 31st of December, 1860.

Mr. Justice Harlan: Then you ask your interest from that date?

Mr. Anderson: From that date.

Mr. Justice Harlan: That is in effect, then, saying that the debt of that State includes that interest?

Mr. Anderson: Includes that interest. It certainly includes interest from the time the stipulation went into effect, and I think it should be construed to relate back to the arbitrary date fixed by both Virginia and West Virginia as of which this settlement should be made. To do justice they must do that; but if interest is to be charged only from the date when West Virginia became a State, June 20, 1863, that would be to leave out the interest for only about two years. But by both the Ordinance and the first West Virginia Constitution, January 1, 1861, was fixed as the date as of which the settlement was to be made. Section 8 of article 8 of the West Virginia Constitution did not require the new State to pay any cash sum to Virginia, and the learned counsel (Mr. Spooner) is mistaken in his quotation and in his interpretation of that section. It required the new State to assume an equitable proportion of that debt. He says there is no reference to the debt; there is a reference to the debt, but no reference to any sum of money. The only reference is to the debt, and the only assumption which the new State was required to take upon its shoulders was a proportion of the debt of the old State; and that debt was an interest bearing debt. That section of the Constitution made it the duty of the government of West Vrginia to provide for the payment of the accruing interest and to provide for the payment of the principal within thirty-four years, with this significant circumstance, which I will take only a moment to mention, that it was provided in that section that the new State should create a sinking fund which would do this thing. The terms in which that sinking fund is defined are identical with those prescribed in the then Constitution of Virginia in reference to the creation of a sinking fund which that Constitution required should be created for the purpose of extinguishing the debt of the Commonwealth. That sinking fund provided for the accruing interest and the payment of the principal within thirty-four years.

Mr. Carlisle: There is no controversy between us about the interest after the debt is ascertained.

Mr. Anderson: Now, if your Honors please, there is another

important point, to which I have deemed it my duty to invite the attention of the Court, and which will have to be decided now, which cannot be postponed, and it seems to me that there is enough in the record to enable the Court to decide now, and that is, if this account is taken under the Wheeling Ordinance, there must also be included in the debit charges against West Virginia, the value of all property which that State has received under the act of February 3, 1863. Our friends on the other side say that West Virginia is not bound by that act, because the consent of Virginia had already been given to her creation into a State.

Mr. Justice Holmes: They also say they did not receive anything under it.

Mr. Anderson: That is a question of fact, if your Honor pleases. We will be prepared to show they received a great deal. They admit that they received some bank stock.

Mr. Justice Holmes: I should like to call your attention in that connection, because I do not think it is mentioned, to a portion of article 9 of the Wheeling Ordinance:

> "No grants of lands or land warrants, issued by the proposed State, shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last."

This language seems to assume on the face of it that all the public land that is in the proposed new State will fall to the new State and be the subject of land warrants from the moment that the new State comes into existence.

Mr. Anderson: No sir, I think not; I hardly think that is a necessary inference, particularly as there is this provision in the same Ordinance, section 11:

> "The government of the State of Virginia, as reorganized by this convention at its session in June last, shall retain, within the territory of the proposed State, undiminished and unimpaired, all the powers and authority with which it has been vested, until the proposed State shall be admitted into the Union by the Congress of the United States, and nothing in this Ordinance contained, or which shall be done in pursuance thereof, shall impair or affect the authority of the reorganized State government in any county, which shall not be included within the proposed State."

In other words, the State reserved its plenary authority and power over all the property and the people within the proposed

State of West Virginia until the new State should be actually admitted into the Union, and under that reservation, if it had been necessary to make any such reservation, it was competent for the Legislature of Virginia to pass this Act of February 3d, 1863. If your Honors please, besides the other sanctions mentioned in the reply brief for Virginia, this Act has additional and conclusive sanction; it has been accepted by the Legislature of West Virginia. The property has been accepted under this Act, and the Act has been recognized by West Virginia. The Act of February 3d, 1863, turned over a great variety of properties to the new State, all taxes due to the old Commonwealth of Virginia, running back to 1831, or to a very remote period—I believe taxes prior to 1831 had been then released; all the delinquent lands were transferred to the new State; all recognizances and judgments; and all property, of whatever character, belonging to Virginiia, which had its situs in the new State, was transferred by the Act to the new State. Now, on the 26th day of February, 1864, at one of the first sessions of the Legislature of West Virginia after the creation of the new State, the Act was passed, a copy of which has been filed in the record, and it goes on to prescribe the mode in which, and the officers by whom, these claims which have been transferred to the State of West Virginia by the State of Virginia shall be collected by the government of West Virginia. That was undoubtedly a recognition of this Act by the government of West Virginia and the acceptance of its provisions, which bind West Virginia.

Mr. Justice White: Did that Act contain a provision that West Virginia should pay for that property?

Mr. Anderson: The Act of February 3d, which transferred all of this property, provided that West Virginia should pay for it, "should duly account for the same in the settlement to be hereafter made" with Virginia,—and there was no settlement to be made except the settlement of the debt.

Mr. Justice Holmes: Look at that very Act. The language is: "has become the property or has been transferred;" so I should say that very phrase left it open.

Mr. Anderson: If your Honor pleases, here is a clear and a positive sanction by West Virginia of that grant. There has been no property transferred to West Virginia except that transferred by that Act of February 3d, 1863. West Virginia's acceptance of a portion of the property granted thereby, was an acceptance of the whole Act.

A great deal of that property would, under no principle of public law, have gone to West Virginia. It is that property, as well as property that, under principles of public law, where there has been no convention between the two States, no treaty or agreement on the subject, which was transferred to, and accepted by, West Virginia under the provisions of that Act.

I now refer to another and an express sanction by West Virginia of the Act of February 3d, 1863. It is the statute found on page 41 of my reply brief. It is the 8th section of the Act approved December 20th, 1875, Acts of the Legislature of West Virginia, session of 1875, page 126, which is as follows:

> "The Auditor shall institute all the necessary and appropriate measures for the collection of all claims for taxes and other demands transferred by the Commonwealth of Virginia to this State by an act of the General Assembly of said Commonwealth entitled 'an act transferring to the proposed State of West Virginia, when the same shall become one of the United States, all the State's interest in property, unpaid and uncollected taxes, fines, forfeitures, penalties and judgments in counties embraced within the boundaries of the proposed State aforesaid;' passed on the third day of February, 1863."

There is here a direct reference to, and acceptance of, the provisions of the Act of February 3d, 1863, which commits West Virginia irrevocably to the terms of that Act.

But, referring to the inquiry made by His Honor, Mr. Justice Holmes, I wish to say farther that under the Wheeling Ordinance West Virginia would not take any of this property, not even such of it as she would take according to the authorities on international and public law, if there had been no agreement between the two States. Here there was an elaborate and minute specification of all the rights of the new State, and no disposition is made of the property the title to which was in the Commonwealth when that Ordinance was passed in August, 1861, and which remained in the Commonwealth after its enactment. The title to that property could not be taken out of the Commonwealth without adding a new term to that Ordinance and to any contract or campact which could be implied from it; and no new term could be added to it without the consent of Virginia. The men who framed that Ordinance recognized that proposition of law to be true. The same men were, to a large extent, members of the Legislature of 1863, which passed the Act which transferred to the new State, when it should be admitted into the Union, all the property within the

limits of West Virginia, the title and ownership of which had been vested in the Commonwealth anterior to the admission of West Virginia, and other property therein mentioned, but upon the terms that the new State should account for it in the settlement to be made between the States.

And so I say the parties themselves have made an agreement upon terms different from those which would have resulted if there had been no convention or treaty or compact between them.

There is only one other matter to which I deem it proper to ask your Honors' attention in this connection, and that is to the principles upon which an apportionment shall be made of the ordinary expenses of the State government. Of course, we cannot determined in advance what you will regard as ordinary expenses. It will be difficult to define them. I suppose they will include all the regular payments, whether annual or otherwise, all the regular and ordinary disbursements of the Government,—

Mr. Carlisle: To conduct the Government.

Mr. Anderson: Or to meet its obligations.

Mr. Carlisle: Oh, no.

Mr. Anderson: Interest on its debt. One of the most regular and ordinary expenses of the Government of Virginia was interest on its debt, and unless that shall be included as an item, great injustice will be done to the Commonwealth, and it will be impossible that there should be any equitable result without it.

But how shall these ordinary expenditures be apportioned? That is a matter which can be passed upon, perhaps, intelligently and satisfactorily by the Court from the data already in the case, or from the facts that are conceded by counsel.

The learned counsel for the defendant say it ought to be apportioned on the basis of aggregate population. Why should the slaves be included? They constituted no part of the body politic; they had nothing to do with the making of the debt; the debt was made exclusively by the white population. The slaves owed no part of the debt. Indeed, they were taxed as property, all of the slaves, except those under twelve years of age, who were regarded as being a burden rather than an advantage to their masters.

Mr. Carlisle: That is, the masters were taxed.

Mr. Anderson: The masters were taxed as upon other property. They were property. They were not persons under the then law, not citizens under the laws of the United States and of Virginia.

The debt was made exclusively by the white population and for its benefit; and the citizenship of the State, the white population, were alone looked to for the payment of the debt. Under these circumstances it seems to me to be just and equitable that the proportion should be upon the basis of the aggregate population after deducting slaves; not only for the reason just cited, but because the slaves added very little to the cost of administering the government. They were policed by their masters upon their plantations. They were regulated by their masters. The records of crime will show that the percentage of crimes among them was insignificant as compared to what it has been among the free population of the country after the negroes were emancipated.

So, upon all these considerations, it will be just and right that the proportion should be made upon the basis of the white population, or, if there is a doubt about that, the benefit of the doubt should be given to Virginia.

I find that I have exceeded the time which the Court has been kind enough to allow me. I beg leave to say one thing more, and that in response to statements made in the argument of the learned counsel for West Virginia. This suit was brought against West Virginia in no spirit of revenge. It was brought in sorrow rather than anger, and not with any desire or purpose of injuring or punishing West Virginia. We do not want West Virginia to be "punished" for anything she has done; neither do we wish the Commonwealth of Virginia or the common creditors to be punished; but what we desire is that this case shall be decided and that the proportion of this debt to be borne by the new State shall be ascertained upon the same principles of justice and equity, which would apply to the apportionment of a common debt between joint owners of property who, under similar circumstances and similar covenants, had divided their patrimony between them.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Decree Referring the Cause to a Master.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

In Equity.—Original, No. 4.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

DECREE REFERRING THE CAUSE TO A MASTER.

This cause coming on this day to be heard upon the complainant's bill and the exhibits filed therewith, the answer of the defendant, with the exhibits filed therewith, and the general replication filed by the complainant thereto, was argued by counsel. On consideration whereof it is adjudged, ordered, and decreed that this cause be referred to , who is hereby appointed a special master herein, who, after giving not less than ten days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will without delay ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

What amount and proportion of said indebtedness and of the interest accrued thereon should in equity be apportioned to and be now paid by the State of West Virginia.

III.

He will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court.

It is further adjudged, ordered, and decreed as follows:

(1) To the end that full and complete information may be afforded the master as to all matters involved in the inquiries with which he is charged by this decree, the Commonwealth of Virginia and the State of West Virginia shall each of them respectively produce before the master, or give him access to, all such records, books, papers, and public documents as may be in their possession or under their control and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to visit the capitals of Virginia and West Virginia, and to make or cause to be made such examinations as he may deem desirable of the books of account, documents, and public records of either State relating to the inquiries he is directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All published records published by authority of the Commonwealth of Virginia prior to the creation of the State of West Virginia and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the partition of her territory which, in the judgment of the master, may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master. The public acts and records of the two States since the creation of the State of West Virginia shall be evidence if pertinent and duly authenticated; but all such testimony tendered by either party shall be subject to proper legal exception as to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

(2) The master is authorized and empowered to employ such accountants, stenographers, or other clerical assistance as he may find it desirable to employ, and to secure such rooms or offices as he may require, in order to the prompt and efficient execution of

this order of reference, and to agree with such accountants and stenographers, typewriters, and the owner of such room or rooms for such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

(3) The complainant will cause the sum of three thousand dollars to be deposited with the marshal of this court to the credit of this cause, on account of the costs and expenses of executing this decree and of this suit, and the complainant will cause such farther sums as may be necessary to defray the costs and expenses of executing this decree to be from time to time in like manner deposited with said marshal. In the event that the defendant shall desire any special statement or accounts to be made, she shall in like manner, before the taking of any such account or the making of such special statement, cause the sum of dollars to be deposited with the marshal.

And the master is authorized from time to time to draw upon the funds so deposited by Virginia for the compensation of the accountants and other clerical assistants whom he may employ, and for any other costs or expenses, including stationery, printing, and room rent, which it may in his judgment be necessary to be incurred in promptly and efficiently executing this order of reference or making up any special statement or accounts asked for by the plaintiff, and the same will be charged up as part of the complainant's costs; and he will draw upon the fund deposited by the defendant for any costs which may be incurred in making up any special statement or accounts which may be desired by the defendant to be specially stated, which drafts, accompanied by proper vouchers, the marshal of this court will pay, and the same will be charged up as part of the defendant's costs in the cause.

And the said marshal is allowed to have and retain a commission of five per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

IV.

The first notice of the time and place fixed by the master for beginning the taking of the accounts directed by this decree shall be given at least thirty days before the date fixed by him there-

for, provided that the date so fixed by the master for beginning the taking of said accounts shall not be a day earlier than February 20, 1907. The master may adjourn his sittings from time to time and place to place without notice to the parties. He will cause to be kept, in a minute book to be provided for the purpose, a journal or minutes of his sittings in the execution of this decree, showing the counsel present, if any, any adjournments which may be taken by him from time to time or place to place, and any other matters which the master may deem it proper to mention therein, which minute book or journal he will return with his report.

V.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys-General of the respective States.

RICHMOND, VIRGINIA, *December* 7, 1907.

To Hon. CLARKE W. MAY,

Attorney-General of West Virginia:

Please take notice that on the meeting of the court on Tuesday, the seventeenth instant, we will move the Supreme Court of the United States to enter in the above-entitled cause the decree of which the above is a copy.

WILLIAM A. ANDERSON,
HOLMES CONRAD,
Counsel for the Complainant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Motion to Modify Decree of Reference.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY.—ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA, *Complainant,*

against

WEST VIRGINIA, *Defendant.*

MOTION TO MODIFY DECREE OF REFERENCE.

To the Honorable the Supreme Court of the United States:

Now comes the State of West Virginia, the defendant herein, and availing itself of the leave granted by the interlocutory decree heretofore entered in this cause, respectfully moves the court to modify the said decree to the end that the same may be more definite and certain in the particulars hereinafter set forth:

First. By amending paragraph two to read as follows:

> "The territorial area and assessed valuation of the States of Virginia and West Virginia June 20, 1863, and the population thereof, with and without slaves, separately stated, including in the latter State the counties of Berkeley and Jefferson."

Second. By adding at the end of paragraph three thereof the words:

> "Prior to January 1, 1861."

Third. By amending paragraph four so as to read as follows:

> "The ordinary expenses of the government of Virginia since any of said debt was contracted and prior to January 1, 1861, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States."

Fourth. By amending paragraph five by striking out the words "fair estimated" where they occur in the first line, and inserting in lieu thereof the word "assessed" and by adding at the end thereof the words "during the same period," so that the same will read:

> "5. And also on the basis of the assessed valuation of the property, real and personal, by counties, of the State of Virginia during the same period."

Fifth. By amending paragraph six by inserting before the word "period" in the second line thereof the word "said" and before the word "prior" in the third line thereof the word "and," and by striking out the words "the admission of the latter State into the Union" and inserting in lieu thereof the words "January 1, 1861," so that it will read:

> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the said period and prior to January 1, 1861."

CLARKE W. MAY,
Attorney General.

J. G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
Of Counsel for Defendant.

[Endorsed:] Supreme Court of the United States. October term, 1907. In equity. Original No. 4. Commonwealth of Virginia, complainant, against West Virginia, defendant. Motion to modify interlocutory decree referring cause to master.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief of Defendant in Support of Motion to Modify Decree of Reference.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, No. 4.

COMMONWEALTH OF VIRGINIA,

vs.

WEST VIRGINIA.

BRIEF OF DEFENDANT IN SUPPORT OF MOTION TO MODIFY DECREE OF REFERENCE.

Paragraph 2 of the decree of reference entered herein on the 4th day of May, 1908, directed the special master to ascertain—

> "2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately."

As a substitute for this the defendant proposes the following:

> "2. The *territorial area* and *assessed valuation* of the States of Virginia and West Virginia June 20, 1863, and the population thereof, with and without slaves, separately *stated, including in the latter State the counties of Berkeley and Jefferson.*"

We respectfully submit that unless the official assessments of the territory and slaves in both sections of the State are made the basis of the valuation of the master, it will be impossible for him to comply with this part of the decree in a manner satisfactory to the court or the parties. Forty-five years have elapsed since the date fixed in the decree for the valuations, and it is scarcely possible that witnesses can now be produced whose testimony upon the subject will be conclusive or satisfactory. Moreover, the introduction of parol

evidence to prove values as they existed forty-five years ago, in a State consisting of more than 60,000 square miles of territory and containing many thousands of slaves, would necessarily prolong the investigation to an unreasonable extent and subject the litigants to a very large and, we think, useless expense. At best, the witnesses could only state their opinions, and upon such a subject they would differ so widely that it would not be possible to reconcile them so as to reach a satisfactory conclusion. The decree provides:

> "All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency."

The authentic official evidence thus provided for in the decree would seem to be sufficient to secure a reasonable degree of accuracy in the valuations ordered to be ascertained by the master without encumbering the record and protracting the investigation by the introduction of unreliable opinions, which must, under the circumstances, be mere guesses.

The assessments are parts of the public records of the State and constituted the basis of taxation in both sections, and their accuracy ought not be impeached at this late day by the mere opinions of witnesses based upon their recollections of the situation as it then existed. These opinions as to the value of the territory of West Virginia would be largely influenced by the developments of her mineral and other resources and the internal improvements made in that State since 1863, and the testimony would be quite different from what it would have been if it had been taken at that time. It was then known, as is alleged in the bill, and was known when Virginia began to create the debt, that these resources existed, and it is to be presumed that the officials in assessing the value of the land took them into consideration. Most of the land was not arable and was valuable mainly, if not entirely, because of the forests and minerals. It would be manifestly unfair to West Virginia to receive as evidence, for the purpose of increasing the valuations, the mere opinions of

witnesses as to the values of gas, coal, iron, and timber separately from the land in which the minerals were deposited or on which the timber was grown, and then add that value to the assessment which already included them. It is stated in the brief filed for Virginia on this motion that these minerals and other resources were not included in the assessments "as distinct subjects of valuation;" but it is said "their presence was considered in estimating the value of land in transactions between vendor and vendee," and that the property was assessed at two-thirds its value. That would be, we suppose, at two-thirds of its market value, including, of course, the minerals and other resources. The same rule of assessment prevailed in both sections of the State, and therefore the relative proportions which the value of property in one section bore to the value in the other would be precisely the same as if it had been assessed at its full market value.

If the assessments are not to govern, what is to be the test value? It would be impracticable to prove the market value of the land and slaves in 1863, but if assessed values are to be ignored or contradicted, we know of no other test except market value that could be properly applied.

For two years prior to June, 1863, a large part of the territory which now constitutes the State of Virginia was occupied by the two armies, and not only was much valuable property destroyed or carried away, but all values, and especially the values of slave property, were greatly depreciated. The people of West Virginia were not responsible for this condition and they ought not to be prejudiced by it in ascertaining the relative values of the property in the two States at that date.

Paragraphs 3, 4, 5, and 6 read as follows:

> "3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.
>
> "4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia with and without slaves, as shown by the census of the United States.
>
> "5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.
>
> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West

Virginia during the period prior to the admission of the latter State into the Union."

The defendant asks that these paragraphs be so modified as to read as follows:

"3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of said debt was contracted, *and prior to January 1, 1861.*

"4. The ordinary expenses of the government of Virginia since any of said debt was contracted *and prior to January 1, 1861*, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

"5. And also on the basis of the *assessed* valuation of the property, real and personal, by counties, of the State of Virginia during the same period.

"6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia, during the said period, *and prior to January 1, 1861.*"

Unless some date is fixed by the court at which the investigation shall stop, the master will be required to decide what seems to us some very difficult questions. On the 17th of April, 1861, Virginia passed an ordinance of secession from the Union, and from that time on until long after West Virginia was admitted as a State the two sections were substantially as separate and distinct as they are now. Not long after the passage of the ordinance of secession the restored government of Virginia was organized, composed almost entirely of the counties now constituting the State of West Virginia. These counties paid nearly the whole of the revenue of the restored State until the admission of the new State into the Union. Is West Virginia to be charged in this proceeding with money expended in what is now her territory during that time, and with her just proportion of the ordinary expenses of the government up to June 30, 1863? That was the only recognized government existing in Virginia during that period. We do not suppose it will be claimed that West Virginia is liable for any part of the ordinary expenses of the government at Richmond after the passage of the secession ordinance. To make such a charge against her would be to compel her to contribute to the support of a government in rebellion against the United States. Under the Wheeling ordinance she ought to be charged with money expended in her counties and with her share of the ordinary expenses and credited with money paid into the State treasury during *the same period*, whatever that period may be; and it should be prescribed by the court, not left to the master.

Most of what we have said concerning paragraph 2 of the decree is also applicable to paragraph 5. It does not appear to us at all practicable to ascertain, by the testimony of witnesses, what was "the fair estimated valuation of the property, real and personal, by counties" forty-five years ago. According to the position taken by counsel for Virginia, the valuation is to be ascertained by considering the oil, gas, iron, coal, and timber separately from the land in or on which they were situated, and then, of course, it would be necessary to ascertain the value of the land separately, without the minerals or timber, in order to secure the entire valuation. This tedious process would have to be adopted in both States, if it was adopted in one, and the investigation would consequently be almost interminable. It is well known that Virginia had vast and valuable deposits of coal and iron and large forests of timber, as well as many other natural resources and advantages which West Virginia did not possess, such as navigable waters, access to tide water, with large bays and fine harbors. Are all these assets to be valued separately also, or did they, like the minerals and timber in West Virginia, affect the value of land and other property of the State and thereby increase the valuation in the official assessments?

The fact that assessments were not made annually, but only once in ten years, is not very material when they are introduced as evidence of values in any intermediate year. The United States census is taken only at the end of each decade, but each decennial census and each decennial assessment shows a certain rate of increase or decrease, as the case may be, since the last one was taken, and it is not difficult, therefore, to calculate with reasonable accuracy what the values are in any particular year. Such evidence is certainly far more reliable than the memories and opinions of witnesses who are called to testify after the lapse of nearly half a century.

In plaintiff's brief on this motion it is said:

> "The expenses of the government of the restored State government from June or July, 1861, to June 20, 1863, when the State of West Virginia was created, were all furnished from the funds of the Commonwealth of Virginia, as appears from the acts of the legislature referred to in the progress of this cause. So that the latter date would be the proper one, if any amendment at all is to be made."

On the 19th day of June, 1861, the convention which had assembled at Wheeling on the 8th of June, 1861, adopted an ordinance for the reorganization of the State government, and the restored State government was organized immediately thereafter by the election

(by the convention) of a governor and other State officials. Senators were elected to the Congress of the United States on the 9th day of July, 1861, and they were admitted to seats in the Senate on the 13th day of the same month. This government continued until 1867, and it defrayed all its own expenses as long as it existed. As already stated, nearly the whole of its revenue was paid by the counties now composing the State of West Virginia until the admission of that State into the Union; the old Commonwealth of Virginia paid no part of the expenses. It had not only withdrawn protection from the persons and property of the people in West Virginia, but was waging war against them, having, as early as April 24, 1861, seven days after the passage of the ordinance of secession, entered into an agreement with the Confederate States transferring the control of the State to the Confederacy. We are not aware of the existence of any acts of the legislature showing that any part of the expenses of the restored State government was paid "from the funds of the Commonwealth of Virginia," unless the restored government is meant; and if this is the meaning of the statement, the people of West Virginia have paid once for the support of their government and for the protection of their territory and property, without any assistance from the old State, and that State ought not now to have any credit on account of these ordinary expenses.

We respectfully submit that, whatever date may be fixed with respect to the closing of the other accounts in controversy, it is clear that West Virginia should not be charged with any part of the ordinary expenses of the State government after the actual separation and the withdrawal of protection by Virginia in this respect.

WM. G. CONLEY,
Attorney General.

J. G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
Of Counsel for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Brief of Plaintiff Against Motion of Defendant to Modify the Order of Reference.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY.—ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA, *Complainant.*

vs.

STATE OF WEST VIRGINIA, *Defendant.*

BRIEF OF PLAINTIFF AGAINST MOTION OF DEFENDANT TO MODIFY THE ORDER OF REFERENCE.

The complainant, by her counsel, respectfully objects to the modifications proposed by the defendant to the order of reference, and for grounds of objection indicates the following, *viz:*

(1) The order of reference directs the master to ascertain and report:

> "2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863," etc.

The proposed modification of this section is as follows, *viz:*

> "The territorial area and *assessed* valuation of the States of Virginia and West Virginia June 20, 1863."

The inquiry should not be restricted to the *assessed* value of the territory, but should be allowed to embrace every reasonable and proper means of ascertaining the actual value of all of the elements of wealth that together made up the value of the State. When one State is spoken of as wealthier than another, reference is not had to the *assessed* valuation of the lands, but to all of the resources of the State which are available for producing revenue.

The elements of wealth of West Virginia, even between Jan-

uary, 1861, and June, 1863, were the *coal*, the *oil*, the *gas*, and the *hardwoods*, which then as now abound throughout its eastern half. These elements of wealth have no place in the assessments for taxation which existed at the dates named. The assessments of land were made in Virginia every ten years. The assessment next preceding January, 1861, and June, 1863, was made in 1856, and manifestly affords no just ground for ascertaining the relative values of the two States as a basis on which the common public debt may justly or equitably be apportioned between these States.

In this connection we may say that there is now before us a copy of the official Report of the Auditor of Virginia, giving in tabulated form exact and full statements of the area and *assessed* value of each of the counties in the old State, of the lots in each of the cities and towns, and the value of all the personal property within the limits of the State. These tables of statistics, occupying nearly seven hundred pages of closely printed matter, give all the information that can be desired as to the *assessed valuation* of the real and personal property within the State in the years 1860 and 1861. But this apportionment of the common liability of the two States for the public debt should not and cannot equitably be made on the basis of the *assessed* values of the property of the States, because the assessed value was not in any case intended to express the actual value. Indeed, it was not intended to be more than two-thirds of the actual value of the property.

The assessment of 1856 did not embrace any of the elements of wealth which since 1861 have formed the principal basis of the wealth of the counties forming the State of West Virginia.

(2) It is proposed to modify the third paragraph of the order of reference by adding to it, at the end, the words "prior to January 1, 1861," the effect of which would be to direct that, even although the Commonwealth of Virginia had expended money within the territory now constituting West Virginia since the first of January, 1861, and prior to June 20, 1863, she should not be credited therewith in this account. Why not?

The "restored State of Virginia" had no existence prior to July, 1861, aand then only to a limited extent and for certain purposes; but even that phantasm of a State, although "what seemed its head the likeness of a kingly crown had on," yet in time, when it had served its purpose, it faded back into the name and body of the present Commonwealth of Virginia. So

it would seem to be but just that if Virginia had at any time prior to the creation of West Virginia expended money within these western counties, and West Virginia reaped the benefit of it, she should be made to account for it.

(3) The fourth paragraph of the order of reference provides as follows, *viz:*

> "4. Such proportion of the ordinary expenses of the government of Virginia, since any of the debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia, on the basis of the average to the population of Virginia, with and without slaves, as shown by the census of the United States."

Defendant proposes to modify this as follows, *viz:*

> "The ordinary expenses of the government of Virginia, since any of said debt was contracted, *and prior to January 1, 1861*, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States."

As stated, the proposed modification, standing alone, is unintelligible. The object of the inquiry is to ascertain what proportion of the ordinary expenses of the State government should be charged to the counties now forming West Virginia.

The expenses of the government of the restored State government from June or July, 1861, to June 20, 1863, when the State of West Virginia was created, were all furnished from the funds of the Commonwealth of Virginia, as appears from the acts of the legislature referred to in the progress of this cause. So that the latter date would be the proper one, if any amendment at all is to be made.

(4.) Paragraph 5 of the order of reference is as follows, *viz:*

> "5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

Defendant asks to modify as follows, *viz:*

> "5. And also on the basis of the *assessed valuation* of the property, real and personal, by counties, of the State of Virginia during the same period."

We have already called attention to this attempt to restrict the inquiry to the assessed valuation, in commenting upon the proposed modification to paragraph No. 2. The assessed value of real property never exceeded two-thirds of its market value, and,

as appears from the Auditor's Report of 1860 and 1861, the assessments of all lands in Virginia were made in 1856, and none later than that date. This assessment did not embrace, as distinct subjects of valuation, coal, or gas, or oil, or hardwoods, which constitute the basis of the large wealth of West Virginia. These all existed in 1861, and their presence was considered in estimating the value of land in transactions between vendor and vendee. Oil was produced in immense quantities in 1862, and was prepared for market at the town of Elizabeth, in West Virginia, in that year. These elements of wealth and value would have been taken into account in any proceeding for partition between joint owners, but were not considered in assessment for taxation.

From 1861 to 1865 West Virginia was the seat of war; few, if any, actual transactions of sale of lands took place, and no normal standard of valuation existed. The difficulties are great enough in the way of reaching the actual values of land in that State during that period without adding the inequitable standard of assessment for taxation.

(5) Paragraph 6 of the order of reference provides as follows, *viz:*

> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union."

The defendant proposes to modify this section as follows, viz:

> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the said period and prior to January 1, 1861."

That is, the defendant wishes to limit the period within which the Commonwealth should be charged with moneys received from the western counties to the 1st of January, 1861, while the court would extend that period to June 20, 1863. As we do not think that either date will make any difference in the account, we leave this matter to the court.

Defendant, in proposing the names of gentlemen from which a selection may be made by the court of a special master to state the account in this cause, has found it needful to advise the court that it has deemed it right not to consider any citizen of centers where "West Virginia certificates" are owned, or sold,

or traded in, and then it proceeds to nominate Mr. Charles E. Littlefield, of Maine.

We state for the information of the court that one of the largest certificate-holders who has made himself known to us during this litigation is a good citizen of the State of Maine. The two gentlemen named by defendant are altogether unimpeachable personally. We would not have nominated them because Mr. Littlefield lives so far away from the counsel and from the records from which all the information required is to be had, and because Mr. John W. Yerkes is at present a member of the firm of Hamilton, Yerkes & Colbert, who are the counsel for the Baltimore & Ohio Railroad Co., which is the largest tax payer in West Virginia, contributing, as we are advised, one-eleventh of the taxes paid into the treasury. It has, therefore, a large interest in reducing the burdens which may rest upon that State and thereby lead to an increase of taxation.

On behalf of the Commonwealth of Virginia, we announced to counsel for West Virginia our purpose to present to the court the name of Mr. John Prentiss Poe, of the city of Baltimore, but were informed by them that Mr. Poe was counsel in a chancery cause of Maryland *vs.* West Virginia, pending in this court, and was on that account ineligible. In this we concurred at the moment, but have since learned from unquestionable sources that Mr. Poe did file such a bill in his official character of Attorney General of Maryland, but that since the expiration of his term of office, now many years ago, he has been in nowise concerned in the cause. We therefore add his name to those already presented, and say that Mr. Poe is a graduate of Princeton, some time a bank clerk, and since 1858 a lawyer of recognized standing in the courts of Maryland and its neighboring States, and for many years a counsellor on the rolls of this court. He is the author of the standard works of Law and Equity Practice in Maryland and was some time the Attorney General of that State.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

I concur in the above.

HOLMES CONRAD,
Of Counsel.

May 19, 1908.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Report of Commission.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

ORIGINAL, NO. 4.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

REPORT OF COMMISSION—JOHN MARSHALL, CHAIRMAN.

Filed as an Exhibit for the Complainant.

The fact that Virginia in 1811-12 called upon Chief Justice Marshall and others of her leading citizens to devote some weeks or months of their time to a reconnaissance of the region lying between the Blue Ridge Mountains and the Ohio, for the purpose of learning the most desirable line of communication between the waters of the Eastern Seaboard and the Western waters, and that the Great Chief Justice and the eminent men who served with him on that Commission responded to that call and devoted themselves to the arduous service which its acceptance involved, is evidence of the profound interest which in the early part of the last century the people of Virginia and her leading citizens took in that subject, and the importance which they attached to it.

The report of this historic Commission is therefore reprinted and filed as an exhibit for the complainant in this cause.

Col. Claudius Crozet, an eminent civil engineer, who, after having served as an engineer under Napoleon, and afterwards as Professor of Mathematics or Engineering in the U. S. Military Academy at West Point, was for a number of years State Engineer

of Virginia, and some of the most important of her works of internal improvement were begun under his direction.

In one of his reports he refers to the service rendered by this Commission in the following language:

> "The first notice of the connection of the eastern and western waters is found in a report, made at the close of 1812, by the commissioners appointed by an act of the preceding session, 'for the purpose of viewing certain rivers within this Commonwealth.' The commissioners, John Marshall, James Breckenridge, William Lewis, James M'Dowell, William Caruthers, Andrew Alexander, examined the James river, from Lynchburg up, crossed the mountains, and descended with much difficulty, and indeed personal danger, the hitherto unexplored New river. They went through this arduous task with a zeal and perseverance worthy of such men.
>
> "A plain sluice improvement of the James and Jackson's river, up to Dunlap's creek; thence a turnpike road, across the Alleghany mountain, which has been made since, and finally a sluice navigation of the Greenbrier, New, and Kanawha rivers were, at that early day, all they thought proper to recommend.
>
> "A remarkable, and in our day, curious passage, occurs in their report. 'Your commissioners submit with diffidence the following propositions: First, that boats impelled by steam may be employed successfully on New River * * *. But they beg leave to say, that the currents of the Hudson, of the Mohawk, and of the Mississippi, are very strong; and that a practice so entirely novel as the use of steam in navigation, will probably receive great improvement, and the power itself be so diversified as to be applied in new and different situations, &c.' These remarks, at the very dawn of steam navigation, show, on their part, much sagacity and forethought."

See Report of Colonel Claudius Crozet, late State Engineer, to the General Assembly of Virginia, 1848.

WILLIAM A. ANDERSON,
Counsel for Virginia.

March, 1908.

Besides the Great Chief Justice, the gentlemen who served upon this Commission were James Breckenridge, distinguished as a soldier, and statesman, and esteemed by contemporaries as the equal in ability, though not in oratory, of his brother, John Breckenridge, of Kentucky; William Lewis, a patriotic citizen of

the highest character, a near relative of Col. Charles, and General Andrew Lewis, of Point Pleasant fame, and a worthy scion of such illustrious lineage; James M'Dowell, one of the gifted men of his generation, who afterwards rendered eminent service as a member of Congress, and as Governor of the Commonwealth; William Caruthers, a leading citizen of the Valley of Virginia, and a farmer and business man of very high character and standing; and Andrew Alexander, surveyor, engineer, representative citizen, a man of skill in his profession, and remarkable for his public spirit.

STATE OF VIRGINIA.

Inland Navigation and Improvements.

PREAMBLE AND RESOLUTION,

For Re-printing the Report of the Commissioners on the Navigation of the Great Kanawha, &c.

[*Agreed to by both Houses of Assembly, February 14, 1814.*]

Whereas, it would greatly promote the welfare of this Commonwealth, and the prosperity of our sister States, to form a more intimate connexion between the Eastern and Western Waters of the United States; and, with a view to that object, the General Assembly of Virginia, at a former session, appointed Commissioners to survey the head waters of James-River and the Great Kanawha, with instructions to ascertain the practicability of extending their navigation to the base of the chain of mountains which divides them, and at the shortest and easiest portage across it; a trust which was accepted and fulfilled, by the Commissioners who acted therein, in a manner that entitles them to the thanks of their country: And, as the result of their labors has never been presented to the Legislature of the Union, nor to the governments of the several States, who cannot but feel an interest in the accomplishment of an enterprise so important to the arts, manufactures, and commerce of the United States—

Resolved, therefore, That the executive of this commonwealth

be, and they are hereby empowered and requested, to cause the Report of the Commissioners to be re-printed, and the Map and References accompanying it to be reduced to a convenient scale, engraved, printed, and annexed to the Report; and, reserving two hundred and fifty copies thereof for the use of the General Assembly, to forward a copy to each of the Commissioners whose names are subscribed to the Report, to each Member of the Congress of the United States, and to the Executives of the several States and Territories.

PROCEEDINGS OF THE COMMISSIONERS.

Letter of Mr. Marshall, One of the Commissioners.

A communication from the Governor, enclosing a letter from the Honorable John Marshall, and a report from the Commissioners who executed the act of the last session, entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth," was laid before the house.

The said letter and Report were read as follows:

Richmond, December 26, 1812.

Sir:—I hasten to submit to your Excellency, for the purpose of being laid before the General Assembly, the Report of the Commissioners who executed the act of the last session, entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth."

To their distance from each other, and the consequent difficulties attending the interchange of sentiment, and the attainment of their respective signatures, is to be ascribed the delay which has taken place in the performance of this part of their duty.

The more detailed report, to which the enclosed refers, is not yet received, but it is expected in a few days, and will then be transmitted to your Excellency. It was not thought advisable longer to withhold the general report, for the purpose of accompanying it with that more in detail, to which it refers.

I have the honor to be,

Sir, with great respect,

Your obedient servant.

J. Marshall.

His Excellency Governor Barbour.

INLAND NAVIGATION.

REPORT.

To the Honorable the Speaker and Members of the General Assembly, the undersigned Commissioners, named, with others, in the act entitled "An act appointing Commissioners for the purpose of viewing certain Rivers within this Commonwealth,"

RESPECTFULLY REPORT—

That, supposing the autumn to be the season which afforded the fairest prospects for giving effect to the views of the Legislature, as expressed in their act, your Commissioners agreed that a meeting should be called on the first of September, at Lynchburg. The number required by law, for the execution of the service they were directed to perform, having assembled, and the necessary preparations having been made, your Commissioners began at the Bridge at Lynchburg, to view James-river, and to take its level by sections to the mouth of Dunlaps-creek. Mr. Andrew Alexander, the surveyor of Rockbridge county, had been engaged to execute this duty under their direction. To his report, which your Commissioners believe to be accurate, they beg leave to refer, as exhibiting, in minute detail, the information required by the law.

As an actual measurement of the whole river would have employed so much time as to defer the completion of the work, until high waters might defeat the object of the Legislature, and was rendered the less necessary by previous surveys; distances were in general conjectured. The eye, aided by a time-piece, and occasionally corrected by actual measurement, furnished information, which, though not perfectly exact, was believed not to vary much from the truth, and to be substantially sufficient. Those places which present serious obstacles were measured by the chain, and the elevation was taken throughout by a spirit level.

On that part of the river which is comprised within the charter already granted, your Commissioners presumed that little, if any, information is expected from them, other than will be found in the annexed report of Mr. Alexander.

From Beall's Bridge, or Crow's Ferry, to the mouth of the Cow-Pasture, no difficulty presents itself, which may not be with

certainty surmounted. The falls are no where formidable; there are long stretches of smooth water, and the shallows may be so deepened as to afford water for boats bringing down from six to eight tons, and carrying up from four to six tons, if not throughout the year, through all but a very inconsiderable portion of it. Your Commissioners give the opinion, unanimously, and with great confidence, that the navigation from Crow's Ferry to the mouth of the Cow-Pasture, may, with improvements by no means expensive, be rendered as certain, as useful, and as permanent, as the navigation from the same place to Lynchburg; and that it may be used at all times when the navigation to Lynchburg can be used, with boats carrying an equal burthen—indeed, that it may be rendered more safe and less laborious, than that from the mouth of the North Fork to Lynchburg now is.

From the mouth of the Cow-Pasture to the mouth of Dunlap's-creek, the difficulties become more considerable, and their removal will require greater expenditures of money. The mass of water diminishes, and the elevation increases.—The shoals become longer and shallower, and the intervals of smooth water shorter. Yet, this rugged navigation, though totally unimproved, is now used during high water. Boats, laden with the produce of the country, pass every year from the mouth of Dunlap's-creek to Richmond. It is, therefore, proved to be, even at this time, practicable for some portion of the year. This portion varies with the seasons. Most commonly, it commences in November, and terminates late in May, or early in June.

That, by the removal of rocks, now lying promiscuously and irregularly through the bed of the river, which it will be necessary in only a few instances to blow, and by the judicious application of labor, to the collection of water in narrower spaces than it now covers, this navigation may be rendered much more secure and beneficial, and the time during which it can be used may be considerably extended, will not admit of doubt.—Whether this portion of the river may be rendered at all times boatable, depends on the depth of water to be collected in particular channels by such means as are applicable to the object.

Some of your Commissioners have been personally engaged in opening the navigation of the North Fork of James-river, through Rockbridge. They are decidedly of opinion, that the river denominated "Jackson's," contains as far as Dunlap's-creek, more

water and less formidable obstructions than were found in the North Fork. Yet the North Fork, though its improvement is far from being complete, is now actually used to great advantage, and is not much inferior to the river below.—Some experienced and judicious boatmen who were employed on the expedition, who are well acquainted with the river and its navigation, unite in the declaration, that, if the means be taken which ought to be employed, that part of James-river which is between the Cow-Pasture and Dunlap's-creek, may be used by any boats which will be capable of continuing their voyage to Lynchburg.

Your Commissioners concur in this opinion; and they take occasion now to remark, that should it be deemed advisable still to adhere to the system of improvement heretofore used in the upper part of the river, the difficulties of this navigation would, they think, be much diminished by several facilities which might be given to it. They would particularly suggest chains, with buoys fastened in rocks or otherwise, or walls on which men may walk, of which boatmen might avail themselves to lessen the labor of ascending places of peculiar difficulty; and thus either to increase the load which may be carried up the river, or to diminish the number of persons necessary for carrying up a given load. They will also mention a fact deemed favorable to the object contemplated by the Legislature. It is this: although the cold may be more intense in the bosom of the mountains than below, this part of the river freezes over.

It will perhaps save the honorable the members of the Legislature some calculation, to observe, that the distance from Lynchburg to the commencement of the Blue Ridge is stated, in the report of Mr. Alexander, to be twenty-five miles one-fourth and thirty poles; the elevation to be one hundred and eleven feet eight inches; shewing an average elevation of four and an half feet to the mile.—The distance through the mountain, that is from Racoon Island to the mouth of the North Fork, is eight miles one-fourth and forty-nine poles, and the elevation one hundred and one feet six inches, giving an average elevation of upwards of twelve feet to the mile. The distance from the mouth of the North Fork to Crows Ferry, or Beall's Bridge, the highest point to which navigation is to be carried by the James-River Company, is stated at twenty-six miles and thirty-eight poles, and the elevation is one hundred and thirty-one feet four inches; making the average elevation five feet to a mile.

The distance from Beall's Bridge, or Crow's Ferry, to the mouth of the Cow-Pasture, is stated at thirty-six miles fifty-nine poles, and the elevation is one hundred and ninety feet three inches, making the average elevation five and an half feet nearly to a mile. The distance from the mouth of the Cow-Pasture to the mouth of Dunlap's-creek, is stated at twenty-three miles three-fourths and twenty poles, and the elevation is two hundred and twenty-eight feet three inches, making the average elevation nine and an half feet to the mile.

Having reached Dunlap's-creek, your Commissioners proceeded to view and mark out what appeared to them to be the best and most direct way for a turnpike road from the mouth of that creek to the most convenient navigable point on Greenbrier river.

With some inconsiderable deviations, which will appear in the report of Mr. Alexander, already referred to, and some others which will be suggested, the road now leading from the mouth of Dunlap's-creek, by Bowyer's Sulphur Spring, to Anderson's Ford, over Greenbrier, at the mouth of Howard's-creek, is believed to be the most eligible which can be made. To that part of the road which passes from the mouth of Dunlap's-creek to the old Iron Works, a distance of about five miles, there are considerable objections, which your Commissioners are inclined to believe may be diminished. The road crosses the creek eight times, and the ground, during the winter and spring would, if much used and not well covered with stone or gravel, be much cut and be very deep. The creek too is frequently so high as not to be fordable.

Should it be found practicable, which your Commissioners believe to be the fact, to render Dunlap's-creek navigable up to its falls, some distance below the old Iron Works, these inconveniences would be in a great measure removed.

Should it be deemed unadvisable to carry navigation up Dunlap's-creek, a direction, as is understood from some of the inhabitants of that neighborhood, may be given to the road, so as to avoid five crossings of the creek, and at the same time shorten the distance. No attempt to view this way was made, because guides could not readily be procured, and your Commissioners feared that, by devoting too much time to a minor object, on which complete information is attainable with ease and certainty through various channels, they might hazard the failure of others which were believed to be of much importance.

The road from the Sulphur Spring to Greenbrier crosses How-

ard's-creek, which is often not fordable, six times, and is in a few places attended with some difficulty. A small improvement may be made in it, and the steepest part avoided, by returning it, near the river, to the ground over which it formerly passed, and from which it has been lately taken.

The road over the mountain has been attentively viewed, and the deviations recommended, from that now in use, carefully and plainly marked. Your Commissioners feel much satisfaction in stating, that the elevation of this part of the road may, in the most unfavorable places, be reduced to an angle of five degrees with the horizon. By occasionally removing the earth, for small distances, this angle may be still further diminished. It is believed to be susceptible of improvement on as easy terms as any other road, since the materials for a turnpike are every where convenient, and not more levelling will be necessary than must be expected in passing through a mountainous country.

Your commissioners proceeded down the Greenbrier river in the boat in which they ascended the James. The season had been remarkably dry, and the water was declared by the inhabitants to be as low as at any period within their recollection. It frequently spreads over a wide bed covered with large stone, and is, in its present unimproved state, and at the season when it was viewed, so very shallow for the greater part of its course, as not to swim an empty boat. The labor of removing stone, and of dragging the boat over those which could not be removed without implements provided for the purpose, was so great, that your Commissioners at one time were unable to advance only three miles in two days, even with the assistance of a horse and of many additional laborers. In part of the river the shoals are frequent and long, and the falls, as the report of Mr. Alexander will shew, considerable. At the great falls, which is the most important of them, the descent is twelve feet in forty-eight poles. There is no perpendicular fall at this place, but one continued rapid, with large rocks, irregularly interspersed through the bed of the river. Near the mouth of the river there is a flat rock, which continues for about two hundred and forty poles, with many irregular apertures or fissures through which the water passes. Although, in the usual state of the river, this rock is covered with water of sufficient depth for navigation; yet, such was the drought of the last autumn, it was necessary to drag the boat over its whole extent.

These difficulties present obstacles to navigation during a season when the waters are remarkably low, which can be surmounted only at considerable expense.

But, from the best information your Commissioners can obtain, and they believe it to be correct, the Greenbrier is seldom so low at any season as it was during the last autumn; and it seldom if ever fails, for eight or nine months in the year, to be at least two feet higher than when viewed by your Commissioners; a depth of water unquestionably sufficient for the purpose of navigation. The testimony given by the inhabitants to this fact, was corroborated by appearances on the river. The indications of a recent considerable diminution of water were not to be mistaken.

On an attentive consideration of the obstacles which were found by your Commissioners to be great, while the river remains in the state in which they viewed it, they are unanimously and decidedly of opinion, that its navigation may be rendered as safe, as certain, and as easy as that of the James, at all times, except when the water is unusually low. The rocks are in general loose, and may be removed without extraordinary difficulty, so as to afford a tolerably smooth passage to boats; and, by collecting the water into narrow channels, a sufficient depth may be obtained, with the exception of a short period in a very dry year, to swim any boat which can be brought at the same time down James-river. But so scanty is the supply of water in a time of uncommon drought, that doubts are entertained whether there may not be a short season of the year during which, unless a considerable expense be incurred, the navigation must be suspended. Though aided by men and horses, ten days of unremitting labor were consumed in passing from the mouth of Howards-creek to the mouth of Greenbrier river, a distance not much exceeding forty-eight miles. In the month of June, the same voyage, if not retarded by measuring the river, might have been performed in a single day. Some of your Commissioners, however, are of opinion, that the Greenbrier may, without great additional expense, be rendered at all times passable for boats carrying half a load.

In addition to the shallowness of the water, (an inconvenience which is common to all rivers as you approach their sources, and which disappears for eight or nine months in the year) and to the rocks which have been mentioned, the obstructions to the navigation of the Greenbrier consists in its falls, and in the general rapidity of its current.

The great falls alone are of sufficient magnitude to merit particular attention. These unquestionably admit of being rendered navigable, either by opening a sluice judiciously through them, or by locks. The latter would be most expensive, but would leave the navigation less laborious.

The rapidity of the current may be estimated by observing that the descent in forty-eight miles and eighty-four poles, is three hundred and sixty-two feet ten inches, between seven and eight feet to the mile.

This current will present no difficulty to a boat descending the river. To one ascending it, the labor will be considerable, but not so considerable as in some parts of James-river.

The night of the 28th of September, was passed among the islands in the mouth of Greenbrier; and on the morning of the 29th, your Commissioners entered New-river.

The New-river, or that part of the Great Kanawha which is above the mouth of Gauley, having to search its intricate way, and force a passage through a long chain of lofty and rugged mountains, whose feet it washes, exhibits an almost continued succession of shoals and falls, from which the navigator is sometimes, though rarely, relieved by a fine sheet of deep placid water.

The difficulties encountered in descending this river were of a character essentially different from those which were experienced in the Greenbrier. Uncommon as had been the drought, the supply of water was abundant. The boat sometimes, though rarely, rubbed upon a shoal; but in every such case it was apparent that a sufficient passage might be opened without much labor or expense. The velocity of the current and the enormous rocks which often interrupt it the number and magnitude of the rapids and falls, the steepness, cragginess and abruptness of the banks, constitute the great impediments which at present exist to navigation between the mouth of the Greenbrier and the Great Falls of Kanawha.

The distance from the mouth of Greenbrier to Bowyer's Ferry, is forty miles one quarter and forty-six poles, and the descent is four hundred and sixty-six feet seven inches; that is, eleven feet six inches in each mile. In general, there is much sameness in the appearance of this part of the river. Long rapids, frequently terminated by a fall of from five to ten feet, in a distance of ten, twenty, thirty, and sometimes a greater number of poles; an intervening space, sometimes more, sometimes less considerable,

of swift or smooth water; rocks, sometimes above the surface, sometimes near it, so as to require great caution to save a boat from dashing on them; a copious stream, with a current commonly impetuous, constitute its leading characteristics.

Falls too great to come within this general description, will be particularly noticed.

Brook's Falls are about four miles and one-fourth below the mouth of Greenbrier. The water descends thirteen feet seven inches in fifty poles. In its most rapid part the descent is five feet ten inches in fourteen poles. The boat was navigated through this place.

A much more formidable obstruction is the falls at Richmond's Mill. These are designated in the neighborhood by the name of the "Great Falls of New-river," but are generally called at a distance, "Lick-Creek Falls."

At this place the water may with propriety be said to fall perpendicularly twenty-three feet. For this distance, the sheet which dashes over the summit is intercepted only by huge fragments of broken rock, which, having been successively disjointed from the brink of the precipice, have fallen into the foaming basin below, where, piled on each other, they form one or two benches that break the cataract. A small distance lower down is another fall of three or four feet.

Here, for the first time, the boat was taken out of the water and let down by skids.

The ground along which a canal may be carried around these falls, pursuing the course of Richmond's mill-race, was measured, and the elevation taken. The descent was found to be twenty-two feet nine inches, in one hundred and eighty-one poles.

This estimate excludes a part of the falls, between five and six feet of which are just above the head of Richmond's mill-race.

The bottom of the river for some distance above these falls, is a hard rock, often appearing above the surface, and much covered with movable stones, some of which are very large. The bottom of the mill-race appears to be of the same description.

From Bowyer's Ferry to the Falls of the Great Kanawha, was estimated at nineteen miles and fifty-eight poles, in which distance the river falls three hundred and thirty-one feet; that is, seventeen feet to a mile. The honorable the legislature will perceive, that below the ferry the descent, in the same distance, is greater than above. For a part of this space, the scene is awful and dis-

couraging. The vast volume of water which rolls down New-river, and which, far above the ferry, often spreads, without becoming shallow, over a bed three or four hundred yards wide; is seldom more than one hundred or one hundred and fifty yards wide. In some places, for a mile or more in continuation, it is compressed by the mountains on each side, into a channel of from twenty to sixty yards wide; and even these narrow limits are still more narrowed by enormous rocks which lie promiscuously in the bed of the river, through which it is often difficult to find a passage wide enough for the admission of a boat. In some places the bank is formed of rugged and perpendicular cliffs or entire rock, which appear to be twenty, thirty, and forty feet high; in others, enormous, but unconnected, rocks dip into the water.

There are unequivocal indications of the river's having risen, in these narrows, from thirty to forty feet perpendicularly.

Immediately above the mouth of Gauley, the river opens and presents a beautiful sheet of deep smooth water, which is succeeded by the rocks over which it dashes, and forms the Great Falls of Kanhawa. The height of these falls is twenty feet four inches. With its name, the river loses its wild and savage aspect. It is no longer confined by rugged cliff, by mountains barely separated from each other, nor interrupted by enormous masses of rocks which are scarcely to be avoided.

Within a short distance above the falls, the current is not unmanageably swift, nor the rocks over which it passes uneven. Below, quite to the rocks which have fallen from the brink over which the cataract rushes, is a deep smooth and beautiful basin. The river is so wide as to rise, in the greatest freshets, only six or seven feet. The falls themselves constitute the impediment, and the only impediment at this place.

Your Commissioners have deemed it proper to state in their full strength, the difficulties which are to be surmounted in opening the intercourse between this part of the state of Virginia and the western country; and to put the legislature, as far as is possible, in possession of the testimony on which their opinion is formed, as well as of their opinion. If, misguided by their conviction of the importance of the object, they are too sanguine in their hopes of its accomplishment, the facts now communicated will enable the General Assembly to correct the mistaken conclusions which have been drawn, and to determine on the course which will best promote the interests of the public.

The practicability of rendering the Greenbrier navigable has already been stated. The system which may be found best adapted for the improvement of James-river, will be equally applicable to the Greenbrier, and will be equally successful.—The one river and the other will be rendered more or less valuable as more or less labor and skill may be employed on them; but there can be no mistake in saying that, without incurring an expense which any would pronounce extravagant they are both capable of being brought into extensive use. Not only in descending, but in ascending also, these rivers may be navigated to great advantage.

With respect to New-river, a judgment cannot be formed quite so decisively, nor pronounced quite so confidently. The difficulties are great, and deserve to be seriously considered.

The boat which conveyed your Commissioners, passed from the mouth of Greenbrier, to the place where their expedition terminated, without being taken out of the water, except at the Great Falls of New-river, and at the Great Falls of the Kanhawa. It was navigated in the usual way through all the other difficult places which abound in New-river, except two—both below Bowyers Ferry. Through these it was conducted by ropes.

The boat was not laden, nor was it empty. In addition to the number of hands usually employed in navigation, it carried between two and three thousand weight. The greater part of this burthen was taken out in the most difficult places; but in many of considerable magnitude, it remained in the boat. Where the vessel was guided by ropes, the necessity of resorting to this expedient was occasioned solely by the intervention of rocks, which can be removed.

It is also worthy of notice, that this voyage was performed by boatmen, who, having never before seen the river, were reduced to the necessity of selecting their way at the moment, without the aid of previous information.

The only impediments to the descent of the boat, except at the two great falls already mentioned, were rocks lying so near the surface of the water as to strike the bottom while shooting over them. At the usual height of the river, these rocks would be entirely covered, and all danger from them be removed; but others would be placed in a situation to expose a boat to equal hazard. It is therefore necessary, even for the descending navigation, to open a plain and broad sluice through all the rapids and falls, so as to relieve boats navigating the river from all danger of

being dashed against the rocks. This may be effected by removing some and blowing others.—This sluice may be so conducted as to graduate the falls where they are most sudden, and thereby, in some degree, to diminish the impetuosity of the current.

Brook's Falls, the Great Falls of New-river, and the Great Falls of Kanhawa, will probably require and admit of a different course.

The first of these which is the least formidable of the three, will present three alternatives to the election of those who may be engaged in improving the navigation.

First—One or more locks, which may unquestionably be constructed at this place.

Second—A canal, which is already almost formed, on the north side of the river. Its completion would require that it be opened for a short distance both where it would receive the water at the head of the falls and where it would empty itself below them.

To the eligibility of this canal, there can be but one objection. There may be impracticable rock, now hidden by the earth, so near the surface as to render this plan unadvisable.

Third—To open a sluice in the river, along its northern bank, and graduate the fall as far as may be compatible with that system of operation.

The Great Falls of New-river must be turned, by using a canal to be cut on the southern side, pursuing nearly the tract of Richmond's mill-race. Should locks be employed, it will most probably be found advisable to place them in this canal. Should locks be dispensed with, there will be no difficulty in descending through this channel, but the toil of ascending must, at this place, be considerable.

At the Great Falls of Kanhawa, there is, near Morris's mill, a very eligible place for locks. If a canal be preferred, there is every reason to believe that the ground will admit of one, which may be so extended, and the fall thereby so graduated, as to afford a safe passage to loaded boats.

These observations are formed on the state of the river when viewed by your Commissioners.—It will readily occur, that they cannot judge with certainty of the changes which may be brought about by a great rise of water.

It would seem most probable, that by such rise the falls would be diminished, because the water at their feet would pass off less rapidly than at their head. But the apprehension cannot be en-

tirely discarded, that in the narrows, which have been mentioned, the torrent would, in a flood, be too impetuous to be trusted. It is probable, that a moderate elevation of the water would rather facilitate the passage of the boats; at least of those descending the river; but that great floods would suspend the navigation.

Having stated their view of this subject, your Commissioners will only add their opinion, that the New-river may be relied on with certainty, for the transportation of articles from east to west.

On the practicability of using this channel of conveyance for the transportation of articles from the western country, towards the rivers which empty into the Atlantic, at least so much of it as lies between Bowyer's Ferry and the Great Falls of Kanhawa, they must speak with less confidence. The great difficulty consists in the velocity of the current. For several miles, between Bowyer's Ferry and the Falls, it is believed that a canal would be impracticable. The river is susceptible of no other improvement than may be made in its channel, or on its banks. The current is often too rapid to be stemmed by a boat impelled by oars; and the water too deep to admit the use of poles. If a channel, sufficient for the safe passage of vessels, be opened, still some other means than oars or poles must be devised for impelling them up the stream.

Your Commissioners submit with diffidence the following propsition:

First—That boats impelled by steam may be employed successfully on New-river.

With the capacities of this powerful agent they are too little acquainted to speak with confidence of the use which may be made of it in the waters of Virginia. Elsewhere, it has certainly been applied with great advantage to the purposes of navigation. Neither have they that intimate knowledge of the velocity of the currents, against which vessels have been propelled by it, to compare them with that of New-river, and to hazard any decided opinion on the comparison.—But they beg leave to say, that the currents of the Hudson, of the Mohawk, and of the Mississippi, are very strong; and that a practice so entirely novel as the use of steam in navigation, will probably receive great improvement, and the power itself be so diversified in its modifications, as to be applied in new and different situations, as their exigencies may require. It is believed, that a sufficient depth of water is certainly

obtainable, but whether sufficient employment may be found, to justify the use of a vessel which must, in any state of things, be constructed at considerable expense, is a question your Commissioners cannot attempt to solve.

Second—Should it be found impracticable to apply steam with advantage to the navigation of New-river, it is respectfully suggested, that between the Great Falls of Kanhawa and Bowyer's Ferry, resort may be had to horse labor.

To give this facility to the navigation, it will be necessary to construct a horse-way along the bank of the river at different heights, or at the most common height of the water. The objection that such way cannot be used at all times, will lose much of force, when it shall be recollected that the navigation up the river will admit of being suspended for considerable intervals, with less injury to those who use it, than that which conveys to the western country articles imported for general consumption. The construction of this way, however, will require the blowing of a great quantity of rock, and will, consequently, be expensive.

Third—Should neither of these expedients be deemed eligible, it is respectfully suggested, that boats may be forced up the current, where it is too rapid for oars and too deep for poles, by the aid of chains fastened in the rocks on the bank.

Whatever doubts may be entertained respecting the navigation for boats ascending the river between the Great Falls of Kanhawa and Bowyer's Ferry; your Commissioners are entirely persuaded of the practicability of using it advantageously between the ferry and the mouth of Greenbrier.

In obedience to the law under which they have acted, your Commissioners will now proceed to state their ideas of the sums of money which will probably be necessary to open the river and make the road they have viewed.

No part of their duty hase been performed with less confidence than this.

It will readily occur to the legislature, that no estimate of expense of executing so great a work as that which is to afford to the western parts of Virginia the means of conveying the produce of their lands to market, and probably to connect Virginia commercially with her sister states in the west, can have just pretensions to exactness.—Were the system of improvement, and the extent to which that system is to be carried, accurately defined; any calculations which could now be made, even by professional

men, of the sum necessary for its execution, might be found to vary widely from that which would be actually expended. Still less precision can be looked for in the calculations of your Commissioners.

But it must be apparent that the expense of improvement will essentially depend on the object for which the improvement shall be made.

If the views of the legislature shall be limited to the conveyance of articles, the growth of the upper country, down James-river, the cheapness of that conveyance will certainly depend much on the degree of perfection to which the improvement may be carried; but the river, being the only channel of conveyance, will, if merely practicable, be used to some extent.

If the views of the legislature shall extend to a free commercial intercourse with the western states, or any of them, the channel selected for that intercourse will come into competition with others which now exist or may be opened, and must recommend itself to a preference by the advantages it offers. With a view to the latter object, no improvement ought to be undertaken but with a determination to make it complete and effectual.

The estimates of expense were more particularly made by Mr. Caruthers, who has been personally engaged in opening the North Fork through Rockbridge. This gentleman made his calculations on the plan which has been adopted by the James-River Company, with such improvements as would better adapt that plan to steam navigation. According to his estimate, one hundred and ninety thousand dollars will be sufficient to accomplish the work from Beall's Bridge, or Crow's Ferry, to the Falls of the Great Kanhawa, including the road.—This estimate is formed on a comparison of the impediments to be removed, with those he had himself encountered in opening the North Fork of James-river. Some others of your Commissioners, who have too little knowledge of the labor necessary for the accomplishment of objects of this description, to confide themselves, in their own judgment, much less to recommend it to the confidence of others, are so impressed with the magnitude of the difficulties they have seen, as to be unable to persuade themselves that the work can be completed for the sum at which it has been estimated. That estimate does not appear to them to be extravagant, if the descending navigation alone be contemplated. To make the ascending navigation such as will entitle it to extensive use, and give this a preference over

other routes, they submit, though with much diffidence, the opinion that at least a half a million, perhaps six hundred thousand dollars, will be requisite.

From the mouth of Dunlap's-creek to the mouth of Howard's creek, is twenty-six miles and forty-four poles. For the first mentioned place to the summit of Alleghany mountain, is sixteen miles and thirty-six poles, and the elevation is nine hundred and forty-eight feet, which makes an angle with the horizon of less than three-quarters of a degree. From the summit of the mountain to the mouth of Howard's-creek, the distance is twelve miles and eight poles, and the descent is eight hundred and thirty-eight feet seven inches, making with the horizon an angle of about three-quarters of a degree. There are no peculiarities attending this route, which will render any plan the legislature may prefer for turnpiking it, more costly in its application to this road, than to others which have been constructed in various parts of the United States. It is now at least equal to, perhaps better, than any other of equal distance in the same part of the country.

In presenting to the honorable the legislature the advantages which, in the opinion of your Commissioners, will probably accrue to this state from executing the work to which their report relates, it will be necessary to divide this subject, and to consider, separately—first, those which may reasonably be expected to result from executing it in part; next, those which are to be looked for from executing it in the whole.

Should the navigation of James-river be carried up to the mouth of Dunlap's-creek, and a turnpike road be made over the Alleghany mountain, although nothing further should be done, a considerable impulse will be given to the agriculture, and a valuable effect produced on the wealth and population of a considerable tract of country. It cannot reasonably be doubted, that Bath, a part of Botetourt, and a great part of Greenbrier, Monroe, and perhaps even Giles, would find a real interest in searching for a market on James-river, for the produce of their soil, if such safe and cheap conveyance were afforded them as might be given by the improvements which have been stated.—Agriculture would mingle more than heretofore with grazing; and industry would flourish when the reward of industry should be attainable. Those more western counties, whose distance might forbid the attempt to transport grain manufactured into flour, or distilled into spirits, to the markets on James-river, might still be encouraged to bring

to those markets, salt, salted provisions, and various manufactures of hemp. An increase of population would result, not only from the check which this state of things would give to emigration, but also from its operation on the inhabitants, in other respects.

Other parts of the state would derive corresponding advantages from their intercourse with a section of the country which would have more to sell and more to purchase than at present. By the augmentation of the wealth and population of a part, not only would those belonging to that part be improved in their circumstances, but the whole would be more powerful, and the public burdens being more divided, might press less heavily on each individual.

These advantages would probably be extended by improving the navigation of the Greenbrier also.

Should New-river be rendered a safe and easy channel of communication, between the Ohio and the commercial towns on James-river, the subject will assume a more important aspect, and the advantages may be estimated on a larger scale. Not only will that part of our own state which lies on the Kanawha and on the Ohio, receive their supplies and send much of their produce to market through James-river, but an immense tract of fertile country, a great part of the states of Kentucky and Ohio, will most probably give their commerce the same direction. All that part of the state of Kentucky which lies above Louisville, and all that part of the state of Ohio whose trade would pass through the river of that name, might reasonably be expected to maintain a large portion of their commercial intercourse with the Atlantic states, through the James or Potowmac. Certainly in a contest for this interesting prize, the states through which those rivers run have geographical advantages, the benefit of which they can lose only by supineness in themselves, or by extraordinary exertions in others. It is far from being impossible, that even the south-western parts of Pennsylvania may look down one of these rivers for their supplies of goods manufactured in Europe.

Let the importance attached by men best acquainted with the subject to the commerce of the west attest its value. The exertions which other states appear to be making to secure it, will probably awaken the attention of Virginia to that part of it which should naturally belong to her.

There is still another aspect in which this subject deserves to be viewed.

That intimate connection which generally attends free commercial intercourse, the strong ties which are formed by mutual interest, and the interchange of good offices, bind together individuals of different countries, and are well calculated to cherish those friendly sentiments, those amicable dispositions, which at present unite Virginia to a considerable portion of the western people. At all times the cultivation of these dispositions must be desirable but in the vicissitudes of human affairs, in that mysterious future, which is in reserve, and is yet hidden from us, events may occur to render their preservation too valuable to be estimated in dollars and cents.

The advantages which may result to Virginia, from opening this communication with the western country, will be shared in common with her by the states of Kentucky and Ohio.

Considering it as a medium for the introduction of foreign articles into those states, it has claims to their serious attention.

The proposition that a nation finds its true interest in multiplying its channels of importation, admitting them to be equally convenient, is believed to be incontrovertible. In addition to those arguments in support of this proposition which belong to every case, the situation of the western states suggests some which are peculiar to themselves, and which well deserve their consideration.

The whole of that extensive and fertile country, a country increasing in wealth and population with a rapidity which baffles calculation, must make its importations up the Mississippi alone, or through the Atlantic states. When we take into view the certain growth of the country, we can scarcely suppose it possible that any commercial city on the banks of that river can keep pace with that growth, and furnish a supply equal to the demand. The unfriendliness of the climate to human life, will render this disparity between the commercial and agricultural capital still more sensible. It will tend still more to retard a population of that sound mercantile character, which would render some great city on that majestic river, a safe emporium for the western world.

In times of profound peace, then, the states on the Ohio would make sacrifices of no inconsiderable magnitude, by restricting their importations to a single river. But, in time of war, their whole trade might be annihilated. When it is recollected that the Mississippi empties itself into the Gulph of Florida, which is surrounded by foreign territory; that the island of Cuba and the coast of East Florida completely guard the passage from its mouth

to the ocean; that the immense commerce flowing down its stream, holds forth irresistible allurements to cruizers, the opinion seems well founded, that scarcely a vessel making for that place could reach its port of destination.

But the length of the voyage up the Mississippi and Ohio, must be attended with delay so inconvenient to persons engaged in commerce, as to render a shorter route, though not less expensive, more eligible. For importation of many articles, there is much reason to believe that a decided preference would always be given to the transportation through the United States, were that transportation rendered as easy as it is capable of being made.

The export trade during peace, so far as the articles exported were designed for a foreign market, would, more probably, pass exclusively down the Mississippi. But those arteles which are consumed in the United States, as manufactures of hemp, would find their way to market through interior and shorter channels.

If the direct route through the Atlantic states would, for many purposes, be more eligible than that through the Gulph of Florida, which must be often connected with a coasting voyage to or from an Atlantic port, then the multiplication of those routes, if in themselves equal, by presenting a greater choice, and by accommodating more territory, must be desirable.

But your Commissioners are sanguine in the opinion, that the communication through the rivers they have viewed, if properly made, will possess advantages over every other, which cannot fail to recommend it to a large portion of the states of Kentucky and Ohio. All that part of the western country which draws its supplies and transports its produce through the river Ohio, and which lies east of Louisville and west of the Pennsylvania line, perhaps a part of the state of Pennsylvania itself, could probably use this route more advantageously than any other; unless, indeed, that through the Potowmac, connected with Monongehela, Cheat, or Yohaghena, should come into competition with it, for the eastern part of the country just mentioned.

That it would, for the importation of articles from Europe, and from the east, (with a few exceptions) and for the exportation of those which are consumed in the United States, be preferred to the voyage through the Mississippi, unless the introduction of steam boats should essentially vary the present state of things, may safely be assumed from the fact, that a land carriage between Pittsburg and Philadelphia or Baltimore, and a carriage up or

down the Ohio, are now used for the purposes described, in preference to the route by New Orleans.

The present price for the transportation of goods from Philadelphia or Baltimore to Pittsburg, is understood to be from seven to ten dollars per hundred weight.

The price of transportation from Richmond, up James-river to the mouth of Dunlap's-creek, thence across the Alleghany to Greenbrier, and down to the mouth of the Great Kanhawa, will certainly depend on the goodness of the road and the degree of perfection to which the navigation may be carried. Your Commissioners believe that a sound national economy would dictate such improvements as would reduce the price of freight, although the labor employed in making them might be procured by an augmentation of toll, and some expenditure of public money.

Should the navigation of James-river be rendered as safe and as easy as may be reasonably expected, and the Greenbrier and New-river be improved, in such manner as the object will justify, your Commissioners believe they hazard nothing in saying, that the expense of transporting one hundred weight from Richmond to the mouth of the Great Kanhawa, will not exceed half the price of transporting the same weight from Baltimore or Philadelphia, to the same place.

The immense works meditated in New York, will certainly, if executed, give to that state great advantages in a competition for the trade of the lakes. But if other convenient and more direct channels be opened, it is not probable that the commerce of the Ohio will take the circuitous route by the lakes.

The expense of transportation from New York through the canal contemplated, can only be conjectured. The character of the rivers which would be used, is not well understood, but they must possess many advantages to give them a preference over the direct way through Virginia to the Ohio.

Your Commissioners, however, take the liberty to repeat, that the success of any attempt to obtain that share of the commerce of the west, to which this state, from her geographical situation and her rivers, would seem to be entitled, must depend entirely on the safety and cheapness of her navigation. A mode of transportation by water in itself insecure, or so laborious as to be little less expensive than carriage by land, will never change the channels in which this trade already flows.

The advantages to accrue to the United States, from opening

this new channel of intercourse between the eastern and the western states, are those which necessarily result to the whole body from whatever benefits its members, and those which must result to the United States, particularly from every measure which tends to cement more closely the union of the eastern with the western states.

In those operations, too, which the exigencies of government may often require, this central channel of communication by water may be of great value. For the want of it, in the course of the last autumn, government was reduced to the necessity of transporting arms in waggons from Richmond to the falls of the great Kanhawa. A similar necessity may often recur.

All which is respectfully submitted to the General Assembly, by

JOHN MARSHALL,
JAMES BRECKENRIDGE,
WILLIAM LEWIS,
JAMES M'DOWELL,
WILLIAM CARUTHERS,
ANDREW ALEXANDER.

Supreme Court of the United States.

OCTOBER TERM, 1907.

Order Amending Decree of Reference.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

NO. 4, ORIGINAL.

COMMONWEALTH OF VIRGINIA, *Complainant,*

vs.

STATE OF WEST VIRGINIA.

ORDER AMENDING DECREE OF REFERENCE.

On consideration of the motion to modify the decree of reference herein,

IT IS NOW HERE ORDERED BY THE COURT that said motion be, and the same is hereby, sustained so far as to make the first line of paragraph 2 read "The extent and assessed valuation," and in all other respects that said motion be, and the same is hereby, denied.

June 1, 1908.

A true copy.

Test: JAMES H. MCKENNEY,

(SEAL) *Clerk of the Supreme Court of the United States.*

Supreme Court of the United States.

OCTOBER TERM, 1907.

Order Appointing Special Master.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

NO. 4, ORIGINAL.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs

STATE OF WEST VIRGINIA.

ORDER APPOINTING SPECIAL MASTER.

It is ordered by the Court that MR. CHARLES E. LITTLEFIELD, a member of this Bar, be, and he is hereby, designated and appointed as Special Master under the decree entered herein on May 4, 1908.

June 1, 1908.

A true copy.

Test: JAMES H. McKENNEY,

(SEAL) *Clerk of the Supreme Court of the United States.*

APPENDIX.

Substitute for House Joint Resolution No. 25.

(Adopted February 21, 1908.)

Raising a Committee to consult with the Board of Public Works concerning the Virginia Debt.

WHEREAS, The defense of this State in the Equity Suit of the Commonwealth of Virginia vs. West Virginia, is now vested in the Attorney General and the Board of Public Works of the State; and,

WHEREAS, said Attorney General and Board have expressed a wish that a non-partisan Committee of citizens and property holders be appointed with whom they can advise and take counsel as to the matters involved in said suit; therefore, be it

Resolved, That John W. Mason and William G. Bennett, of the First Congressional District, Frank M. Reynolds and John J. Cornwell of the Second Congressional District, William A. MacCorkle and Samuel Dixon of the Third Congressional District, E. M. Gilkeson and George W. Curtin of the Fourth Congressional District, C. W. Campbell and Isaac T. Mann of the Fifth Congressional District, and Nathan Goff, Johnson N. Camden, John K. Thompson and F. B. Enslow at large, be and they are hereby appointed such Committee; and it shall be their duty to advise with the Board of Public Works of the State and make such recommendations as they may deem best to protect the interests and welfare of the people of the State in said matters.

The members of said Committee shall take the oath provided by the Constitution, which shall be filed with the Governor. It shall convene on the call of the Governor, and shall make report to the Legislature from time to time of its proceedings. Vacancies in said Committee by death, resignation, failure or refusal to serve or otherwise, shall be filled by the Board of Public Works.

Judge Mason's Letter to Governor Dawson.

"FAIRMONT, W. VA., May 29, 1908.

"HON. WM. M. O. DAWSON, *Governor.*

"DEAR SIR: The Legislature of West Virginia at its last session by joint resolution adopted February 21, 1908, appointed me a

member of a non-partisan committee with whom the Attorney General and the Board of Public Works might advise and counsel in regard to the matters involved in the suit in equity of the Commonwealth of Virginia vs. State of West Virginia, now pending in the Supreme Court of the United States.

"I am profoundly grateful for the compliment done me by the legislature, and have very reluctantly reached the conclusion that I cannot accept the appointment without vacating the position I now hold as Circuit Judge. It was the purpose of the framers of the Constitution of this State not only to separate and keep distinct the legislative, executive and judicial departments, so that neither shall exercise powers properly belonging to either of the others, and that no person shall 'exercise more than one of them at the same time, except that justices of the peace shall be eligible to the legislature,' as provided in article 5, but they also deemed it wise to prohibit judges from holding any other office under this or any other Government, hence the provision contained in section 16, Article VIII, 'No Judge, during his term of office, shall practice the profession of law or hold any other office, appointment or public trust, under this or any other government, and the acceptance thereof shall vacate his judicial office.' I have reached the conclusion that persons serving on this committee will do so by 'appointment within' the meaning of the Constitution. The resolution in express terms provides that the persons named 'be and they are hereby appointed such committee,' and then defines the duties required of them, and requires each member to 'take the oath provided by the Constitution' and file it with the Governor. The oath meant, I assume, is the oath required by section 5, of Article IV. To comply with this requirement each member must take an oath to support the Constitution of the United States and the Constitution of this State, and to faithfully discharge the duties of the office to the best of his skill and judgment. After taking and subscribing such oath and filing it with the Governor, the person doing so could scarcely be heard to deny that the position is an 'office' or 'appointment.'

"I have reached this conclusion with regret. The suit referred to is a very important one—involving the property and the honor of the people of our state. As a citizen, and, consequently one of the defendants, I would gladly aid in preparing our case and in doing all within my power to have it properly presented to the distinguished Court which is to pass upon it. It is more than a mere

law suit. The honor of two commonwealths is involved. The people of Virginia, so far as they have any control of the case, will not demand of us anything more than a fair and just settlement of this account, and all loyal West Virginians will join in this demand and require nothing more of Virginia. But, unfortunately, Virginia's case has passed almost entirely beyond her control and into the hands of speculators who are conducting this suit for the money there is in it for them. This combination may not be more corrupt than other combinations formed for speculative purposes, but it is well that we realize that there is behind this movement an unlimited amount of money and an unscrupulous combination of Wall Street stock gamblers. But if we are true to ourselves, they are absolutely powerless to harm us; all their efforts and intrigues will come to naught if our case is properly prepared and all the facts laid before the Court. We must not lose sight of the fact that the case is to be heard and determined by the greatest Court in the world. If we lose in this Court it will be because our cause is bad, or the facts are not all brought before the Court. We go into Court handicapped, to some extent, by a sentiment which these speculators have been laboring for years to create:—that West Virginia is in some way endeavoring to evade settlement with Virginia.

"As evidence of this, they point to the so-called West Virginia Certificates and say we repudiate these evidences of indebtedness. Certainly we repudiate every liability on account of them, and most solemly protest against having anything to do with them, or the holders thereof. The issuing of these certificates was a great wrong. The men of Virginia, then in power, hard pressed by the creditors of the State and perhaps somewhat piqued by the action of our people in forming the new state, did great injustice to West Virginia and placed our people in an improper light before the world, when they issued these certificates. We have persistently and continuously refused to recognize them. We have always been ready and willing to settle with Virginia, but not with the holders of these bonds. If any part of the Virginia debt is properly chargeable to West Virginia, we want to pay it. We don't want the people of Virginia to pay anything that we should pay. We asked for an accounting with Virginia long before she issued these certificates and were refused consideration, or even the courtesy of a hearing. It is the grossest injustice to charge

us with attempting to evade an accounting and settlement with Virginia.

"We are now in a Court of Justice where these charges will have no bearing on the merits of the case. The Court will proceed to make a settlement without any regard to the question as to why it was not made sooner. We are now most concerned in preparing our side of the case. We are represented in Court by learned and distinguished counsel. They will look after the law and properly present our case, but we must furnish them the evidence. We know we don't owe anything on account of these so-called West Virginia Certificates, and we believe we should not, in equity and good conscience, be required to pay any of the debt, but whether we should pay any part of the debt depends wholly upon the facts. We have been told by our fathers that in the distribution of the money for which Virginia issued her bonds there was not a 'fair divide.' Practically all of the money was spent in improvement east of the Alleghanies, and we paid more than our share before the separation.

"The men who had control of public affairs in Virginia during the time this debt was being contracted had no confidence in the ability of the people inhabiting the mountain counties to pay anything, and hence dealt with them on a cash system. They never expected any money spent here to be returned, and hence they doled it out to us with a parsimonious hand.

"For many years prior to 1861 the people living in northwestern Virginia had complained bitterly of the basis of legislative representation, unequal taxation, and a selfish distribution of the public revenues and funds. Dr. Alexander Campbell and Philip Doddridge and other prominent men of the west, in the great Constitutional Convention of 1829-30, warned the people of the east what would be the result if this injustice continued.

"It is not true that the demand for the formation of the State of West Virginia arose out of the differences of opinion in relation to the civil war. The real trouble long antedated 1860. We were simply submitting to injustice and biding our time. The peculiar condition created by the attempted secession of some of the people of Virginia afforded that opportunity and we availed ourselves of it and the state was formed in strict compliance with law. We would have demanded the new state in the course of time, no matter whether living under a new Confederacy or the United States Government. When the new state was formed

it provided by its Constitution of 1863, Article VIII, section 8, that 'An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty one, shall be assumed by this State,' and section 9 of the Ordinances of the State of Virginia, passed August 19, 1861, provided how this debt shall be ascertained.

"The State of Virginia has permitted the use of her name in this suit and the Court, so far, has held that we are properly in Court and must make our defense. It is now for us to make good our contention. After the lapse of many years, and the death of the men who were personally acquainted with the facts together with the difficulties of tracing these transactions, it is no easy task to ascertain the whole truth.

"There seems to be a disposition on the part of some of our people to criticize, rather than aid, the persons charged by law with the duty of preparing our case. They seem to think that the present State administration and the dominant party alone are sued, and are almost willing that these Wall Street speculators may succeed, provided it may embarrass their political antagonists. This is not only bad politics, but it is unwise and unpatriotic. If there is any honorable way to get rid of this suit, why don't they suggest it? If they are in possession of any facts necessary for the defense, why don't they make them known? If the case is not being properly defended, by all means tell us why. We hear much talk about compromise and settlement out of Court. All law suits arising out of controversies of this character are simply involuntary arbitration, and I know of no body of men to whom this controversy can be submitted with such confident assurance that it will be fairly, properly and justly settled, as to the Supreme Court of the United States.

"I wish that those of our people who have been tempted to criticize could see the folly of such a course and remember that we are all parties to the suit and that contentions among co-defendants will benefit none but the plaintiff.

"You will please say to the members of the Board of Public Works that while I cannot act officially as a member of the Advisory Committee, for the reasons stated above, yet it will afford me great pleasure to aid them in any way that I can. I am, my dear sir,

"Yours very truly,

(Signed) JOHN W. MASON.

Part of Speech of Hon. Waitman T. Wiley,

IN THE UNITED STATES SENATE, JULY 14, 1862, ON THE ADMISSION OF WEST VIRGINIA INTO THE UNION.

(See Congressional Globe, Part 3, 2d Sess. 37th Cong., p. 2415.)

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Mr. President, before I answer this question,* I desire to correct a misapprehension which I find is prevalent, not only throughout the country, but likewise here. It seems to be supposed that this movement for a new State has been conceived since the breaking out of the rebellion, and was a consequence of it—that it grew alone out of the abhorrence with which the loyal citizens of West Virginia regarded the traitorous proceedings of the conspirators east of the Alleghanies, and that the effort was prompted simply by a desire to dissolve the connection between the loyal and disloyal sections of the State. Not so, sir. The question of dividing the State of Virginia, either by the Blue Ridge mountain, or by the Alleghanies, has been mooted for fifty years. It has frequently been agitated with such vehemence as to threaten seriously the public peace. It has been a matter of constant strife and bitterness in the Legislature of the State. The animosity existing at this time between the North and South is hardly greater than what has at times distinguished the relations between East and West Virginia, arising from a diversity of interests and geographical antagonisms. Indeed, so incompatible was the union of the territory lying west of the Alleghany mountains with the territory lying east thereof, under one and the same State municipality, that so long ago as 1781, several of the States insisted that Virginia should include in her act of cession all her trans-Alleghany territory making the Alleghany mountains her western, as they were her natural, boundary. A committee in the Federal Congress about this time, made a strong report, suggesting such a boundary; and Mr. Madison records that—

"From several circumstances, there was reason to believe that Rhode Island, New Jersey, Pennsylvania, and Deleware, if not Maryland likewise, retained latent views of confining Virginia to the Alleghany mountains."—Madison's Debates, Vol. 1, pp. 463-465.

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*This was a question asked by Senator Willey of the United States Senate whether or not Congress ought to give her consent to the admission of West Virginia into the Union.

Secondly. I respectfully solicit the attention of Senators to the geographical position of the proposed new State. Look at the map. Observe how this territory lies, like a wedge driven in between the State of Ohio on one side, and the States of Pennsylvania and Maryland on the other, and is completely cut off from all convenient intercourse with East Virginia by the Alleghany mountains, the sky-kissing summits of which are proposed as the eastern boundary of the new State. How is it possible to identify these two sections of the State of Virginia in a common State policy, or system of internal improvements, or economical interests? You have only to examine the geography of the State to see that this is impracticable. It never has been done. It cannot be done. Hence the revenues of the State heretofore, with slight exceptions, have all been expended in the construction of lines of improvement avoiding those impassable mountain barriers, and leading to the South and Southwest in directions which have not only not benefitted the northwest section of the State, (that part contained in the new State), but have, indirectly, operated to its serious disadvantage. This sectional appropriation of the State's revenues has long been inveighed against as unfriendly and unjust, and has engendered bitter sectional animosity between the counties lying east and those lying west of the Alleghanies. But, perhaps, it might be more charitable to attribute this policy to an absolute necessity growing out of the utter impracticability of constructing any improvement connecting the two sections of the State.

Third. This application for admission as a new State is predicated on considerations of industrial and commercial necessity. The people living within the limits of the projected new State never had, and never can have, any trade or commerce with Eastern Virginia. There is no means of getting back and forth between the two sections by any direct and convenient way. There never has been; there never can be. The impediments are insuperable. Trans-Alleghany sells nothing to cis-Alleghany; and vice versa. The traffic and commerce between the two sections has not amounted to fifty thousand dollars in the last twenty years. The natural and best markets of West Virginia are Baltimore, Pittsburg, Cincinnati, &c. If Eastern Virginia were willing to do so, she has not the ability to push her railways and other means of transportation and travel into the northwest; and if she had both the will and the ability, all such improvements in

Virginia could only carry the trade and staples of West Virginia beyond better and nearer markets.

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(See Congressional Globe, Part 4, 2nd Sess. 37th Cong., p. 3317.)

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Now, sir, I wish to make another remark in answer to the Senator from Illinois. He seems to have fallen into the mistake, common to almost every person, that this movement was conceived in a desire to separate ourselves from the disloyal portion of the State of Virginia, that it grew out of our national difficulties, out of the secession of Virginia from the Federal compact. No, sir; no. These circumstances may have precipitated action upon it; they may have given us the opportunity to effect the long-cherished desire of our section of the State; but this controversy is older than I am; I have heard it ever since I can remember anything. It grows not out of these national dissensions; it grows not out of loyalty or disloyalty to the Government; it grows not out of this question of secession; but it grows out of the social, geographical, commercial, industrial distinction and antagonisms that never can be reconciled by the power of man. The Almighty, with his own eternal hand, has marked the boundary between us. We live upon waters that flow into the valley of the Mississippi; our eastern brethern live upon waters that flow into the Potomac and the Chesapeake; and there is a chain of impassable mountain barriers between us that prevent, and will forever prevent, all connection, all social relations, all interchange of traffic and commodities by any convenient means of transportation. Owing to these facts, we ask this separation, and we place it upon these large national grounds; not upon the questions of secession and disloyalty. If those were the only questions at issue, I would say to the western people, as I have hitherto said to them, stand fast, not only until the Union is restored, but until all Virginia again is made loyal to the national flag, and until we all dwell together again beneath its ample folds in peace and in security. But, sir, we never can dwell in harmony, not because now we are separated by principles of secession and anti-secession, or loyalty and disloyalty, but because the Almighty, with His own hand, has placed barriers between us that separate our trade and our intercourse, because our social relations are different, because our places of market are different, because our industrial interests are different, and because, on account of these facts, our internal resources have never

been developed, and never can be developed while we are connected with Eastern Virginia.

This new proposed State contains within its towering hills and mountains, treasures richer, perhaps, than can be found within the limits of any other State within this Confederacy, and there they have lain, ever since the establishment of this Government, undeveloped, unworked, valueless, and they must continue to remain so unless a different policy be pursued. Is it just to the people there? Is it just to the loyal people of Virginia that they shall be thus trampling under their feet treasures which, if developed, would be of untold value, but are valueless beneath their feet in consequence of the antagonisms of State policy which must ever exist, until there is a separation between the sections?

Upon these grounds, then, we place this issue; not upon those other grounds. If those other grounds were alone the consideration which moved us, I, for one, would cast my fortunes in the common bark, and when Virginia went down, if she did, I would go down with her, as I intend to do anyhow, so far as our natural fortunes are concerned.

But the Senator from Illinois takes occasion to say that a division of the State will operate against the reorganization of the eastern section of Virginia; that the Wheeling government, as he calls it, is a neucleus around which the other counties as they are relieved of the pressure that is upon them, can be brought under the State authority. Sir, where is the county east of the Blue Ridge today that can be recognized by any other power than that of military authority? not one. You tell me of Alexandria. How long would Alexandria acknowledge the authority of the government at Wheeling if you were to withdraw your soldiers?

How long would any other county east of the Blue Ridge do it? There is not a county, in my estimation, and much as I regret to have to say it, let me tell the Senator from Illinois that the only mode by which Virginia can be brought into subjection again to the State and national authorities is by the stern power of the military arm. If this new State is established it leaves the laws of Virginia as they now exist, both in the new State and in the old State precisely the same as before. There is the revised code, there are all the officers, there is all the machinery of the law. What are they worth in a civil point of view? Nothing. You have today to enforce authority by the sword, and you will

have to do it still if you continue with the old state, and you will have this embarrassment, you will have a civil authority in the western part of the State incapable of exercising any power in the eastern part of the State, and it will be obligatory upon the United States, before this rebellion is subdued in Eastern Virginia, to appoint a military Governor, and therefore you will have in the State of Virginia a military Governor and a civil Governor. Separate the sections and each can govern itself according to the civil laws, and you will not be embarrassed by the civil government in one section of the State, and you may be left free to exercise the necessary military authority in the other portions of the State. All this matter about granting letters of administration can be done about as well in the State after the division as it can be now under the existing state of affairs.

Again: the Senator undertakes to say, and urges as another reason why this State should not be divided, and the new State received into the Union, that it would be the admission of another slave State. So far as the slaves themselves are concerned, what is the fact? If you do not admit the State, what is the fact? Every one of them will remain in perpetual bondage. I am arguing the case now on his own principles; I am not saying whether slavery is right or wrong; but I am speaking gratia argumenti. Taking his own premises as true, and his views of slavery as true, what will be the result of this policy? If you do not divide the State, it follows that every slave within the limits of the proposed new State will remain in bondage forever. And yet the people who desire to become a new Commonwealth make a proposition here today that all slaves born after the 4th of July next shall be freed, and that all slaves over ten years of age shall be free at twenty-one, and all over fifteen shall be free at twenty-five. With what proffer to the honorable Senator from Illinois, he would rather have no State at all, because it would bring in a slave State, and keep these slaves forever in bondage. There is an old maxim, a homely one, but it is very true, that half a loaf is better than no bread sometimes.

There is another remark which I wish to answer. I happened to say the other day, and I reiterate it now, upon the authority of personal communication with a great many citizens of Northwestern Virginia, and upon the authority of a great many letters which I have received within the last fort-night, that unless the relief is granted to the people of that section of the State which

this bill will afford, thousands upon thousands of them will take up the little all they have and find a home elsewhere. Such is my information, and I believe it. But the honorable Senator inquired, how will the erection of that section of the State into a new State relieve us from the difficulties of which we complain, how will it bring about security and peace that will retain those citizens within its limits? So far as the enemy abroad are concerned, they can invade us as well if we are erected into a new State, as they can without it; but we do not fear the enemy, we do not fear the national foe, we fear the guerrillas in our midst, we fear the slumbering secessionism that remains there, as my colleague has stated; but give us this new State, and you destroy at once that singular sentiment of State pride, and the new State having once been established, those people will go with the State, acknowledging, singular as it may seem, a supreme allegiance to the State rather than to the United States.

These are some of the reasons, but I want to show to the honorable Senator from Illinois how this thing will operate. Suppose the rebellion is put down all over Eastern Virginia; suppose, as I hope will be the case, that this prediction will be fulfilled and that those secessionists may be driven out: will our condition be any better? Our difficulties are geographical; they are sectional. Look at the state of facts in Eastern Virginia. The State of Virginia is indebted to almost every man east of the Blue Ridge; almost every man has scrip for a horse, or a wagon, or a bag of wheat furnished to the confederate troops. Carry us back to Eastern Virginia, and what is the result? This people to whom the State government is thus indebted will send to the Legislature men who will reflect their will, and what will that be? They will enact laws not only to prevent our receiving any benefit of the State revenues for improvements in our western section, as we have always been prevented, but we shall have imposed upon us, through the overwhelming majority, through the influence of the popular will, the payment of the debts which eastern Virginia has contracted in sending men across our borders to murder our citizens and burn our houses, besides having furnished ten thousand men in resisting them, and paying our proportion of the national debt. That will be our condition if we are carried back into Eastern Virginia; and it is no wonder our people are excited; it is no wonder that by scores they have been beseeching the members of the Committee on Territories, coming here from their

homes at their own expense, beseeching that now when they may, they may have a separate and independent existence. It will injure no one; it will not injure Virginia; it will not injure the Union. It will give to this Union, and to those who desire it, in due time a free State.

Part of the Speech of Hon. Jacob B. Blair

OF VIRGINIA, IN THE HOUSE OF REPRESENTATIVES, JULY 16, 1862, ON THE ADMISSION OF WEST VIRGINIA INTO THE UNION OF STATES.

(See Congressional Globe, Part 4, 2nd Sess. 37th Cong., p. 327.)

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Mr. Speaker, having now, as I think, shown that the Legislature of the restored government of Virginia is the legitimate and constitutional Legislature of Virginia, and consequently possessed of full power to give the consent required by the Constitution of the United States to the formation and erection of the proposed new State, I now propose to offer some reasons why Congress should not withhold its consent to the admission of West Virginia into the Union. But before proceeding to do so, I desire to disabuse the minds of all those who may be laboring under the impression that this project of erecting a new State within the jurisdiction of Virginia has been set on foot and the idea suggested since the commencement of this war. Nothing, sir, could be further from the facts. The question of the division of the State has not only been suggested, but to a greater or less extent agitated for the last forty years.

The desire of the people west of the Alleghany mountains to be separated from those residing east of the mountains, has grown out of causes wholly unconnected with the war, and of which I will speak before I conclude my remarks.

I have always thought, and still think, that there are but few who will take the trouble to examine the map of the State of Virginia who will not be convinced that not only justice demands that the people occupying the western slope of the Alleghany mountains should be permitted to form a new State out of that

territory in order that they might pass laws suitable to their own wants and peculiar condition, but that it is the interest of those residing east of that range of mountains that such a separation should be made. What commercial intercourse, let me ask, exists between them? None, literally none. My colleague in the Senate in that excellent speech of his delivered on presenting the memorial to that body asking that Western Virginia might be admitted into the Union, gave it as his opinion that there had not been over fifty thousand dollars of traffic and commerce between the two sections during the last twenty years. I thought the estimate a high one, and so remarked to my colleague from the tenth district, (Mr. Brown), who replied that there never had been but one commercial transaction come under his observation, and that was an exchange of two dogs. How could it be otherwise when there are no railroads, canals, or water communication between the two sections of the State? There stand the Alleghany mountains, between the valley and the great Northwest, with their immense base and lofty summits speaking by the authority of the God of nature to those who reside on either side, saying, "thus far shalt thou come, and no further."

Mr. Speaker, Virginia has spent millions upon millions in wild schemes of internal improvements, and not withstanding she has had Henry A. Wise for her Governor, a man in whose head, I will venture to say, more wild impracticable, and, I might as well add, devilish schemes originated than in the brain of any other man, yet he never seriously dreamed of, much less suggested, the idea of pushing a railroad through the Alleghanies. Deprived, therefore, of any road connecting the two sections of the State, except two narrow mud turnpike roads, the location of either of which, in many places, would puzzle the most skillful engineer to find, it may be imagined that the commerce between the eastern and western parts of the State is not very extensive, and the intercourse between the people somewhat limited.

The two roads I have referred to are the Staunton and Parkersburg and the Northwestern turnpike roads. The former is located from Staunton to Parkersburg, and the latter from Winchester to Parkersburg. It is my fortune, Mr. Speaker, to reside at the city of Parkersburg, on the bank of the river Ohio, where, as I have always said, these two roads terminate. I know, therefore, whereof I speak when I declare that there are not one hundred travelers that pass over these two roads from Staunton or

Winchester to Parkersburg, or *vice versa*, during an entire year. Before this war commenced, our delegates to the General Assembly, and all others who desired to visit the city of Richmond, the capital of the State, were of necessity compelled to leave the State in order to get there, unless they went by way of Staunton and Winchester, over one of the roads I have mentioned.

Again: the habits, tastes, and industrial pursuits of the people residing in the two sections of the State are as unlike each other as perhaps any two States in the Union. Those who reside east of the Alleghany mountains have long been distinguished as the F. F. V.'s. They are a kind and hospitable people, generally men of wealth and ease. They know but little and care less about the arts and sciences of the day. They raise but little more corn or wheat than is necessary for their own use, depending entirely on raising a crop of young negroes to add to their yearly wealth. Not so with the people of the west. They are generally limited in means, but a hardy, industrious, and energetic people. While they do not claim by birth or otherwise to be superior to their eastern brethren or their countrymen at large, they do maintain they are the equals of either. This difference in the interests, habits, and social institutions of the two sections of the State, coupled with the fact that there can never be to any extent any commercial intercourse between them, renders it almost if not quite impossible to enact laws suitable to the wants and circumstances of both. That negro slavery requires laws of a more stringent and peculiar character than any other species of property, I think all will admit; and that these laws are distasteful if not inimical to the interests of those who do not own slaves, I think is equally clear.

Now, if this be clear of negro slavery generally, is it not doubly so in a State like Virginia, where all, or nearly all, of those who own slaves reside east of the Alleghany mountains? If any one has doubted the truth of this proposition, I think in the history of the legislation of Virginia may be found the most conclusive evidence. Prior to the year 1850, that part of Virginia lying between the Blue Ridge and the Alleghany mountains, known as the valley of Virginia, was almost as much neglected by the State as that part lying west of the Alleghanies. The two sections contained a white population of nearly one hundred and fifty thousand more than the residue of the State, and yet they were in a minority in both branches of the General Assembly. It was in the year

1850, Mr. Speaker, that the convention was called which formed the present constitution of Virginia. It is a period in the history of the State which will long be remembered by not only those who were members of that convention, but by the people of the State at large. The people of the west and valley, smarting under the wrongs and injustice that had been done them through a long series of years, laid aside for once all party considerations and elected their best and truest men to represent them in said convention, and instructed them to demand that the representation in the Legislature should thereafter be based on the white population of the State, and not on the mixed or arbitrary basis as it then was. As soon as the convention met it was apparent that the eastern part of the State was not disposed to yield to the demands of the valley and the west. Day after day, and week after week passed, until several months were spent in discussing what was called the white and mixed basis, and so violent was the discussion at times that it was feared that a compromise of conflicting views was impossible, and that the convention would break up in a row and leave the difficulty to be settled at the point of the sword. But finally the slave interest triumphed, and by the terms of the compromise the rights and interests of the people residing west of the Alleghanies were wholly disregarded, and the people doomed to perpetual bondage unless released of the passage of this bill. It was, in truth and in fact, a compromise between the valley, the former ally of the west, and the eastern part of the State, to which the delegates west of the Alleghanies were compelled to give their consent. How was this compromise effected, and what were its terms? The delegates residing east of the Blue Ridge said in substance to the delegates residing in the valley, "you know that part of Virginia lying west of the Alleghany mountains is principally settled by emigrants from western Pennsylvania, the State of Ohio, and the New England States. You also know that they are opposed to the institution of slavery, and if they were not, slavery can never exist there to any extent for two obvious reasons: first, because the laws of climate forbid it, and secondly, a slave has but to cross the line into Pennsylvania, or the Ohio River into the State of Ohio, and he is free. This being the case, slavery, has only a nominal existence there. Now, you people of the valley, like we of the east, have sprung from quite a different stock. We do not belong to the 'mudsills' of society. You, like we, are largely in-

terested in not only protecting but continuing the institution of slavery. This being the case, come let us reason together; let us compromise this matter, and take care of ourselves; and let this mongrel race beyond the Alleghanies take care of themselves;" and, Mr. Speaker, to make a long story a short one, the east and the valley struck a bargain by which they secured for themselves the control of the legislative department of the State until the day of judgment and a day after, and leaving those residing west of the Alleghanies to shift for themselves the best they could. They formed a constitution for the State of Virginia, and to show the House how shamefully the west was treated, I will read three or four lines of the twenty-third section of article four of that delectable instrument:

> "Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on lands of the value of $300. Slaves under that age shall not be subject to taxation."

Here you will perceive that all slaves over twelve years of age are only taxed equal to and not to exceed that assessed on land of the value of $300, while all slaves under twelve years of age are wholly exempt from taxation. By this little provision no less than $200,000,000 worth of property of the citizens of the valley and those residing in the eastern part of the State was relieved from taxation, while every knife and fork; every bed, whether feather or straw; every horse, mare or gelding, whether blind, spavined, or wind-broken; every old clock, whether it had refused to tell of the passing hours or not; in a word, every species of property, real, personal, and mixed, west of the Alleghany mountains, was taxed, taxed, taxed!

Now, Mr. Speaker, where and how was this money spent, thus wrung from the hard earnings of the people of the west? Look upon the map, and you will find the question incontrovertibly answered. See how the eastern part of the State is checkered over with railroads in every direction—no less than five, and perhaps more, running to and through the city of Richmond—all having been built, either in whole or in part, at the expense of the State. Now, sir, look west of the Alleghanies, and see how many you will find there. Here is the Baltimore and Ohio railroad, running along the line between Virginia and Pennsylvania, and terminating at the city of Wheeling. How much did the State contribute to that great improvement? Not a dollar! On the contrary, it

was years before she would even give her consent that it should be built at all over the soil of Virginia. Then, again, here is a branch of the same road, known as the Northwestern Virginia road, which has its terminus at the city of Parkersburg, not one dollar to build which did the State contribute. Sir, we petitioned the Legislature of the State for fifteen or twenty years for the privilege of building that road over our own soil, with our own means, before our prayer was granted. Why, Mr. Speaker, this partial legislation? Why was the west deprived of the benefits so lavishly showered upon the east? We all know in the west the reason. They did not attempt to conceal the fact that they regarded us unsound on the slavery question; and that every railroad and turnpike made through the western part of the State would induce emigration to that part of the State; and that every man that settled there added that much to the strength of the west. Hence it was the policy of our eastern brethren to retard in every way possible the settlement of the west.

Now, sir, I ask whether it is possible for a State to prosper where such antagonistic interests exist. Is it not the interest of both that a division should take place, that each may pass such laws as their respective wants and interests may require?

But it is argued by those who oppose this bill, that we should wait until the whole State is restored and every county in the State is fully represented in the Legislature, and then get the consent of the Legislature, and Congress will admit us at once. In reply to this reasoning I have this to say; that the people of the west are not disposed to let the present opportunity pass, when they can accomplish that which they have so long desired to attain, and which justice and right demand should be done. History affards but few instances where men clothed with power voluntarily give it up. It was once said by Virginia's most gifted sons, that there was no way of judging the future but by the past; and if we look in this instance to the past to ascertain what our eastern brethren would be most likely to do in regard to this question when (if ever) they shall be fully represented in the Legislature of the State, we are forced to the conclusion that, instead of giving their consent to the erection of a new State within the jurisdiction of Virginia, they would, if possible, rivet the chains more tightly upon us, and compel us to pay not only our just proportion of the debt of the State before the passage of the ordinance of secession, but any debt that has been con-

tracted by Letcher & Co. in prosecuting this unholy war against the United States.

Again, it is argued that if the Legislature of the State, when the whole State is restored, will not give its consent to the erection of the new State, a convention of the people of the State can be called, and a new Constitution be framed, and many if not all the grievances now complained of by the west will be corrected, and a division of the State rendered unnecessary. This reasoning, Mr. Speaker, is fallacious. By an examination of the constitution of Virginia it will be seen that the valley and eastern part of the State have a majority in both branches of the General Assembly, and is it reasonable to suppose that they will consent to the calling of a convention to frame a new constitution in order to yield to the west that which has heretofore been denied her, and which will greatly and materially abridge the rights of the east? Certainly not. But, sir, if a convention was called, the delegates from the east and the valley would form a majority of the convention, and consequently the west would be still at their mercy; for let it be borne in mind that while the valley was, to some extent, prior to the year 1850, identified with the west, since that period, by the clause in the constitution of 1850 to which I have already referred, and by connecting the valley and the east together by building the Tennessee, the Central, and the Manassas Gap railroads, it is now fully identified with the east. Now, I ask any candid man to tell me what relief have we residing west of the Alleghanies to expect by waiting until the whole State is restored for anything else that can or may happen in the future. Sir, we are doomed to perpetual bondage unless Congress grants us relief by the passage of this bill. And instead of being a bill entitled "A bill for the admission of the State of Western Virginia into the Union, and for other purposes," it ought to be entitled "A bill for the release of three hundred and thirty-four thousand white people residing west of the Alleghanies from a worse than Egyptian bondage, and for the admission of the new State of West Virginia into the Union."

Sir, if peace to our distracted country was proclaimed tomorrow, and every sword now drawn in deadly strife returned to its scabbard, it would bring no peace to Western Virginia. The old feuds and differences existing between the two sections of the State, arising out of the conflict of interests that I have already mentioned, intensified by what has grown out of this war, pre-

clude the idea of the two sections of the State ever living in peace under the same State government again. The boundary of the proposed new State embraces an area of twenty-four thousand square miles, and an aggregate white population of over three hundred and thirty-five thousand; also an aggregate slave population at the beginning of the war of a little over twelve thousand, which it is reasonable to suppose is not now more than half that number. It is the opinion of everyone, I believe, without an exception, who has written about or examined the internal wealth of the several States of the Union, that Virginia contains more resources of wealth than any other State; and that these resources are principally confined to that part of Virginia embraced within the lines of the new State all will admit. Look at her wells of oil on the banks of the Little Kanawha river, pouring forth their hundreds of barrels per day; her immence beds of bituminous cannel coal, her deposits of ore, her water-falls, and her forests of timber. Then, sir, look at her lands; say nothing about their adaptation to the growth of wheat, corn, and for grazing; as a wool-growing country it has no superior, if it has an equal on the globe. Many have already embarked in that enterprise and have met with the most gratifying success, and I will venture to predict that before many years West Virginia will be the great wool-growing as well as manufacturing region of the United States.

Mr. Speaker, Virginia is one of the oldest States in the Union. As I have remarked before, it is conceded that she possesses more elements of wealth than, perhaps, any other State, and yet it is a humiliating fact that she is at least fifty years, if not more, behind her daughter Ohio in population, wealth, and nearly everything that makes a State great and prosperous. Why is this? I repeat the question, why is this? Sir, to my mind the reason is obvious. When not affirming and reaffirming the resolutions of 1798-99 and discussing political abstractions, we were wasting our time and energies in the vain endeavor to reconcile irreconcilable interests between the two sections of the State, instead of dividing the State on the line made by nature into two independent States, that the inhabitants of each might develop their own internal wealth and pass laws suitable to their own wants and conditions. Sir, we cannot, even with your aid, recall the past, but we may with it improve the future.

Mr. Speaker, in reference to the question of slavery in the new State, I have but a word or two to say. The laws of climate

forbid its existence there, nor is it the desire or wish of the people that it should be a slave State. Hence it was that I cheerfully consented that that question might be settled at once by inserting the clause contained in this bill. The further extension of slavery under this Government has become an absolute idea. And if one of the results of this war be the extinction of slavery in the border States, and the shaking to its very center the institution in every southern State, let the South remember that it was she who filled the goblet, and if she is compelled to drink its contents to its very dregs, she cannot say to the border States, "you did it."

Mr. Speaker, there is another consideration which, although not germane to this bill, I cannot refrain from alluding to before closing my remarks. It is the noble and patriotic stand taken by the people of northwestern Virginia at the very commencement of this causeless and unfortunate war. Yes, sir, the news had hardly reached the patriotic people of northwest Virginia that an ordinance of secession had passed withdrawing Virginia from the Union, before they had met, and, kneeling before the altar of their country, they resolved that, come what might, they would stand by the old flag and the Union which their fathers had bequeathed to them. How they kept their resolve, let incontrovertible facts answer.

The tenth congressional district, represented on this floor by my colleague, (Mr. Brown,) and my own district, the eleventh, containing together a white population of not over one hundred and twenty-five thousand, have now in the service of the United States over eleven thousand men exclusive of those who have come from other parts of the country and enlisted in Virginia. Sir, one little county in my district—a county within whose limits a traitor dare not enter—with a voting population of about one thousand, has sent to the field four hundred and sixty men. I allude to the glorious and patriotic county of Ritchie. Tell me, sir, where are the two congressional districts and where the county that has in proportion to its population turned out as many men for this war? They cannot be found.

Mr. Speaker, when the impartial historian shall write the history of this war, the heroic and patriotic course of the people of northwestern Virginia will form not only one of its most interesting but brightest chapters. Sir, bound as we are to the great West by ties made by the God of nature, we could not if we would,

and would not if we could, change our relations to the Government of the United States; no, sir, no. Let me say to the Representatives on this floor from Ohio, Indiana, Illinois, and other western States, that your destiny is ours, and that whatever is in store for you in the impenetrable future is likewise in store for us. Come, therefore, and aid us in the passage of this bill, to the end that we may be erected into a new State, that you with us may share in the riches and blessings that will flow by developing the incalculable mineral wealth of northwest Virginia, which will, in the future as in the past, unless our request is granted, remain buried in the bosom of our mountains.

Mr. Speaker, one word more and I have done. It is said by those who desire some excuse, if I may so speak, to oppose this bill, that they cannot bear the idea of dividing the old Commonwealth of Virginia, which has given birth to so many great statesmen, and around whose history so many delightful associations cluster. Sir, I yield to no man in the regard, not to say love, I have for the good old Commonwealth. It was on her soil I first opened my eyes to the light of heaven. I read with childish pride, and point with delight to her history and the part her sons have taken heretofore in the councils of the nation. Nay more, I would obliterate, if possible, from the memory of man the humiliating and unjustifiable position she now occupies towards that Government she has contributed so largely to build up. But what of all this? Did she lose any of her historic renown when she ceded to the General Government the territory now comprising the great Northwest, or when she permitted her daughter, Kentucky, to set up for herself, that she might have a name in history? No, sir, no! And thus it will be if her youngest daughter, West Virginia, is permitted to assume all the responsibilities of one of the States of this Union. Instead of detracting from her fame and history, it will add to both, and the time will come when she will point with pride and pleasure, as did the Spartan mother, to her children, and say "these are my jewels."

Mr. Speaker, pass this bill and you will carry joy and gladness to every loyal heart in northwestern Virginia. Pass it, and you buoy up the hearts and strengthen the arms of those that have grown faint and weak in defending their homes, and maintaining that Government which is the hope of the friends of constitutional liberty throughout the civilized world. Yes, pass it, and you will do that which justice and right demand, and we will ever cel-

ebrate the event as we do the birthday of our national existence, with bonfires and illuminations, and songs of thanksgiving and praise.

Part of the Speech ot Hon. William G. Brown,

IN THE HOUSE OF REPRESENTATIVES, DECEMBER 9, 1862, ON THE ADMISSION OF WEST VIRGINIA INTO THE UNION.

(See Congressional Globe, Part 1, 3d Sess. 37th Congress, p. 41.)

* * * * * * * * * * * * * * * *

Mr. Brown, of Virginia. I was about leaving the question of legitimacy of the government of Virginia, when I was interrupted by the order of the day. I have already referred to the convention of May, 1861; but I beg leave to read some of the resolutions of that convention. I do so because the gentleman from Kansas was pleased to speak of that body as a mob. Sir, I wish the gentleman from Kansas could have looked upon that convention of five hundred men. I have never served in a body more conspicuous in point of talent or appearance. And if gentlemen will only read the resolutions passed by that body, and compare them with the views of the gentleman from Kansas, I think they will find them to compare very well in point of ability.

* * * * * * * * * * * * * * * *

If the views, then, of the gentleman from Kansas be correct, I have no right to a seat upon this floor. If Virginia is a Territory, then by the unauthorized and illegal act of secession of that State I have no business to a seat upon this floor. The Wheeling convention resolved that it would hold elections for Congressmen and for members of the State Legislature upon the regular day of Election. Upon that day, sir, there was a larger vote given in my district than had ever been given before. I was returned to the House of Representatives by a majority of more than fifteen thousand over all the other persons voted for. The vote was almost unanimous for me. The delegates to the Virginia Legislature were also elected by the people of Virginia by a large vote. But I need not advert to my own district as the only one where this was the case. The adjoining district of my colleague (Mr. Blair) voted in the same way. My colleague was also elected by a very large majority. The vote in West Virginia was larger than had ever been given before. The members to the General Assembly

were elected on the day fixed by law for their election. They were elected for the very purpose of reorganizing the State government, and maintaining their allegiance to the Constitution and the laws of the United States. They denied the power of the separate action of the Richmond usurpation to sever them from this government, and to destroy their right to the enjoyment of the laws of Virginia as they were.

I will insert in my remarks, if I should see proper, the resolutions passed by the convention of the 11th of June, 1861, which reestablished the loyal government of Virginia.

Mr. Speaker, I will remark before I take my seat, that the extent of territory of West Virginia is larger than some of the old thirteen States of the Union, embracing some twenty-four thousand square miles. Its population is larger than some of those old states. We have a population of three hundred and thirty thousand, giving us, under the apportionment of 1860, three Representatives upon this floor, which is all we claim in the pending bill, leaving eight representatives to the remaining portion of old Virginia. So much for that matter.

With regard to our revenue, I will add a word. The revenue collected within the boundaries of the new State in 1859 can be stated. I have no accurate estimates since that year. I hold in my hand the report of the Auditor, which fixes the revenue in the forty-eight counties included in the bill of the Senate, for the year 1859, at $620,-061.39, a sum larger than is collected in many of the old States of the Union.

Now, sir, there are other considerations why this House should admit West Virginia into the Union. The bill ought to be passed at once as a matter of expediency. It is not a new question with the people of West Virginia. They have been struggling for it for forty years. They were on the point of revolution in 1829-30, when Eastern Virginia yielded a small pittance of the power to them—not what they were entitled to, but enough to reconcile them for the moment. In 1850 we were again upon the point of revolution because we were denied our proper representation in the Legislature of Virginia. They then yielded to us our proper representation in the House of Representatives, but they denied them to us in the Senate. They fixed the Senate upon the mixed basis, as they called it. They gave us our proper weight in one branch of the Legislature, but in the other they held the power to control us. As an equivalent for what they gave us, they retained in the constitution the provision

that was most oppressive and unjust. They retained a provision that the Legislature should not tax negroes under twelve years of age at all. I need not tell you, sir, that the negro population is to be found in Eastern Virginia. All that valuable class of property, many of them then worth from a thousand to fifteen hundred dollars—the negroes under twelve years of age—was entirely exempt from taxation, and the remaining portion of the negro property was only taxed as property at the value of $300. Although the negroes should bring more than a thousand dollars it was fixed that they should only be valued at $300 each. While every article of our property was taxed at its full value, the negro was almost exempt from taxation. We protested against it, but we were powerless because they retained in the Legislature an undue proportion of the representative power.

But, sir, that is not all. They raised—not upon the property in these negroes—large sums of money for the purpose of constructing railroads. They collected of the $600,000 a large amount for the purpose of constructing railroads in Eastern Virginia — railroads they are now using for our subjugation and for the destruction of the Union. They built them out of our money. They raised revenue in an undue proportion upon us, and then expended it within their own localities. A greater outrage was never committed upon a loyal people.

But, sir, I could assign another reason. Our relations, always unfriendly and unkind in consequence of their oppression, are doubly so now, because of our loyalty. We, sir, are the only people within the limits of a seceded State that declared open resistance to the revolution. The five hundred delegates who assembled at Wheeling to inaugurate the project of reestablishing the government of Virginia upon a loyal basis, went with their lives in their hands. They were threatened with expulsion from the State. They were threatened with the gallows. At the time we assembled there the southern troops were marching with all possible speed for the purpose of intimidating us, and to prevent us from the exercise of our allegiance to the laws. They were, sir, within fifty or sixty miles from Wheeling. A people never did exhibit more firmness and more determination than the loyal people of Virginia on that occasion. So far as we had any intimation from this Government, it was through the last message of Mr. Buchanan, who denied that it had the right to coerce a seceded State. Virginia had seceded and annexed herself to the Southern confederacy; and here were about three hundred thousand loyal people of Virginia, without any assurance of aid from

this Government, determined that if the policy of the incoming Administration should be the same as that of Mr. Buchanan, and would not give us aid, we would, for the love of the Government of our fathers, take up arms and resist the southern confederacy ourselves. And, indeed, we did not know but that this Government, under the views of Mr. Buchanan, might aid the southern confederacy in suppressing us as an insurrection. It was a new question; but we were resolved upon one thing, and that was, that if we were carried out of the old State of Virginia, and our connection with this government broken up, it should be done by force and at the point of the bayonet.

How does that people now stand? We have in the field, fighting for this Government, sixteen regiments raised almost exclusively within the limits of the new State. We have supplied more than our full quota, and that not by drafting but by volunteering. When the last requisition was made upon us, we furnished the number promptly. In my own county and district nearly every fighting man is now in the army. Are we to be turned back to the old Commonwealth, there to be oppressed by her to be driven from the borders, if persecution can drive us from our homes? Many of our citizens say they will leave the homes of their fathers and seek new homes in the West unless they can be relieved from this threatened load of oppression and danger. My advice to them has been otherwise. I have told them not to run after liberty in another land, but swear by the God of their fathers that they will bring liberty to their own homes; and we will do it by the aid of this Government and the blessing of God, and we will be a free people.

I received this morning from the Legislature of the State of Virginia, sitting at Wheeling, a dispatch containing a resolution passed by that body, asking this House to pass the Senate bill just as it passed the Senate. I had the honor yesterday of presenting petitions from the people of Virginia, numbering some five thousand, asking the same thing. My colleague (Mr. Blair) presented a batch of similar petitions. There is but one voice among our constituents, and this is in favor of a division of the State.

Mr. Bingham. Will the gentleman from Virginia allow me to say that I am prepared to make a report upon those petitions which were referred to the Committee on the Judiciary, to the effect that the prayer of the petition be granted?

Mr. Brown, of Virginia. I desire to put this House right upon one further point, and then I will leave this question to the House

for their final action, so far as I am concerned. It has been asserted, and understood in some quarters, that the organization of the government at Wheeling was for the purpose of forming a new State. I am prepared to say that when that convention originally met in Wheeling, although there were a few radicals there who wanted to form a new State without reinstating the old State of Virginia, we voted them down, and commenced the exercise of our original rights as freemen to build up the loyal government of Virginia; and, although we designed eventually to ask for this separation, and it was what we anxiously desired, yet we determined to be a law-abiding people, and ask for what we desired through the forms of law. We think we have brought ourselves within the forms of law, and we think we have conducted ourselves in such a manner as to recommend us favorably to the consideration of this body; and now, in the name of my constituents, and of the loyal men of Virginia, I most earnestly appeal to this body to give us the relief we ask, and grant us the prayer we have made. With these remarks I shall leave the case with the House. The following are among the proceedings of the convention assembled on the 11th of June, 1861:

A DECLARATION OF THE PEOPLE OF VIRGINIA, REPRESENTED IN CONVENTION, AT THE CITY OF WHEELING,

THURSDAY, JUNE 13, 1861.

The true purpose of all government is to promote the welfare and provide for the protection and security of the governed; and when any form or organization of government proves inadequate for or subversive to their purpose, it is the right, it is the duty of the latter, to alter or abolish it. The Bill of Rights of Virginia, framed in 1776, reaffirmed in 1830, and again in 1851, expressly reserves this right to a majority of her people. The act of the General Assembly, calling the convention which assembled at Richmond in February last, without the previously expressed consent of such a majority, was therefore a usurpation; and the convention thus called has not only abused the powers nominally intrusted to it, but, with the connivance and active aid of the executive, has usurped and exercised other powers, to the manifest injury of the people, which, if permitted, will inevitably subject them to a military despotism.

The convention, by its pretended ordinances, has required the people of Virginia to separate from and wage war against the Government of the United States, and against the citizens of neighboring

States, with whom they have heretofore maintained friendly, social, and business relations.

It has attempted to subvert the Union founded by Washington and his copatriots, in the former days of the Republic, which has conferred unexampled prosperity upon every class of citizens, and upon every section of the country. It has attempted to transfer the allegiance of the people to an illegal confederacy of rebellious States, and required their submission to its pretended edicts and decrees.

It has attempted to place the whole military force and military operations of the Commonwealth under the control and direction of such confederacy, for offensive as well as defensive purposes.

It has, in conjunction with the State executive, instituted, wherever their usurped power extends, a reign of terror intended to suppress the free expression of the will of the people, making elections a mockery and a fraud.

The same combination, even before the passage of the pretended ordinance of secession, instituted war by the seizure and appropriation of property of the Federal Government, and by organizing and mobilizing armies with the avowed purpose of capturing or destroying the captial of the Union.

They have attempted to bring the allegiance of the people of the United States into direct conflict with their subordinate allegiance to the State, thereby making obedience to their pretended ordinances treason against the former.

We, therefore, the delegates here assembled in convention to devise such means and take such action as the safety and welfare of the loyal citizens of Virginia may demand, having maturely considered premises, and viewing with great concern the deplorable condition to which this once happy Commonwealth must be reduced unless some regular adequate remedy is speedily adopted, and appealing to the Supreme Ruler of the universe for the recititude of our intentions, do hereby, in the name and on behalf of the good people of Virginia, solemnly declare that the preservation of their dearest rights and liberties, and their security in person and property, imperatively demand the reorganization of the government of the Commonwealth, and that all acts of said convention and executive, tending to separate this Commonwealth from the United States, or to levy and carry on war against them, are without authority and void; and that the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated.

AN ORDINANCE FOR THE REORGANIZATION OF THE STATE GOVERNMENT, PASSED JUNE 19, 1861.

The people of the State of Virginia, by their delegates assembled in a convention at Wheeling, do ordain as follows:

1. A Governor, Lieutenant Governor, and Attorney General for the State of Virginia shall be appointed by this convention, to discharge the duties and exercise the powers which pertain to their respective offices by the existing laws of the State, and to continue in office for six months, or until their successors be elected and qualified; and the General Assembly is required to provide by law for an election of Governor and Lieutenant Governor by the people as soon as in their judgment such an election can be properly held.

2. A council, to consist of five members, shall be appointed by this convention, to consult with and advise the Governor respecting such matters pertaining to his official duties as he shall submit for consideration, and to aid in the execution of his official orders. Their term of office shall expire at the same time as that of the Governor.

3. The Delegates elected to the General Assembly on the 23rd day of May last, and the Senators enittled under existing laws to seats in the next General Assembly, together with such Delegates and Senators as may be duly elected under the ordinances of this convention, or existing laws to fill vacancies, who shall qualify themselves by taking the oath or affirmation hereinafter set forth, shall constitute the Legislature of the State, to discharge the duties and exercise the powers pertaining to the General Assembly. They shall hold their offices from the passage of this ordinance until the end of the terms for which they were respectively elected. They shall assemble in the city of Wheeling, on the 1st day of July next, and proceed to organize themselves as prescribed by existing laws, in their respective branches. A majority in each branch of the members qualified as aforesaid shall constitute a quorum to do business. A majority of the members of each branch thus qualified, voting affirmatively, shall be competent to pass any act specified in the twenty-fourth section of the fourth article of the constitution of the State.

4. The Governor, Lieutenant Governor, Attorney General, members of the Legislature, and officers now in the service of the State, or of any county, city, or town thereof, or hereafter to be elected or appointed for such service, including the judges and clerks of the several courts, sheriffs, commissioners of the revenue, justices of the peace, officers of the city and municipal corporations, and officers of

the militia, and officers and privates of volunteer companies of the State, not mustered into the service of the United States, shall each take the following oath or affirmation before proceeding in the discharge of their several duties:

I Solemnly swear (or affirm) that I will support the Constitution of the United States, and the laws made in pursuance thereof, as the supreme law of the land, anything in the constitution and laws of the State of Virginia, or in the ordinances of the convention which assembled at Richmond on the 13th of February, 1861, to the contrary notwithstanding; and that I will uphold and defend the government of Virginia as vindicated and restored by the convention which assembled at Wheeling on the 11th day of June, 1861.

If any elective officer, who is required by the preceding section to take such oath or affirmation, fail or refuse so to do, it shall be the duty of the Governor, upon satisfactory evidence of the fact, to issue his writ declaring the office to be vacant, and providing for a special election to fill such vacancy, at some convenient and early day to be designated in said writ; of which due publication shall be made for the information of the persons entitled to vote at such elections; and such writ may be directed, at the discretion of the Governor, to the sheriff or sheriffs of the proper county or counties, or to a special commissioner or commissioners to be named by the Governor for the purpose. If the officer who fails or refuses to take such oath or affirmation be appointed by the Governor, he shall fill the vacancy without writ; but if such officer be appointed otherwise than by the Governor or by election, the writ shall be issued by the Governor, directed to the appointing power, requiring it to fill the vacancy.

ARTHUR I. BOREMAN, *President.*

G. L. CRANMER, *Secretary.*

DEBT SUIT

VIRGINIA v. WEST VIRGINIA

Joint Resolution by West Virginia Legislature
Creating Commission

OPINIONS OF UNITED STATES SUPREME COURT

BRIEFS ON FINAL HEARING

MASTER'S REPORT

REPRINTED BY ORDER OF
A. A. LILLY
ATTORNEY GENERAL
1913



West Virginia Debt Commission

APPOINTED BY THE GOVERNOR

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Fairmont.

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Parkersburg.

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Conference Committee's Substitute for House Substitute for Senate Joint Resolution No. 5.

(Adopted by the Legislature of West Virginia, February 21, 1913.)

Creating a commission, known as the Virginia debt commission, to provide for arranging and settling with the commonwealth of Virginia the proper proportion of the public debt of the original commonwealth of Virginia, if any should be borne by West Virginia, to take into consideration all matters arising between the commonwealth of Virginia and the State of West Virginia in reference to said original public debt, and to report its proceedings to the governor of the state.

WHEREAS, The commonwealth of Virginia instituted a suit in the supreme court of the United States against the state of West Virginia, to have the state of West Virginia's proportion of the public debt of Virginia as it stood before one thousand eight hundred and sixty-one, ascertained and satisfied; and,

WHEREAS, At the October term, one thousand nine hundred and ten, the supreme court of the United States made a finding that the share of the principal debt of the original commonwealth of Virginia to be borne by the state of West Virginia, was seven million one hundred and eighty two thousand six hundred and seven dollars and forty six cents; and,

WHEREAS, Said court did not fully and finally decide the question involved, but suggested that such proceedings and negotiations should be had between the states upon all the questions involved in said litigation as might lead to a settlement of the same; therefore, be it

Resolved by the Senate of West Virginia, the House of Delegates concurring therein:

That a commission of eleven members, known as the Virginia debt commission is hereby created. The members of said commission shall be appointed by the governor, two of whom shall be chosen from each congressional district of the state, and one at large, not more than six of whom shall belong to any one political party, and all resignations or vacancies in the said commission as they occur shall be filled by the appointment of the governor.

Said commission is authorized and directed to negotiate with the

commonwealth of Virginia, or with any person or committee owning or holding any part of the said indebtedness for a settlement of West Virginia's proportion of the debt of the original commonwealth of Virginia, proper to be borne by the State of West Virginia.

The commission is hereby directed to ascertain and report upon and give the utmost publicity to all the facts in relation to the pending suit instituted against the state of West Virginia by the commonwealth of Virginia and to ascertain and report upon and give like publicity to all the facts and conditions under which the West Virginia certificates are held or owned, together with the names and residences of the persons having the legal or equitable right to receive from West Virginia whatever may be ascertained to be payable thereon.

To ascertain and report as to any part of the Virginia debt claimed against the state of West Virginia, which is owned or held or claimed to be due, at law or in equity, by the commonwealth of Virginia in her own right; and having made the investigation required hereby, said commission is authorized and directed to negotiate with the commonwealth of Virginia for a settlement of West Virginia's proportion of the debt of the original commonwealth of Virginia, proper to be borne by the state of West Virginia.

A majority of said commission shall have authority to act. The commission shall choose its chairman and appoint its secretary and other necessary officers.

The expenses properly incurred by the commission and its individual members, including compensation of said members at the rate of ten dollars per day for the time actually employed, shall be paid by the state out of the moneys appropriated for said purpose.

The commission shall make a report to the governor as soon as practicable, and upon receipt of said report the governor shall convene the legislature for the consideration of the same.

The commission is hereby authorized to sit within or without the state and to send for papers and records and to examine witnesses under oath.

MEMBERS OF THE COMMISSION

Pursuant to the authority vested in him by the foregoing resolution His Excellency, H. D. HATFIELD, Governor, made the following appointments:

At Large—W. E. WELLS, Newell.

First Congressional District—JOHN W. MASON, Fairmont; HENRY ZILLIKEN, Wellsburg.

Second Congressional District—J. A. LENHART, Kingwood; W. T. ICE, Philippi.

Third Congressional District—U. G. YOUNG, Buckhannon; JOSEPH E. CHILTON, Charleston.

Fourth Congressional District—R. J. A. BOREMAN, Parkersburg; JOHN M. HAMILTON, Grantsville.

Fifth Congressional District—W. D. ORD, Landgraff; JOSEPH S. MILLER, Kenova.

Supreme Court of the United States

No. 3, Original.—OCTOBER TERM, 1910.

Commonwealth of Virginia
vs.
State of West Virginia. } In Equity.

[March 6, 1911.]

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill brought by the Commonwealth of Virginia to have the State of West Virginia's proportion of the public debt of Virginia as it stood before 1861 ascertained and satisfied. The bill was set forth when the case was before this Court on demurrer. 206 U. S. 290. Nothing turns on the form or contents of it. The object has been stated. The bill alleges the existence of a debt contracted between 1820 and 1861 in connection with internal improvements intended to develop the whole State, but with especial view to West Virginia, and carried through by the votes of the representatives of the West Virginia counties. It then sets forth the proceedings for the formation of a separate State and the material provisions of the ordinance adopted for that purpose at Wheeling on August 20, 1861, the passage of an act of Congress for the admission of the new State under a constitution that had been adopted, and the admission of West Virginia into the Union, all of which, we shall show more fully a little further on. Then follows an averment of the transfer in 1863 to West Virginia of the property within her boundaries belonging to West Virginia, to be accounted for in the settlement thereafter to be made with the last named State. As West Virginia gets the benefit of this

property without an accounting, on the principles of this decision, it needs not to be mentioned in more detail. A further appropriation to West Virginia is alleged of $150,000, together with unappropriated balances, subject to accounting for the surplus on hand received from counties outside of the new State. Then follows an argumentative averment of a contract in the Constitution of West Virginia to assume an equitable proportion of the above-mentioned public debt, as hereafter will be explained. Attempts between 1865 and 1872 to ascertain the two States' proportion of the debt and their failure are averred, and the subsequent legislation and action of Virginia in arranging with the bondholders, that will be explained hereafter so far as needs. Substantially all the bonds outstanding in 1861 have been taken up. It is stated that both in area of territory and in population West Virginia was equal to about one-third of Virginia, that being the proportion that Virginia asserts to be the proper one for the division of the debt, and this claim is based upon the division of the State, upon the above-mentioned Wheeling ordinance and the Constitution of the new State, upon the recognition of the liability by statute and resolution, and upon the receipt of property as has been stated above. After stating further efforts to bring about an adjustment and their failure, the bill prays for an accounting to ascertain the balance due to Virginia in her own right and as trustee for bondholders and an adjudication in accord with this result.

The answer admits a debt of about $33,000,000, but avers that the main object of the internal improvements in connection with which it was contracted was to afford outlets to the Ohio River on the west and to the seaboard on the east for the products of the eastern part of the State, and to develop the resources of that part, not those of what is now West Virginia. In aid of this conclusion it goes into some elaboration of details. It admits the proceedings for the separation of the State and refers to an act of May, 1862, consenting to the same, to which we also shall refer. It denies that it received property of more than a little value from Virginia or that West Virginia received more than belonged to her in the way of surplus revenue on hand when she was admitted to the Union, and denies that any liability for these items was assumed by her Constitution. It sets forth in detail the proceedings looking to a settlement, but as they have no bearing upon our decision we do

not dwell upon them. It admits the transactions of Virginia with the bondholders and sets up that they discharged the Commonwealth from one-third of its debt and that what may have been done as to two-thirds does not concern the defendant, since Virginia admits that her share was not less than that. If the bonds outstanding in 1861 have been taken up it is only by the issue of new bonds for two-thirds and certificates to be paid by West Virginia alone for the other third. Liability for any payments by Virginia is denied and accountability, if any, is averred to be only on the principle of § 9 of the Wheeling ordinance, to be stated. It is set up further that under the Constitution of West Virginia her equitable proportion can be established by her Legislature alone, that the liquidation can be only in the way provided by that instrument, and hence that this suit cannot be maintained. The settlement by Virginia with her creditors also is pleaded as a bar, and that she brings this suit solely as trustee for them.

The grounds of the claim are matters of public history. After the Virginia ordinance of secession, citizens of the State who dissented from that ordinance organized a government that was recognized as the State of Virginia by the Government of the United States. Forthwith a convention of the restored State, as it was called, held at Wheeling, proceeded to carry out a long entertained wish of many West Virginians by adopting an ordinance for the formation of a new State out of the western portion of the old Commonwealth. A part of section 9 of the ordinance was as follows: "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new state during the same period." Having previously provided for a popular vote, a constitutional convention, &c., the ordinance in § 10 ordained that when the General Assembly should give its consent to the formation of such new State, it should forward to the Congress of the United States such consent, together with an official copy of

such constitution, with the request that the new State might be admitted into the union of States.

A constitution was framed for the new State by constitutional convention, as provided in the ordinance, on November 26, 1861, and was adopted. By Article 8, § 8, "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." An act of the Legislature of the restored State of Virginia, passed May 13, 1862, gave the consent of that Legislature to the erection of the new State "under the provisions set forth in the constitution for the said State of West Virginia." Finally Congress gave its sanction by an act of December 31, 1862, c. 6, 12 Stat. 633, which recited the framing and adoption of the West Virginia constitution and the consent given by the Legislature of Virginia through the last mentioned act, as well as the request of the West Virginia convention and of the Virginia Legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the act of Congress should take effect, and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a State on June 20, 1863.

It was held in 1870 that the foregoing constituted an agreement between the old State and the new, *Virginia* v. *West Virginia*, 11 Wall. 39, and so much may be taken practically to have been decided again upon the demurrer in this case, although the demurrer was overruled without prejudice to any question. Indeed, so much is almost if not quite admitted in the answer. After the answer had been filed the cause was referred to a master by a decree made on May 4, 1908, 209 U. S. 514, 534, which provided for the ascertainment of the facts made the basis of apportionment by the original Wheeling ordinance, and also of other facts that would furnish an alternative method if that prescribed in the Wheeling ordinance should not be followed; this again without prejudice to any question in the cause. The master has reported, the case has

been heard upon the merits, and now is submitted to the decision of the Court.

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. *Missouri* v. *Illinois*, 200 U. S. 496, 519, 520. *Kansas* v. *Colorado*, 206 U. S. 46, 82-84. Therefore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect merits, with which we proceed to deal. See *Rhode Island* v. *Massachusetts*, 14 Peters, 210, 257. *United States* v. *Beebe*, 127 U. S. 338.

The amount of the debt January 1, 1861, that we have to apportion no longer is in dispute. The master's finding was accepted by West Virginia and at the argument we understood Virginia not to press her exception that it should be enlarged by a disputed item. It was $33,897,073.82, the sum being represented mainly by interest-bearing bonds. The first thing to be decided is what the final agreement was that was made between the two States. Here again we are not to be bound by technical form. A State is superior to the forms that it may require of its citizens. But there would be no technical difficulty in making a contract by a constitutive ordinance if followed by the creation of the contemplated State. *Wedding* v. *Meyler*, 192 U. S. 573, 583. And, on the other hand, there is equally little difficulty in making a contract by the constitution of the new State, if it be apparent that the instrument is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent State and by Congress as embodying a just term which conditions the parent's consent. There can be no question that such was the case with West Virginia. As has been shown, the consent of the Legislature of the restored State was a consent to the admission of West Virginia under the provisions set forth in the Constitution for the would-be State, and Congress gave its sanction only on the footing of the same Constitution and the consent of Virginia in the last-mentioned act. These three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they es-

tablish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.

We are of opinion that the contract established as we have said is not modified or affected in any practical way by the preliminary suggestions of the Wheeling ordinance. Neither the ordinance nor the special mode of ascertaining a just proportion of the debt that it puts forward is mentioned in the Constitution of West Virginia, or in the act of Virginia giving her consent, or in the act of Congress by which West Virginia became a State. The ordinance required that a copy of the new constitution should be laid before Congress, but said nothing about the ordinance itself. It is enough to refer to the circumstances in which the separation took place to show that Virginia is entitled to the benefit of any doubt so far as the construction of the contract is concerned. See opinion of Attorney-General Bates to President Lincoln, 10 Op. Att. Gen. 426. The mode of the Wheeling ordinance would not throw on West Virginia a proportion of the debt that would be just, as the ordinance requires, or equitable, according to the promise of the Constitution, unless upon the assumption that interest on the public debt should be considered as part of the ordinary expenses referred to in its terms. That we believe would put upon West Virginia a larger obligation than the mode that we adopt, but we are of opinion that her share should be ascertained in a different way. All the modes, however, consistent with the plain contract of West Virginia, whether under the Wheeling ordinance or the Constitution of that State, come out with surprisingly similar results.

It was argued, to be sure, that the debt of Virginia was incurred for local improvements and that in such a case, even apart from the ordinance, it should be divided according to the territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that

two or three-fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one-fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole State would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand. If we should attempt to look farther, many of the corporations concerned were engaged in improvements that had West Virginia for their objective point, and we should be lost in futile detail if we should try to unravel in each instance the ultimate scope of the scheme. It would be unjust, however, to stop with the place where the first steps were taken and not to consider the purpose with which the enterprise was begun. All the expenditures had the ultimate good of the whole State in view. Therefore we adhere to our conclusion that West Virginia's share of the debt must be ascertained in a different way. In coming to it we do but apply against West Virginia the argument pressed on her behalf to exclude her liability under the Wheeling ordinance in like cases. By the ordinance West Virginia was to be charged with all State expenditures within the limits thereof. But she vigorously protested against being charged with any sum expended in the form of a purchase of stocks.

But again, it was argued that if this contract should be found to be what we have said then the determination of a just proportion was left by the Constitution to the Legislature of West Virginia, and that irrespectively of the words of the instrument it was only by legislation that a just proportion could be fixed. These arguments do not impress us. The provision in the Constitution of the State of West Virginia that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be and an indication of the way. Apart from the language used, what is just and equitable is a judicial question similar to

many that arise in private litigation, and in nowise beyond the competence of a tribunal to decide.

The ground now is clear, so far as the original contract between the two States is concerned. The effect of that is that West Virginia must bear her just and equitable proportion of the public debt as it was intimated in *Hartman* v. *Greenhow*, 102 U. S. 672, so long ago as 1880, that she should. It remains for us to consider such subsequent acts as may have affected the original liability or as may bear on the determination of the amount to be paid. On March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, passed an act authorizing an exchange of the outstanding bonds, &c., and providing for the funding of two-thirds of the debt with interest accrued to July 1, 1871, by the issue of new bonds bearing the same rate of interest as the old, six per cent. There were to be issued at the same time, for the other one-third, certificates of same date, setting forth the amount of the old bond that was not funded, that payment thereof with interest at the rate prescribed in the old bond would be provided for in accordance with such settlement as should be had between Virginia and West Virginia in regard to the public debt, and that Virginia held the old bonds in trust for the holder or his assignees. There were further details that need not be mentioned. The coupons of the new bonds were receivable for all taxes and demands due to the State. *Hartman* v. *Greenhow*, 102 U. S. 672. *McGahey* v. *Virginia*, 135 U. S. 662. The certificates issued to the public under this statute and outstanding amount to $12,703,451.79.

The burden under the statute of 1871 still being greater than Virginia felt able to bear, a new refunding act was passed on March 28, 1879, reducing the interest and providing that Virginia would negotiate or aid in negotiating with West Virginia for the settlement of the claims of certificate holders and that the acceptance of certificates 'for West Virginia's one-third' under this act should be an absolute release of Virginia from all liability on account of the same. Few of these certificates were accepted. On February 14, 1882, another attempt was made, but without sufficient success to make it necessary to set forth the contents of the statute. The certificates for balances not represented by bonds, "constituting West Virginia's share of the old debt," stated that the balance was "to be accounted

for by the state of West Virginia without recourse upon this commonwealth."

On February 20, 1892, a statute was passed which led to a settlement, described in the bill as final and satisfactory. This provided for the issue of bonds for nineteen million dollars in exchange for twenty-eight millions outstanding, not funded, the new bonds bearing interest at two per cent for the first ten years and three per cent for ninety years; and certificates in form similar to that just stated, in the act of 1882. On March 6, 1894, a joint resolution of the Senate and House of Delegates was passed, reciting the passage of the four above mentioned statutes, the provisions for certificates, and the satisfactory adjustment of the liabilities assumed by Virginia on account of two-thirds of the debt, and appointing a committee to negotiate with West Virginia, when satisfied that a majority of the certificate holders desired it and would accept the amount to be paid by West Virginia in full settlement of the one-third that Virginia had not assumed. The State was to be subjected to no expense. Finally an act of March 6, 1900, authorized the commission to receive and take on deposit the certificates, upon a contract that the certificate holders would accept the amount realized from West Virginia in full settlement of all their claims under the same. It also authorized a suit if certain proportions of the certificates should be so deposited, as since then they have been—the State, as before, to be subjected to no expense.

On January 9, 1906, the commission reported that apart from certificates held by the State and not entering into this account, there were outstanding of the certificates of 1871 in the hands of the public $12,703,451.79, as we have said, of which the commission held $10,851,294.09, and of other certificates there were in the hands of the public $2,778,239.80, of which the commission held $2,322,141.32.

On the foregoing facts a technical argument is pressed that Virginia has discharged herself of all liability as to one third of the debt; that, therefore, she is without interest in this suit, and cannot maintain it on her own behalf; that she cannot maintain it as trustee for the certificate holders, *New Hampshire* v. *Louisiana*, 108 U. S. 76; and that the bill is multifarious in attempting to unite claims made by the plaintiff as such trustee with some others

set up under the Wheeling ordinance, &c., which, in the view we take, it has not been necessary to mention or discuss. We shall assume it to be true for the purposes of our decision, although it may be open to debate, *Greenhow* v. *Vashon*, 81 Va. 336, 342, 343, that the certificate holders who have turned in their certificates, being much the greater number, as has been seen, by doing so, if not before, surrendered all claims under the original bonds or otherwise against Virginia to the extent of one-third of the debt. But even on that concession the argument seems to us unsound.

The liability of West Virginia is a deep seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two States. If one-third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining two-thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire* v. *Louisiana* into play. For even if Virginia is not liable she has the contract of West Virginia to bear an equitable share of the whole debt, a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See *United States* v. *Beebe*, 127 U. S. 338, 342. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125, 126. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his *cestui que trust*. *Lloyd's* v. *Harper*, 16 Ch. D. 290, 309, 315. *Lamb* v. *Vice*, 6 M. & W., 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.

It remains true then, notwithstanding all the transactions between the old Commonwealth and her bondholders, that West Virginia must

bear her equitable proportion of the whole debt. With a qualification which we shall mention in a moment, we are of opinion that the nearest approach to justice that we can make is to adopt a ratio determined by the master's estimated valuation of the real and personal property of the two States on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger share on West Virginia, but the relative resources of the debtor populations are generally recognized, we think, as affording a proper measure. It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia $300,887,367.74, and for West Virginia $92,416,021.65. These figures are criticised by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia cannot complain of the result. They would give the proportion in which the $33,897,073.82 was to be divided, but for a correction which Virginia has made necessary. Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt, whereas at the ratio shown by the figures her share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the creditors were content to accept from her, say $22,598,049.21, is $3,333,212.26; subtracting the last sum from the debt leaves $30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have $7,182,507.46 as her share of the principal debt.

We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a final decree there would be figures to be agreed upon or to be ascertained by reference to a Master. Among other things there still remains the question of interest. Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on one side and on the other. The circumstances of the asserted default and the conditions sur-

rounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar. As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.

True copy.

Teste: JAMES H. MCKENNEY,
Clerk of Supreme Court, U. S.

[Seal of Court.]

NOTE:—The above opinion is printed and circulated in accordance with the custom of this office to keep the public informed of the proceedings of this cause.

WILLIAM G. CONLEY,
Attorney General.

Charleston, March 9, 1911.

Supreme Court of the United States

No. 3—Original.—OCTOBER TERM, 1911.

Commonwealth of Virginia
vs.
State of West Virginia.

In Equity.

[October 30, 1911.]

Mr. Justice HOLMES delivered the opinion of the Court.

This is a motion on behalf of the Commonwealth of Virginia that the Court proceed to determine all questions left open by the decision of March 6, 1911. 220 U. S. 1. The grounds of the motion are these: On April 20, 1911, the Virginia Debt Commission wrote to the Governor of West Virginia, referring to the suggestion of a conference between the parties in the decision, and requested that he would take steps that would lead to such a conference at an early date. At that time the Governor of West Virginia had called an extra session of the Legislature upon another matter. The constitution forbade the Legislature, when so convened, entering upon any business except that stated in the call, but as there were twenty-six days between the call and the session that followed it, there was time for the Governor to issue a further proclamation on the subject of the debt. The Governor in his message to the Legislature referred to the matter, and put, as questions to be considered, whether the appointment of the Virginia Debt Commission was enough to require West Virginia now 'to take the initiative,' and whether a Commission should be appointed to meet the Virginia Commission. He also stated that if, without formal action of three-fifths of the body under the Constitution, a majority should express to him the opinion that the Legislature ought to be called into extraordinary session to consider the matter, he should deem it sufficient reason for a call. But it seems that he did not use his power of his own motion or receive such an expression as induced him to use it, and the Legislature does not meet in regular session until January, 1913. The Commonwealth of Virginia concludes from these facts that there is no likelihood of a conference with any satisfactory results.

The Attorney General of West Virginia answered that the members of the Legislature convened in May, 1911, were elected before this cause had been argued and under conditions that left them uncertain as to the wishes of their constituents; that the Governor was of opinion that he could not constitutionally amend his proclamation so as to embody consideration of the debt, and that there is no one in West Virginia except the Legislature that has power to deal with the matter. He then suggested a doubt whether the Virginia Debt Commission was empowered to deal with the case in its present phase, in view of the provision in the Resolution creating it that it should not negotiate except upon the basis that Virginia is bound only for the two-thirds of the debt that she had provided for, and concluded that this Court ought not to act before the West Virginia Legislature at its next regular session can consider the case in the spirit anticipated by the opinion of the Court.

With regard to the doubt implied by the Governor of West Virginia whether it now is incumbent upon that State to take the initiative, and that suggested by its Attorney General whether the Virginia Debt Commission has the necessary power, we are of opinion that neither of them furnishes a just ground for delay. The conference suggested by the Court is a conference in the cause. The body that directed the institution of the suit has taken the proper step on behalf of the plaintiff, and it is for the defendant to say whether it will leave the Court to enter a decree irrespective of its assent or will try to reach a result that the Court will accept. The conference is not for an independent compromise out of Court, but an attempt to settle a decree. The provision as to negotiations, in the Virginia Resolution preceding the Statute authorizing this suit, refers, we presume, to a settlement out of Court and has nothing to do with the conduct of the cause. If the parties in charge of the suit consent, this Court is not likely to inquire very curiously into questions of power, if, on its part, it is satisfied that they have consented to a proper decree.

A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man: it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the

Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace.

Motion overruled without prejudice.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

ORIGINAL NO. 3.

COMMONWEALTH OF VIRGINIA, Plaintiff,

vs.) In Equity.

STATE OF WEST VIRGINIA, Defendant.

DEFENDANT'S BRIEF

PART I.

ARGUMENT OF CASE ON THE BILL AND ANSWER AND EXHIBITS.

INTRODUCTORY STATEMENT.

Complainant's bill was filed at the October term, 1906, to which defendant interposed demurrer and amended demurrer, which, after argument, in March, 1907, were overruled in the opinion of this Court pronounced May 27, 1907 (206 U. S. 290).

The briefs and argument of counsel on the demurrer are contained in West Virginia Compilation, Vol. I. (See last paragraph of this statement.)

Defendant filed her answer and its exhibits in October, 1907.

May 4, 1908, the cause, by a decree, was referred to a Special Master

with directions (209 U. S. 514), which directions were modified, June 1, 1908, by substituting in paragraph 2 of the decree of reference the words "assessed valuation" for the word "value."

There is contained in Vol. 2 of West Virginia Compilation, at the pages indicated, the following:

Form of decree proposed by each party, referring cause to a Master, plaintiff's at p. 35, defendant's p. 41; the motion of defendant to modify the decree of reference, p. 325; the order modifying said decree, p. 371; the names recommended by each party as fit persons to be appointed Master, by plaintiff at p. 61, by defendant at p. 57; the order appointing Mr. Charles E. Littlefield Special Master, p. 375. The volume also contains the briefs and arguments of counsel on the motion to refer the cause to a Master and on the motion to modify the decree of reference.

Beginning on November 16, 1908, and ending on July 2, 1909, sessions were held by the Special Master at Richmond, Va., to take evidence. Thereafter the Special Master held sessions in the city of New York, to hear arguments of counsel, the last whereof was held on January 1, 1910.

March 17, 1910, the Special Master filed his report.

In April, 1910, the parties filed printed exceptions to the Master's report.

The printed Record consists of two volumes; the Record proper, referred to herein as "R., p. ---"; and the Appendix to the record, referred to herein as "App., p. ---." The Appendix contains such statutes and ordinances and extracts therefrom, and selections from constitutions of Virginia and West Virginia, as were deemed most material to the questions in the cause, compiled by the parties under direction of the Special Master.

The Record consists of Part I. and Part II. The former contains the Bill and its exhibits; defendant's demurrer and amended demurrer; opinion of the Court overruling demurrer (206 U. S. 290); defendant's answer and its exhibits; decree referring cause to the Master; motion to modify decree of reference; and the orders modifying decree, and appointing the Special Master.

Part II. contains the proceedings and evidence taken before the

Special Master, arranged under the seven paragraphs of the decree of reference; followed by the evidence of general application to the cause. Under each paragraph is printed the exhibits and other evidence germane to the subject of the paragraph.

But not all the exhibits, documents and other evidence adduced is printed in the Record. In order to keep the Record as small as might be, under direction of the Master much was omitted therefrom. None of the original principal exhibits of either party are printed, except under Paragraph VII. After the oral evidence of the expert accountants of each party was given, by direction of the Master, these accountants prepared "Joint Exhibits," from which all items were omitted about which there was no disagreement as to amount; and in which the items and details thereof about which there were disagreement were stated. Some other exhibits were also omitted.

So, the oral evidence of the expert accountants printed in the Record was given under the original exhibits and before the "Joint Exhibits" were prepared. All matters of mere routine were also omitted from the Record; but all the exhibits, evidence, etc., introduced before the Master at the hearings specified are part of the record of the cause, and were returned by the Master with his report.

Some evidence was taken by the Master after the Record was printed, and designated as "Supplemental Exhibits" 1 to 11.

Besides the foregoing, there have been used in the cause two books, gotten out by the Attorneys General of West Virginia, referred to above as West Virginia Compilation, Vol. I. and Vol. II., and referred to herein as "W. Va. Comp., Vol. —, p. —." Copies of these books have been filed in the clerk's office of the Court.

Historical Statement Showing Formation of West Virginia and Her Assumption of a Just Proportion of the Public Debt.

On November 15, 1860, Governor John Letcher issued a proclamation convoking the General Assembly of Virginia in extra session. In obedience to this proclamation, the general assembly convened in the capitol at Richmond at the time designated therein, and on January 14, 1861, passed an act providing "for electing members of

a convention and to convene the same." The delegates to this convention were to be elected on the 4th of February, 1861, and to assemble at Richmond on the 14th of the same month.

The convention assembled at Richmond at the time appointed, composed of 152 delegates, of whom 47 were from counties now included in West Virginia, and on April 17, 1861, the following ordinance was adopted by said convention:

"AN ORDINANCE TO REPEAL THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA BY THE STATE OF VIRGINIA, AND TO RESUME ALL THE RIGHTS AND POWERS GRANTED UNDER SAID CONSTITUTION.

"The people of Virginia, in their ratification of the Constitution of the United States of America, adopted by them in Convention on the twenty-fifth day of June, in the year of our Lord, one thousand seven hundred and eighty-eight, having declared that the powers granted under the said Constitution were derived from the people of the United States, and might be resumed whensoever the same should be perverted to their injury and oppression, and the Federal Government having perverted said powers, not only to the injury of the people of Virginia, but to the oppression of the Southern Slaveholding States.

"*Now, therefore, we, the people of Virginia, do declare and ordain*, That the ordinance adopted by the people of this State in Convention, on the twenty-fifth day of June, in the year of our Lord, one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified; and all acts of the General Assembly of this State ratifying or adopting amendments to said Constitution, are hereby repealed and abrogated; that the union between the State of Virginia and the other States under the Constitution aforesaid is hereby dissolved, and that the State of Virginia is in full possession and exercise of all the rights of sovereignty which belong and appertain to a free and independent State.

"*And they do further declare*, That said Constitution

of the United States of America is no longer binding on any of the citizens of this State.

"This Ordinance shall take effect and be an act of this day, when ratified by a majority of the votes of the people of this State, cast at a poll to be taken thereon, on the fourth Thursday in May next, in pursuance of a schedule hereinafter to be enacted."

The Ordinance of Secession was accompanied by a Schedule providing, among other things, for a vote of the people on the question of the ratification of the ordinance by the people of Virginia, to be taken on the fourth Thursday in May, 1861. The ninth section of this ordinance provided as follows:

"The election for members of Congress for this State to the House of Representatives of the Congress of the United States, required by law to be held on the fourth Thursday in May next, is hereby suspended and prohibited until otherwise ordained by this Convention."

On April 18, 1861, said Convention adopted the following resolution:

"*Resolved*, That the Governor of this Commonwealth be requested to communicate immediately to the President of the Confederate States, the fact that this Convention, on yesterday, adopted an Ordinance resuming the powers delegated by Virginia to the Federal Government, and to express to the said President the earnest desire of Virginia to enter into an alliance, offensive and defensive, with the said Confederate States."

Pending the question of the ratification of the Ordinance of Secession by a vote of the people of Virginia, the State entered into the following temporary convention with the Confederate States of America:

"1st. Until the union of said Commonwealth with said Confederacy shall be perfected, and said Commonwealth shall become a member of said Confederacy according to the Constitutions of both powers, the whole military force and military operations, offensive and defensive, of said Commonwealth in the impending conflict with the United States, shall be under the chief control and direction of the President of said Confederate States, upon the same principles, basis and footing

as if said Commonwealth were now, and during the interval, a member of said Confederacy.

"2nd. The Commonwealth of Virginia will, after the consummation of the union contemplated in this convention, and her adoption of the Constitution for a permanent Government of said Confederate States, and she shall become a member of said Confederacy, under said permanent constitution, if the same occur, turn over to said Confederate States all the public property, naval stores and munitions of war, etc., she may then be in possession of, acquired from the United States, on the same terms and in like manner as the other States of said Confederacy have done in like cases.

"3rd. Whatever expenditures of money, if any, said Commonwealth of Virginia shall make before the union under the Provisional Government, as above contemplated, shall be consummated, shall be met and provided for by said Confederate States.

"This Convention, entered into and agreed to, in the city of Richmond, Virginia, on the twenty-fourth day of April, eighteen hundred and sixty-one, by Alexander H. Stephens, the duly authorized commissioner to act in the matter of the said Confederate States, and John Tyler, William Ballard Preston, Samuel McD. Moore, James P. Holcombe, James C. Bruce and Lewis E. Harvie, parties duly authorized to act in like manner for said Commonwealth of Virginia—the whole subject to the approval and ratification of the proper authorities of both governments respectively.

"*In testimony whereof*, the parties aforesaid have hereto set their hands and seals, the day and year aforesaid, and at the place aforesaid, in duplicate originals.

"JOHN TYLER, (SEAL)
"WILLIAM BALLARD PRESTON, (SEAL)
"SAMUEL MCD. MOORE, (SEAL)
"JAMES P. HOLCOMBE, (SEAL)
"JAMES C. BRUCE, (SEAL)
"LEWIS E. HARVIE. (SEAL)
"Committee of the Convention.

"ALEXANDER H. STEPHENS. (SEAL)
"Commissioner for Confederate States."

On the day upon which the Convention adopted the Ordinance of Secession, it took steps to enable the government of Virginia to possess itself of the property of the Federal Government within its territorial jurisdiction; and Virginia accordingly reduced into her own possession the Norfolk and Gosport Navy Yards, with vessels, steam engines, machinery, tools, supplies and other property, valued at $2,497,130.92, and the old and new custom houses at Norfolk, valued at $207,000.00.

On the same day (April 17) the Commonwealth of Virginia, through said Convention, provided for a State Military force. This was done by the adoption of "An Ordinance to call the volunteers into the service of the State and for other purposes." On the 19th of April, the office of Major-General of the Military and Naval forces of the State was created. Three days later Governor Letcher nominated Robert E. Lee for this office, which was promptly confirmed by the Convention. April 27th, an Ordinance providing for Enlistment in the Provisional Army was adopted. It provided that all free, able-bodied men, between the ages of eighteen and forty-five, might enlist, and the enlistment should be binding on minors, provided they be allowed four days to reconsider and retract their enlistment.

On the 29th of April, five Congressmen were elected to represent Virginia in the Provisional Congress of the Confederate States, about to assemble at Montgomery, Alabama. These were the Hon. R. M. T. Hunter, of Essex county; William C. Rives, of Albemarle county; the Hon. John W. Brockenbrough, of Rockbridge county; Walter R. Staples, of Montgomery county, and Judge Gideon D. Camden, of Harrison county.

By another Ordinance, adopted April 30th, the term of service of all volunteers called into service under the Ordinance of the 17th of April, 1861, was twelve months, unless sooner discharged.

On May 1, 1861, the Convention adopted an Ordinance absolving all citizens of Virginia from their allegiance to the United States.

On May 7, 1861, the representatives of Virginia in the Confederate Congress took their seats in that body, except said Camden, and a Resolution adopted by the Congress of the Provisional Government, ratified the terms of alliance entered into on the 24th of the preced-

ing April, by and between Alexander H. Stephens, the Confederate Commissioner, and the Commissioners of Virginia, and the old Commonwealth was thus formally admitted into the Confederate States of America, May 7th, 1861.

> "*A Brief Summary.*—The Convention having adopted an Ordinance of Secession; forbidden the election in the State of representatives to the Federal Congress; effected an Alliance, offensive and defensive, between Virginia and the Confederate States; adopted the Constitution of the Provisional Government of said States; elected five members of the Confederate States Congress, four of whom hastened to take their seats; released all officers from the oaths they had taken to support the Constitution of the United States, and absolved all the people of Virginia from their allegiance to the United States; captured the property of the National Government at Harper's Ferry; took possession of the Norfolk and Gosport Navy Yards, with the property connected therewith; occupied the custom houses at Norfolk and Richmond; and made arrangements by which the State was formally admitted a member of the Confederate States,—the whole done before the time arrived for the people to vote for the ratification or rejection of the Ordinance of Secession,—the Convention adjourned until June 12th ensuing."
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> See *"How West Virginia Was Made,"* by Lewis, pp. 8-23.

Pending the vote upon the question of ratifying the Ordinance of Secession, the loyal citizens left within the counties now constituting West Virginia asserted an earnest and patriotic endeavor to avoid the calamity incident to the adoption of this ordinance. After publication by the authorities at Richmond of its adoption, the citizens of the old state living within the present boundaries of West Virginia, instituted a movement to restore the practical governmental relations of Virginia to the United States.

The first convention called by the people of Northwestern Virginia, known as the May Convention, adjourned on the 15th day of May, 1861, after having provided for the meeting of a second convention in the event that the Ordinance of Secession should be ratified by the

people on the 23rd day of May ensuing. This was done by means of a resolution, reported by the Committee on Federal Relations, adopted by the convention, as follows:

> "*Resolved*, That, in the event of the Ordinance of Secession being ratified by a vote, we recommend to the people of the Counties here represented, and all others disposed to co-operate with us, to appoint, on the 4th day of June, 1861, delegates to a General Convention, to meet on the 11th of that month, at such place as may be designated by the Committee hereinafter provided, to devise such measures and take such action as the safety and welfare of the people they represent may demand, each county to appoint a number of Representatives to said Convention equal to double the number to which it will be entitled in the next House of Delegates; and the Senators and Delegates to be elected on the 23rd inst., by the counties referred to, to the next General Assembly of Virginia, and who concur in the views of this Convention, to be entitled to seats in the Convention as members thereof."

The second convention of the people of Northwestern Virginia assembled on June 11, 1861. It adopted an ordinance for the reorganization of the State government of Virginia. This ordinance provided for the appointment of a governor and a lieutenant governor, and also for other State officers of Virginia, and declared that the members elected to the General Assembly of Virginia should meet in Wheeling and constitute the legislative department of the government; and all other necessary steps were taken to restore the government of Virginia to her proper place in the Union; in fact, the government of Virginia was duly restored in this convention. After transacting all the business necessary to this restoration, the convention adjourned to meet on the first Tuesday in August, 1861, in the city of Wheeling. On Tuesday, August 6, 1861, this convention, which adjourned on the 25th of June of the same year, re-assembled pursuant to its adjournment. At its second session this convention provided by ordinance for the formation of a New State out of the territory of Virginia now constituting West Virginia, and for the call of a convention, to which delegates should be elected, for the

formation of a constitution for the new State. This election was duly held, and the delegates elected to such convention met, and framed a constitution. The convention assembled on the 26th of November, 1861, and, having finished its work, adjourned on February 18, 1862. A schedule was attached to this proposed constitution, providing for an election to take the sense of the people on the question of ratification. The election was held on April 3, and resulted in its ratification by the people. On May 13, 1862, the General Assembly of Virginia passed an act giving the assent of Virginia to the formation and erection of the proposed new State; and on April 20, 1863, a proclamation was made by the President of the United States, reciting the act of Congress approved on the 31st day of December, 1862, by which the State of West Virginia was declared to be one of the United States of America, and was admitted into the Union on an equal footing with the original States in all respects whatsoever, upon the condition that certain changes should be duly made in the proposed constitution of that State; and then reciting that proof of a compliance with that condition had been submitted to him, he therefore declared in pursuance of the act of Congress, that the said act would take effect and be in force from and after sixty days from April 20, 1863; and accordingly on that day, June 20, 1863, West Virginia became one of the United States.

See *"How West Virginia Was Made," pages* 78 *et seq.*, 317 *et seq.*

A condensed history of the formation of West Virginia appears in the case of *Virginia* v. *West Virginia*, 78 U. S. 39 (20 L. Ed. 67.) There can be no question as to the validity of the acts of the Restored Government of Virginia which resulted in the formation of the State of West Virginia, as this is settled by the case just cited, and also because the new State was recognized as one of the States of the Union by all branches of the general government. The formation of the State of West Virginia was the result of the acts of the loyal government of Virginia—a government in harmony with the general government, and one performing all the acts of a government of a State in all its practical relations with the Federal government. The ninth section of the ordinance providing for the

formation of the new State, contains the following as to the assumption by West Virginia of a part of the public debt of Virginia:

> "Said new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State within the same period."
>
> Appendix to R., p. 122.

The Constitution of the new State, adopted in 1862, by a vote of the people, with reference to the said debt, provides as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."
>
> Appendix to R., p. 125.

Shortly after the close of the late Civil War, Virginia brought suit against West Virginia to establish jurisdiction over the counties of Jefferson and Berkeley, claimed by the defendant as a part of her territory. This suit was not decided until March 6, 1871, when the demurrer filed to the bill was sustained and the bill dismissed.

Virginia v. *West Virginia*, 78 U. S. 39 (20 L. Ed. 67).

Therefore, it was not known until the decision of this case whether the counties of Jefferson and Berkeley were a part of Virginia or West Virginia; and hence no settlement could be made between the two States with reference to the public debt, on the basis of the ordinance of Virginia, above quoted, providing the method by which the settlement should be effected, until after this case was decided.

Virginia Sought No Adjustment with West Virginia of Any Part of the Public Debt as Alleged in Her Bill

With reference to the efforts at settlement between the two states touching the public debt, the bill makes this averment:

> "After the year 1865, and prior to the year 1872, attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia contracted prior to January 1st, 1861; but all such attemps proved ineffectual and vain, and no accounting or settling of any kind was ever had between the two States in regard to this debt."
>
> Record, p. 10.

The answer of the defendant to this paragraph of the bill appears in the record at pages 149-154. The facts in relation to this matter are as follows:

The first governor of West Virginia, the Hon. Arthur I. Boreman, in his first message to the first legislature of that state, in discussing the financial condition and prospects of the new state, said:

> "The constitution provides that this state shall assume an equitable proportion of the debt of Virginia, prior to the first day of January, 1861, but no settlement can be made at present, and when it is made our 'equitable proportion' cannot be much."

In his message, dated January 16, 1866, to the legislature of that year, Governor Boreman, after quoting section 8 of article 8 of the constitution of West Virginia, says that the execution of this provision of the constitution had theretofore been impracticable on account of the existence of the war, but now that the war is over and peace is restored, he recommended the appointment of commissioners on behalf of the state to meet a like commission from Virginia.

Prior to December, 1866, Virginia instituted a suit in equity against the State of West Virginia in this Honorable Court for a decision of the question whether or not the counties of Berkeley and

Jefferson constituted a part of the State of West Virginia. This cause was not determined until the 6th day of March, 1871, on which day it was decided in favor of West Virginia. During pendency of this suit no adjustment of West Virginia's liability, as provided in the ordinance, could be made, because until the boundaries of West Virginia were definitely determined it could not possibly be known what (1) amount of money was spent within the boundaries as state expenditures, (2) what her just proportion of the expenses of the state government was, nor (3) the amount paid into the state treasury from her counties, as provided by the ordinance.

In his message to the legislature of 1867, Governor Boreman refers to his recommendation of the appointment of commissioners, made in last message, to meet commissioners from the State of Virginia, and states that it had not been done because the authorities of Virginia had made no provision for such settlement. He states that he was informed that the Honorable Alexander H. H. Stuart, of Virginia, together with two others, had been appointed under a resolution adopted by the general assembly of Virginia: first, for the purpose of securing a reunion of the two states, or secondly, for the purpose of adjusting the public debt and for a fair division of the public property. On February 28 of the same year, the legislature of West Virginia by resolution declared that the people of that state were unalterably opposed to a reunion with the people of Virginia, but expressed the willingness of West Virginia to effect a prompt and equitable settlement between the two states, and directed the Governor as soon as the said suit in the Supreme Court of the United States relating to the counties of Berkeley and Jefferson had been disposed of, to appoint three commissioners on the part of West Virginia to treat with commissioners of Virginia upon the matter of adjusting the public debt as provided in the ordinance of 1861 and the constitution of West Virginia (W. Va. Compilation, vol. 1, pp. 444-6).

In January, 1868, the governor of West Virginia informed the legislature in his annual message, that the

> "Commissioners to treat with Virginia in regard to the public debt of that state, have not yet been appointed under the resolutions of that subject adopted by the

> legislature, February 28, 1867. The resolutions prescribe that the suit brought by Virginia in the Supreme Court of the United States, to recover jurisdiction over the counties of Berkeley and Jefferson, shall be finally disposed of before such appointment shall be made, which event has not yet transpired; and, if it had, there might still be a question whether such settlement should take place in the present condition of affairs in Virginia."

The "present condition of affairs in Virginia" referred to was doubtless that arising out of the anomalous situation caused by the refusal of Congress to admit representatives from Virginia, from December, 1865, until the state was re-admitted into the Union in 1870. Congress, it appears, refused to recognize as valid the legislature that assembled under the Alexandria constitution of Virginia. Later, the state was placed under military government; a new constitution was adopted in 1868, ratified by the people in July, 1869, and Virginia re-admitted into the Union January 26, 1870. No negotiations could properly or safely have been carried on with Virginia during this period of "reconstruction," even if the suit to recover Berkeley and Jefferson counties had not been pending.

Again, in his message in 1869 to the legislature of West Virginia, the Governor stated that commissioners had not been appointed by him up to that time, owing to the fact that the suit between the states was still pending. Virginia having, by an act approved February 18, 1870, provided for the appointment of three commissioners to treat with the authorities of West Virginia, the Governor of West Virginia, by communication dated February 24, 1870, advised the legislature of West Virginia of the passage of that act; and thereupon the legislature of West Virginia, March 1, 1870, appointed a joint committee of its two houses to confer with the Virginia commissioners and report to the legislature, providing, however, that such appointment of commissioners should not in any manner prejudice the rights of West Virginia involved in the suit then still pending in this Court respecting the counties of Berkeley and Jefferson. (W. Va. Comp., vol. 1, pp. 446-7.)

On March 3, 1870, the Governor of West Virginia was authorized

by the legislature by joint resolution to appoint three resident citizens of the state to treat with the authorities of Virginia upon the subject of the public debt of that state, but it was provided that nothing in that action was to be construed as impairing the jurisdiction of West Virginia over the counties of Berkeley and Jefferson. (W. Va. Comp., vol. 1, pp. 447-8.) As the resolution was passed on the last day of the session, and as there was omission to make appropriation of money to carry out its provisions, the Governor of West Virginia, in his message of 1871, stated that no appointment had been made owing to the lack of funds to pay the compensation and expenses of such commission.

Pending the efforts thus being made on the part of West Virginia, the general assembly of Virginia, through the Governor of that state, tendered to West Virginia a proposition for an arbitration of the question relating to the debt, the arbitrators not to be citizens of either state, each state to appoint two, and an umpire to be chosen by the arbitrators if deemed necessary. This proposal was submitted to the legislature of West Virginia on February 17, 1871; but on the 15th, two days prior to the communication of this action of Virginia, the legislature of West Virginia had passed a joint resolution, authorizing the Governor to appoint three disinterested citizens of the state to treat with the authorities of Virginia upon the subject of the adjustment of the public debt of that state existing prior to January 1, 1861, to report on various matters relating to the creation of the debt, upon the investments held by the state of Virginia, and, providing, among other things, compensation for the commissioners and for the employment of an accountant or clerk. (W. Va. Comp., vol. 1, pp. 448-9.)

The proposal of Virginia relating to arbitration was referred by the legislature of West Virginia to a joint special committee of the two houses, which committee reported a preamble and joint resolution, rejecting the tender of arbitration because the adjustment of the debt should be subject to the ratification of the legislatures of the two states, and because citizen commissioners from the two states would be necessarily more familiar with the circumstances attending the creation of the said debt and other questions connected therewith. This joint resolution also invited Virginia to appoint three disinterested

citizens of that state as commissioners, with authority to treat with the commissioners theretofore authorized upon the part of West Virginia; but it was provided that their report should be subject to the approval and ratification of the legislature of the State of West Virginia and the general assembly of the commonwealth of Virginia. The Governor of West Virginia was directed by said resolution to communicate to the Governor of Virginia, without delay, certified copies of the preamble and resolution. (W. Va. Comp., vol. 1, pp. 449-54.) Accordingly, the Governor of West Virginia appointed three commissioners for the purpose aforesaid. This commission is known as the "West Virginia Debt Commission of 1871." After their appointment they proceeded to Richmond, where all the evidences of the receipt and expenditure of the money were kept, and there spent some time in the examination of such documents as were accessible. Realizing the necessity for further and more accurate information than they could obtain unassisted, they addressed a communication to the second auditor of Virginia, soliciting specifically the necessary information. To this request the second auditor made a reply, in which he declined to furnish the information desired, a copy of which reply is filed as "Exhibit No. 2" of defendant's answer (R., p. 166).

Soon after their appointment the commission addressed a letter to the Governor of Virginia, notifying him of their appointment, their organization, and the duties put upon them, and requesting him to indicate at his earliest convenience what "channel of communication will be open to us." Nearly a month later they received from the Governor of Virginia a copy of a letter from him to the Governor of West Virginia, declining to recognize the West Virginia commissioners (W. Va. Comp., vol. 1, pp. 457-9). A few weeks later, in his message to the legislature, the Governor of Virginia "proceeds," to quote the language of the West Virginia Debt Commission, "to asperse the good faith of the State of West Virginia" (W. Va. Comp., vol. 1, p. 463). Having failed in their effort to obtain either the recognition or the co-operation of the Governor or the second auditor of Virginia, the commission left Richmond, because, as they say in their report, "further stay was not likely to add to the scant information

already gleaned by them from the public documents" (W. Va. Comp., vol. 1, p. 462).

The failure and refusal of Virginia to recognize, receive, or co-operate with the commissioners placed them at a great disadvantage, and they therefore obtained only such facts and figures as enabled them to make an imperfect report to the Governor of West Virginia with reference to the matters with which they were charged; and because of the incompleteness and inaccuracy of their report, and because it appeared therefrom, that in making their investigations they wholly disregarded the provisions of the ordinance of the Wheeling convention adopted August 20, 1861, and did not follow the method of settlement therein prescribed, their report was not adopted by the legislature of West Virginia. In 1873, the senate of West Virginia made an investigation of the subject of the debt, through its finance committee, of which J. M. Bennett, who was for eight years auditor of the old state of Virginia, and whose time expired when the city of Richmond was evacuated in 1865, was chairman. This committee made a report on December 22, 1873, from which it appeared that West Virginia upon a settlement with Virginia, based on the provisions of section nine of the ordinance, did not owe to Virginia anything whatever, but that, on the contrary, Virginia was indebted to West Virginia on account of said debt on January 1, 1861, in the sum of $512,000, not including interest. A copy of this report is printed in the record at page 166, as Exhibit 3 of defendant's answer.

A few weeks after the West Virginia Debt Commission of 1871 retired from Richmond after their fruitless endeavors there for recognition and co-operation, and after the Governor of Virginia had, in his message to the general assembly, questioned the good faith of West Virginia, Virginia passed her first funding act, that of 1871, in which she assumed two-thirds of the amount of the debt as her full share, and, *in violation and repudiation of section nine of the ordinance* of August 20, 1861, arbitrarily set aside the other one-third as West Virginia's portion. This is the more remarkable when it is remembered that she refers to and quotes from said section nine of the ordinance in the preamble of this act (R., p. 18). And to the same

effect were the funding acts of 1879, 1882, and 1892. The joint resolution of the general assembly of Virginia, approved March 6, 1894, to provide for adjusting the portion of the debt to be borne by West Virginia, and creating the Virginia Debt Commission, provides (R., p. 49):

> "But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof."

And the act of the general assembly of Virginia, approved March 6, 1900, is to the same effect, namely, that Virginia is liable for two-thirds only of the debt as her part thereof, which she has already provided for.

West Virginia, since the passage of the funding act of 1871—certainly since the adoption of the joint resolution of 1894,—could enter upon negotiations with Virginia upon no other basis. West Virginia must agree, as a preliminary to any such negotiations with Virginia, that Virginia was liable for two-thirds only of the debt, that this was her "equitable proportion," and that she has settled that. And what besides would it be held that West Virginia recognized or admitted or agreed to had she entered into negotiations with Virginia on such basis? This, that she had recognized that she was liable for the other third as *her* "equitable proportion"; for, it would be reasoned, that since it takes three thirds to make a whole, and as Virginia was liable for two-thirds only, West Virginia must be liable for the other third. It is and was not reasonable to ask that West Virginia should place herself in such a position, especially as it would have set aside the agreement West Virginia made with reference to her portion of the debt and the method of ascertaining the same, contained in section nine of the ordinance.

West Virginia has never receded from the said provisions of the ordinance with reference to the settlement of her just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a state. The resolutions adopted by her legislature in recent years, in which she declared that she did not owe

the state of Virginia anything on account of said debt, and would not negotiate with her concerning the same, were based upon the said report of the finance committee of 1873, upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance, and upon the conditions of negotiations dictated by Virginia in her said joint resolutions of 1894, and said act of 1900.

After the said proposition of Virginia, made in 1871, to select arbitrators, which was declined by West Virginia, as hereinbefore stated, Virginia at no time signified her desire to settle with West Virginia the matters relating to West Virginia's proportion of said public debt until after the adoption of said joint resolution approved March 6, 1894, whereby she had compromised and settled with her creditors and been released from all liability, which resolution provided that the commission thereby created should not proceed with negotiations with West Virginia until assurances should be received from the holders of a majority in amount of the certificates issued by Virginia under her funding acts, hereinbefore referred to, that they desired the commission to undertake such negotiations and would accept the amount so ascertained to be paid by West Virginia in full settlement of the one-third of the debt of the original state which had not been assumed by Virginia; and also that in no event should said commission enter into negotiations except upon the basis that Virginia was bound only for the two-thirds of the debt of the original state and which she had already provided for as her equitable proportion thereof. Under this resolution no negotiations were proposed to West Virginia until the year 1895, and then only upon the conditions prescribed in said joint resolution of 1894, which has never yet been repealed or modified in this respect. Negotiations were again offered by Virginia in 1906, but upon the same condition that is, that West Virginia should enter upon such negotiations with the admission on her part that Virginia should be liable for two-thirds only of the debt, which was again declined by West Virginia.

It will be clearly seen, therefore, that the allegations in the bill that "attempts were made at different times by the public authorities of both the commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportion of

the common liability," is not supported to the extent and effect sought to be shown by the bill filed in this case.

It is averred in the bill that it was soon apparent that Virginia had by the act of March 6, 1871, assumed a heavier burder than she was able to bear, and other plans for the settlement of the debt were attempted to be made by the action of the General Assembly on March 28, 1879, and February 14, 1882, until at length, it is alleged, that a final and satisfactory settlement of the portion of the debt of the original state which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892. See R., pp. 21-47. Virginia files with her bill copies of each of these Acts of her General Assembly as exhibits Nos. 2, 3 and 4. It is also shown by the bill that Virginia by her Act of March 30, 1871, sought to fix her liability upon the basis of two-thirds of the original debt, and it is alleged that this was the intention of that act.

All Questions Arising Upon the Record of this Case Are Still Open for the Consideration and Decision of the Court.

Before entering upon the further consideration of the case, the attention of the Court is respectfully called to its former decision rendered upon the demurrer filed to the bill in this cause, appearing in 206 U. S. 290-322, the third point of the syllabus reading as follows:

> "The question whether the Commonwealth of Virginia has been released from all liability on account of the public debt evidenced by bonds of the state outstanding on January 1, 1861, will not be passed upon on a demurrer to a bill filed by that state against the State of West Virginia which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original State of Virginia which was assumed by West Virginia at the time of its creation as a state, but the consideration of such question will be postponed until the final hearing."

Again, in this case, reported in 209 U. S. 514-537, in the opinion of the Court referring this cause to a Master, specifying the matters

as to which the Master should report, the Court uses the following language:

> "The answers to these inquiries to be without prejudice to any question in the cause."

Inasmuch as the question of the release of Virginia by her creditors from all liability to her on account of the debt in question, and her lack of interest to prosecute this suit so far as it relates to the settlement of said debt, or the ascertainment of the just proportion thereof payable by West Virginia, is still open for consideration, these matters may, therefore, be properly argued on the hearing of the cause at this time, as well as all other questions that properly arise in the cause.

The Bill Sets Up Four Distinct and Independent Grounds in Respect to Each of Which Virginia Seeks Relief.

To intelligently argue this case, it is necessary to know just what Virginia seeks to recover by her bill. An examination of it discloses four distinct and independent grounds upon which she asks adjudication, and in respect to each of which she seeks a recovery against West Virginia.

The *first* of these grounds is that which relates to the part of the public debt held by third persons which Virginia alleges West Virginia should be required to assume and pay, and which Virginia has not paid and declines to pay, for the very substantial reason, as shown by her bill and its exhibits, that from its payment she has been exonerated by the acts and consent of her creditors, the holders thereof, and as to which she avers that she *sues in trust* for the benefit of those creditors or holders of said unpaid part of said debt who may be entitled thereto.

The *second* of these grounds is that which relates to the part of the said debt not held by third persons but which Virginia averts she holds in her Literary and Sinking funds, of which she herself, as she contends, is the owner, and as to which she sues in her own right and *not as trustee*.

The *third* ground is predicated upon the allegation that Virginia

has paid off or retired of principal and interest of said debt a sum considerably in excess of $25,000,000, which she owns in her own right, and on account of which she avers that she has "a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor." This claim she asserts in her own right.

The *fourth* and last ground in respect to which she asks a decree against West Virginia is based upon certain property which she avers was transferred to and became the property of West Virginia, under two acts of the legislature of Virginia passed respectively on the 3rd and 4th days of February, 1863, amounting, in the aggregate, as alleged in the bill, to several millions of dollars, the exact amount of which it is alleged the plaintiff is unable to state. This claim is also asserted by Virginia in her own right.

These four several phases of the bill will be presented and considered in the order we have here respectively designated.

Questions Arising Upon the Record for the Consideration and Decision of the Court.

First. Virginia has no interest in this suit, so far as it seeks to ascertain West Virginia's proportion of said debt, Virginia suing therefor in her alleged capacity as trustee; because no liability now attaches to Virginia in respect thereto, as Virginia has been released therefrom by the concurrent acts of herself and her creditors.

Second. Inasmuch as the bonds held by Virginia through the agency of her Literary and Sinking funds do not constitute any part of the debt within the meaning and contemplation of the ordinance of 1861, or the provision of the constitution of West Virginia adopted in 1862, Virginia cannot maintain this suit as to this phase of the bill; for the very cogent reason that these bonds are assets belonging to Virginia herself, and do not constitute a debt in any sense of the term.

Third. To authorize a suit for contribution, where the principle of this doctrine is applicable, it is absolutely essential that the party seeking contribution shall have paid more than his just share of a common debt. The very contrary appears from exhibit 3 filed with

plaintiff's bill (R. pp. 26-38) and made a part thereof. From the bill and this exhibit it appears that every dollar which Virginia ever paid on account of said debt was actually applied in reduction of that part of the debt which she herself assumed, and that no part thereof was ever applied upon the unfunded part which Virginia contends should be assumed and paid by West Virginia; and, inasmuch as West Virginia has not received any benefit whatever of any sum paid by Virginia, she is not liable to the plaintiff for contribution. It is clear, therefore, that Virginia can not maintain the bill as to this phase of the cause, predicated upon her alleged right of contribution.

Fourth. The plaintiff produced no proof of the *value* of the property embodied in the claim of Virginia against West Virginia, for property transferred by the former to and received by the latter by the act of February 3, 1863 (App. to R., p. 128). In the printed record the only evidence of this value is that furnished by West Virginia. West Virginia admitted that the value of the bank stocks received by her was $186,630.00. The Special Master found that the value of the other property so received by West Virginia was $73,578.00 (Report, pp. 181-193). Hence, if Virginia can maintain this suit as to this feature of her bill, she could recover only the sum of $260,208.00.

Fifth. But Virginia has blended in this suit, with the claim which she asserts in her representative capacity as trustee, various other claims which she asserts in her own right, thus clearly creating a *multifarious* demand, which cannot be asserted in one and the same cause, unless the court shall be constrained for convenience' sake to treat those demands which she asserts in her own right as mere matter of surplusage and not entitling her to any relief on account thereof.

Sixth. Treating then the claims which Virginia asserts in her own right as not proper subjects for relief but as surplusage, Virginia has no claim whatever, as shown by the bill and its exhibits, which she can sustain in this cause; and therefore the whole bill must be dismissed.

The propositions which we have here presented, and which clearly arise upon the record in this cause, will be discussed in the order named; and in our argument we will consider the various acts of legislation adopted by the State of Virginia which ultimately resulted

in her release from any and all liability regarding the unfunded part of the Virginia debt created before and existing on January 1, 1861. It is clear that this is the date from which we must reckon, because this date is fixed by the ordinance of Virginia herself in section 9 thereof (R. p. 146), and the constitution of West Virginia adopted in 1862 (R. p. 147), and to the provisions whereof Virginia gave assent and therefore accepted as the condition of her assent to the formation out of her territory of the new state (R. p. 165).

Virginia Has no Interest in this Suit so far as it Seeks to Ascertain West Virginia's Proportion of Said Debt.

Virginia has no interest in this suit so far as it seeks to ascertain West Virginia's proportion of the debt, because any part of the debt which West Virginia may have assumed by reason of the ordinance or her constitution was direct to the creditors and not to Virginia; and because no liability now attaches to Virginia in respect thereto, as Virginia has been released therefrom by the concurrent acts of herself and the creditors.

Following in consecutive order the propositions arising on the record, we necessarily begin with the consideration of the Wheeling Ordinance and the first Constitution adopted by the State of West Virginia.

Any assumption of any part of the public debt that West Virginia may have taken upon herself by reason of the Wheeling Ordinance of August 20, 1861, or by reason of the West Virginia constitution of 1862, was to the creditors and not to the Commonwealth of Virginia. Both the terms of the Ordinance and of the Constitution relating thereto are clear and distinct, and show that West Virginia did not assume to pay any part of the public debt to Virginia. That part of said Ordinance relating thereto is as follows:

> "Sec. 9. The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any

part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period." * * * *

"Sec. 10. When the general assembly shall give its consent to the formation of such new state, it shall forward to the congress of the United States such consent, together with an official copy of such constitution, with the request that the said new state may be admitted in the union of states." App. to R., p. 122.

That part of the West Virginia Constitution referred to in section 10 of said Ordinance is as follows:

"Sec. 8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." App. to R., p. 125.

From the foregoing it clearly appears, therefore, that the Commonwealth of Virginia had full knowledge that any assumption West Virginia made of any part of the public debt was to the creditors and not to the Commonwealth of Virginia. The terms of said Ordinance and the provisions of the West Virginia Constitution were known to Virginia. Section 3 of the act of the General Assembly of Virginia pased May 13, 1862, required the Governor of Virginia to transmit to the senators and representatives of Virginia in Congress, said act of the General Assembly and a "certified original of the said Constitution and schedule." App. to R., p. 126.

That the assumption was to the creditors, and not to Virginia, is evident not only from the words of the Ordinance and the Constitution, but also from the condition of the times. The people of Virginia inhabiting that part which became West Virginia were loyal to the Union; they adhered to and were under the jurisdiction of a government which was in a state of war with the government to which what

is now the State of Virginia adhered and was loyal. The two states of Virginia and West Virginia were in armed conflict. Virginia had "suspended," or postponed until after the end of the war, her obligations to those citizens, including those of West Virginia, who adhered to the Union. She "repudiated" that part of her debt, and the interest thereon, held by citizens loyal to the Union. She held up the property of the citizens of West Virginia who adhered to the Federal government. The Ordinance and the Constitution were framed under these conditions—in a time of war; when it was impossible to forecast the result of that war; when no victory had favored the Union cause, but when the victories favored the cause of the Southern Confederacy; indeed, when the chances favored the success of the Confederacy, and the creation of another nation in the territory of the Federal government seemed probable. It would be most unreasonable to suppose that West Virginia would, under such conditions, agree to pay money over to Virginia for the benefit of West Virginia's own citizens who were at that time the creditors of Virginia. It would be most reasonable that West Virginia would look to the interests of her own citizens, and that any money she should pay would be paid so as to protect their interests. And this is what she did do. And hence she agreed to take upon herself or assume a just or equitable proportion of the debt; but provided that this proportion should be ascertained by *her own legislature.* There is nothing in the compact that she would consult Virginia either as to the portion she would pay or as to the persons to whom she would pay it. To this agreement and compact Virginia assented. Upon this agreement and compact, Virginia assenting, West Virginia was admitted into the Union. It is fundamental that, while courts can enforce agreements between parties, they cannot make agreements for parties; they can only enforce the agreements the parties have made.

The lawfully Restored Government of Virginia, when she framed the ordinance for the creation of the new state (R., p. 6), and when she gave consent for the admission of West Virginia into the Union, did not contemplate that any part of the public debt should be paid by West Virginia to the mother state; nor would Congress, under the conditions then existing, have given its consent to the admission

of West Virginia if it had been understood that the said ordinance and the constitution provided that the share of the public debt which West Virginia would pay was to be paid to the old state. It was the understanding of the Restored Government of Virginia, of the framers of the constitution of West Virginia, and of Congress, that payment would be made direct to the creditors of Virginia, and not to the state of Virginia. The circumstances attending the passage of the act of Congress admitting West Virginia into the Union clearly indicate this. In support of this proposition, we quote from Exhibit No. 8 of plaintiff's bill the following excerpt:

> "A brief extract from the debates, when the bill providing for the admission of West Virginia was under consideration, will serve my purpose tonight:
>
> "MR. OLIN: 'I desire to ask what will become of the bonds and other obligations which Virginia has issued or incurred by the recognition of a new state?'
>
> "MR. HUTCHINS: 'I will answer my friend from New York. Here is the provision of the constitution of West Virginia in reference to that matter: An equitable portion of the debt of Virginia prior to January the first, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable.'"
>
> "MR. CRITTENDEN: 'There is another question; the State of Virginia owes a large debt. How is this debt to be divided?'"
>
> "MR. BLAIR: 'The constitution framed by the convention of the people of the proposed new state binds the new state to pay its just proportion of the debt owed by Virginia prior to the ordinance of secession.'"
>
> "MR. CRITTENDEN: 'I only knew that in this bill there was no provision made for a division of the said debt. The gentlemen tells us there is a provision made for it in the constitution, and I am satisfied with that. As it has been attended to, I have no more to say about it.'" (Record, pp. 80, 81.)

For the original of the above quotations from the debates in Congress, see pp. 45-47 of Congressional Globe, Part I., 3d sess. 37th Cong. 1862-63.

From that debate we add the following quotation from the speech of Representative Edwards (p. 47):

> "But it is said, further, that there may be some difficulty about the public debt of Virginia. Well, sir, if Virginia remains in rebellion, if she succeeds, in conjunction with others of the southern states, in establishing the independence of the southern confederacy, where then, I ask, will the creditors of that state, many of them living in the northern states, go for the collection of their debts? What is the market value of the securities of the state now under the circumstances of her rebellion? Sir, if I had bonds of that state in my possession, I should consider them worth far more with the new state of Western Virginia in the Union as a free state, with her industrious population, she having provided in her constitution to assume her just proportion of all the debts of the state, than if the old state remained entire and wasting the resources of both its eastern and western portions in supporting the rebellion."

It seems clear that the solicitude of Congress related to the holders of the debt, and it was believed by them that these creditors would have the right to look to the new state for payment to them of the just and equitable proportion of the debt she had assumed. The question asked by Mr. Crittenden, and his comment on the reply to it, and the remarks of Mr. Edwards, and, indeed, the whole course of the debate, so far as it touched the debt question, go to show that it was contemplated by all the parties that payment would be made to the creditors and not to the State of Virginia. There is no reason to believe that it was the intention of either the Restored Government of Virginia, or of Congress, that West Virginia was to assume a just or equitable proportion of the public debt of Virginia and then turn the same over to the old State of Virginia, the greater part of whose territory was then in rebellion against the Federal Government and held by armies in hostility to that government. Why would the Federal Government, under such circumstances, concern itself about the fiscal affairs of the rebellious government of Virginia? There was every reason, however, why Congress should concern itself about

the interest of the loyal creditors of Virginia; and the same sentiment which prompted Congress to have solicitude for the interest of such creditors, would also prompt the loyal Restored Government of Virginia concerning them. At that date there could be no negotiations between West Virginia and the old state; nor could it be told with any certainty how soon in the future there could be such negotiations between them, because the result of the war was at that time very uncertain, and no one could tell either what the result of the war would be nor how long it would continue, nor *what would be the conditions after its close*. The language of the ordinance and of the constitution of West Virginia is that West Virginia should assume or take upon herself and pay a just or an equitable proportion of the debt. But, very significantly, neither instrument declares it should be paid to Virginia. If the intention had been to pay it to Virginia, then it would seem a reasonable assumption that it could not be paid to Virginia until the amount was ascertained by negotiations between the two states. In other words, if it was the contemplation that whatever West Virginia was liable for was a liability to Virginia, then it would follow that Virginia should have something to say about the amount thereof. But the constitution of West Virginia distinctly provided that the legislature of West Virginia alone should ascertain the amount; and this was agreed to by both the Restored Government of Virginia and the Congress of the United States, the former in giving its consent to the formation of the new state, and the latter by its act admitting West Virginia into the Union.

This is the view taken by the Supreme Court of Appeals of the Commonwealth of Virginia, in the case of *Higginbotham* v. *Commonwealth*, 25 Gratt. 627, decided in 1874, and cited by Virginia in her brief in this cause. It was upon this principle of a direct liability from West Virginia to the creditors, that Virginia based her first act of March 30, 1871 (R., p. 17), whereby she funded a large amount of the public debt upon the basis of two-thirds to herself and one-third to West Virginia. It was upon this principle that she passed the acts of March 28, 1879 (R., pp. 21-26), and of February 14, 1882 (R., pp. 26-38), and of February 26, 1892 (R., pp. 38-47). It was upon this principle that Virginia adopted her joint resolution

approved March 6, 1894 (R., p. 49). It was upon this principle that Virginia passed the act of March 6, 1900 (R., p. 50). It was upon this principle of construction that Virginia waived, in said funding acts of 1871, 1882 and 1892, the clause in her constitution of 1869, which provided that such part of the public debt as should be assumed by West Virginia should be applied to the discharge of said debt. It was also upon this principle of construction that Virginia superseded section 19 of article 10 of her constitution of 1869 by her constitution of 1902, in the latter of which she impliedly remits the holders of the unfunded part of her debt to the State of West Virginia for the direct payment thereof.

We next take up in consecutive order the consideration of those acts whereby Virginia was ultimately released from all liability as to that part of the state debt which she has assumed to be her just portion thereof. The first of which is the

Act of 1871,

which had for its express object the funding of said debt and the fixing, upon her own basis, of Virginia's proportion thereof, and remitting her creditors to West Virginia for the payment of the residue. This act, which is filed as exhibit number 1 with plaintiff's bill (R. p. 17), contains the following recital:

> "Whereas in the formation of the State of West Virginia, there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas, in the Ordinance authorizing the organization of said state, it was provided that the said state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, eighteen hundred and sixty-one, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this state, and will continue to be made as long as may be necessary; and whereas the people of this commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and whereas it

> has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof and not to this state, as the constitution of this state provides; now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due: therefore,
>
> "1. Be it enacted," etc. (R., p. 18.)

The act then provides:

> "That from and after its passage * * * no bond, certificate or other evidence of indebtedness shall be issued for any portion of the debt of this state; nor shall any interest be paid upon any part or portion of said debt except as hereinafter provided." (R. p. 18.)

The act then provides for the funding of the two-thirds of the debt, with its accrued and unpaid interest to the first day of July, 1871, to bear interest at the rate of six per cent per annum, to be due and payable in thirty-four years from date, redeemable at the pleasure of the state, the bonds to be made payable to order or bearer, the coupons to be paid semi-annually and receivable for taxes and other debts due the state (R. 18). The third section of the act provides for the surrender of the old and the acceptance of the new bonds for two-thirds of the amount of said debt, and the issuance of a certificate, bearing the same date as the new bond, for the other one-third of the debt, "and that payment of said amount, with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be made between the states of Virginia and West Virginia in regard to the public debt of the state of Virginia existing at the time of its dismemberment, and that the state of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees. * * * The remaining one-third of unpaid interest, both on the bonds and certificates, shall be

payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia." (R. p. 19.)

Section 4 of this act provides:

> "The treasurer, by proper endorsement, written or stamped, upon each bond, certificate of stock or interest certificate so surrendered and delivered to him, shall cancel the same, and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law." (R. p. 20.)

An examination of this act discloses that provision is made only for the payment of the new bonds funded under this act and the interest accruing thereon. By this act Virginia signifies to her creditors that she will pay no bond or any part of said debt except the two-thirds thereof provided for in this act, nor any interest thereon except upon the bonds issued by her to cover said two-thirds.

The provisions of this act were accepted by a large number of her creditors, as shown by the number of certificates issued under it, which amounted on January 23, 1905, to $10,639,776.42 (R. p. 55.)

The acceptance of the provision of this act by the creditors constituted between them and Virginia a lawful contract, as declared by this court in *Hartman* v. *Greenhow*, 102 U. S. 672 (26 L. Ed. 271). The consideration of this valid contract was based upon the negotiability and receivability of the coupons for taxes and other dues owing to the state, written on their face, and the conditional promise of Virginia to pay the unfunded part of said debt. This act did leave a conditional liability upon Virginia to pay or provide for the payment of the unfunded debt of the Commonwealth represented by certificates issued by her, from which she could not relieve herself without the assent of her creditors; but Virginia was relieved from this conditional liability by the consent of the creditors, and the subsequent acts of the Commonwealth relating to the debt, and hereinafter cited.

Act of 1879.

To obtain a reduction of the rate of interest upon the two-thirds

of said debt assumed by Virginia, this act (1879) was passed, the recital in such act declaring that,

> "The council of foreign bondholders of London, England, and the funding association of the United States of America, limited, have, in view of this belief expressed their willingness to jointly endeavor to obtain the consent of the creditors to an abatement in the rate of interest." (R. p. 21.)

The act, to effectuate its purpose, divides the outstanding indebtedness of the state into two classes, as follows:

> "Class I., which shall be taken to include all tax-receivable coupon bonds, and all registered bonds and fractional certificates which are convertible under the act approved March thirtieth, eighteen hundred and seventy-one, into such tax-receivable coupon bonds.
>
> "Class II., which shall be taken to include all bonds funded under the act approved March thirtieth, eighteen hundred and seventy-one, as amended by the act approved March seventh, eighteen hundred and seventy-two; and also two-thirds of the face value, with two-thirds of the unpaid accrued interest up to the first of July, eighteen hundred and seventy-one, on all unfunded bonds, including sterling bonds." (R., p. 22.)

It will be seen that this act deals with the entire debt, both that funded under the act of 1871 and that not so funded, and of that so unfunded this new act provides for the funding of two-thirds of it at its face value with two-thirds of its unpaid accrued interest.

The act is made effectual upon the following condition, provided in the act as part of section 5 thereof:

> "If on or before the first day of May, eighteen hundred and seventy-nine, the council of foreign bondholders and the funding association of the United States of America aforesaid, shall file with the governor their assent to and acceptance of the terms of this act, the same shall be taken to be a contract between the state and the said corporations, and the governor shall forthwith provide for the preparation of the bonds provided for by this act." (R., p. 23.)

The act also provides for the funding of the entire debt, on the basis of two-thirds thereof assumed by Virginia, and gives, in effect, an indefinite period for such purpose (R., p. 23.)

Provision is made by section 6 of this act for the cancellation of the bonds surrendered under it (R., pp. 23, 24), and section 7 thereof provides as follows:

> "The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act and who shall not have yet received certificates representing the remaining one third of their principal and interest, due and payable by the state of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy one, when they make such exchange; and the state of Virginia will negotiate or aid the creditors holding all of such certificates issued under this act, or previous acts, in negotiating with the state of West Virginia for an amicable settlement of the claims of such creditors against the state of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the state of Virginia from all liability on account of said certificates." (R., p. 24.

The act provides in section 8 thereof for the payment of interest on the bonds issued thereunder (R., p. 24). The act also provides for a sinking fund to pay the principal of the bonds (section 9; R., pp. 24, 25). It repeals all acts inconsistent with it, and therefore repeals the act of 1871 and the acts amendatory thereof. The rate of interest under the act of 1871 was six per cent. per annum (R., p. 18); while under this act the annual rate was three per cent for ten years, four per cent for twenty years, and five per cent for ten years (R., pp. 21, 22).

Act of 1882.

The following is the title of the act of 1882:

> "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing

at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon." (R., p. 26.)

To this act there is this preamble:

"Whereas to the end which this act comprehends, a full statement of the debt is essential; and whereas the following has been carefully made up from the records of the second auditor's office of the state, it is confidently submitted as presenting a true state of the account between the state and her creditors—the account is as follows." (R. p. 26.)

Then follows a full statement of the account of the debt as between Virginia and the holders thereof.

On January 1, 1861, there were three classes of this debt:

Sterling, bearing 5 per cent interest...	$ 1,973,000.00
Dollar, bearing 6 per cent interest....	29,533,582.90
Guaranteed, bearing 6 per cent interest	294,130.00
Total	$31,800,612.90

Interest on this debt:

Past due and uncalled for	$ 101,023.63
Maturing at this date, January 1, 1861	944,156.38
Total	$1,045,180.01

Then follows a statement of the debt as of July 1, 1863, amounting to $33,141,212.12. This is followed by a statement of accrued interest to July 1, 1863, amounting to $5,954,716.08. Of this total principal as of July 1, 1863, Virginia assumes two-thirds as her "equitable portion," which is $22,094,141.96. Of this total amount of interest Virginia assumes two-thirds, which is $3,969,810.72; an aggregate of principal and interest of $26,063,952.38.

Virginia continues this statement in detail to July 1, 1882, crediting herself and charging to her creditors all payments made by her on account of said debt from January 1, 1861, to July 1, 1882, making an aggregate balance of $21,035,377.15, principal and interest, and inclusive of $1,428,245.25 held by the literary fund of the state and

$602,016.90 as interest on such fund (R., pp. 27-32). This total sum of $21,035,377.15 represents two-thirds of the debt, principal and interest, as of July 1, 1882, after deducting everything ever paid by Virginia on account of said debt during the period between January 1, 1861, and July 1, 1882—a period of twenty-one and one-half years.

The act then continues with an extended recital classifying this debt, stating her intention to provide a uniform rate of interest, treating the said sum of $21,035,377.15 as,

> "the amount of Virginia's equitable share of the debt of the old and entire state, as the same is ascertained and now formally declared by the foregoing account" (R., pp. 33, 34.)

Then follows sections 1, 2 3 and 4 of the act, authorizing the issuance of new bonds for said debt, prescribing the form of the bond, fixing therein the rate of interest at three per cent per annum, and the form of the coupon to accompany the bond (R., pp. 34, 35). Section 5 of the act prescribes the denomination of the bonds to be issued in exchange for the outstanding indebtedness of the state as enumerated in the act for "her equitable share" (which the act fixes as we have seen at two-thirds of the original debt after deducting therefrom all money paid by her on account thereof) of each class as shown in the recital to the act (R., p. 33), extending from A to F inclusive. For her equitable share of class A she refunds at 53 per cent; class B at 60 per cent; class C at 69 per cent; class D at 80 per cent; class E at 69 per cent; class F at 63 per cent. (R., pp. 35, 36.)

Section 6 of this act of 1882 provides as follows:

> "For all balance of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate as follows:
>
> No.....
>
> "The commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ..... dollars, held by ....., dated the ..... day of..... and numbered ....., to be accounted for by the State

of West Virginia, without recourse upon this commonwealth.

"Done at the capitol of the State of Virginia, this ..... day of ....., eighteen .....
..... Second Auditor.
....., Treasurer."
(R., p. 36.)

It is prescribed in section 8 of this act:

> "All the bonds and certificates of debt and evidences of past due and unpaid interest taken in under the provisions of this act, shall be canceled by the treasurer in the presence of the board of commissioners of the sinking fund as the same are required, and by the treasurer the same shall be carefully preserved until such time as the general assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so cancelled from time to time shall be certified by said board and filed with the treasurer for preservation." (R., p. 37.)

The act, in section 11, provides for a sinking fund (R., p. 37), in section 13 for the payment of interest on the bonds issued under the act (R., p. 38), and section 15 declares:

> "That from and after the passage of this act, no bonds, certificates or other evidences of indebtedness, shall be issued for any portion of the debt of this state, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided."

Act of 1892.

While the act of 1882 contemplated and provided for the funding of all the said debt assumed by Virginia and her release from the balance thereof, in March, 1890, as appears from a recital in this act of 1892 (R., p. 38), it had not all been funded by said act of 1882; so that in March, 1890, a commission was appointed on the part of Virginia to receive propositions for funding the debt of the Commonwealth not funded under the act of 1882, known as the "Riddleberger bill" (R., p. 38).

This act recites as a fact that,

> "said Virginia debt commission has submitted a report to the general assembly, wherein it appears that under a certain agreement, dated May twelfth, eighteen hundred and ninety, lodged with the Central Trust Company of New York, Frederick P. Olcott, William L. Bull, Henry Budge, Charles D. Dickey, Junior, Hugh R. Garden and John Gill, constituting a committee for certain of the creditors of Virginia, called the 'Bondholders' committee' have proposed to said commission to surrender to the state in bulk not less than twenty-three million of dollars of the public debt, unfunded under said act approved February fourteenth, eighteen hundred and eighty-two, in exchange for an issue of new bonds, as hereinafter specified, the same to be apportioned between the several classes of creditors by a tribunal which the said creditors have themselves appointed; and that, in pursuance of said proposal an agreement has been entered into unanimously between the said commission and the said bondholders' committee, subject to approval by the general assembly, whereby in exchange for the said unsettled obligations of the state held by the public, which were issued prior to February fourteenth, eighteen hundred and eighty-two (exclusive of evidences of debt held by the public institutions of the commonwealth pursuant to law and by the United States) together with the interest thereon to July first, eighteen hundred and ninety one, inclusive, aggregating about twenty-eight million of dollars, there shall be issued nineteen million of dollars of new bonds, dated July first, eighteen hundred and ninety-one, and maturing one hundred years from said date with interest thereon at the rate of two per centum per annum for ten years from said first day of July, eighteen hundred and ninety-one, and three per centum per annum for ninety years thereafter to the date of maturity, said interest to be payable semi-annually, of which aggregate debt of about twenty-eight million of dollars the said bondholders committee represent that they now hold and agree to surrender not less than twenty-three million of dollars; and
>
> "Whereas said report and agreement contemplate the

surrender of the obligations held by the bondholders' committee as an entirety, and do not contemplate an apportionment by the general assembly between the various classes of creditors so represented by said bondholders' committee, the same having been committed to a distributing tribunal, as hereinbefore recited; and

"Whereas it is the desire and intention of the general assembly that a settlement of all the other outstanding obligations of the state (except those issued under the act of February fourteenth, eighteen hundred and eighty two, the evidences of debt held by the public institutions of the state in pursuance of law and by the United States) as well as those controlled by the bondholders' committee, as aforesaid, shall be made under the provisions of this act." (R., pp. 38, 39.)

This act provides in the first section, that the sinking fund commissioners do issue nineteen million of dollars in bonds in lieu of the twenty-eight million dollars outstanding not funded under the act of 1882 (R., p. 39; in the second section, the date of the bonds, when payable, the rate of interest (two per cent for the first ten years and three per cent for the remaining ninety years), and for the redemption of the bonds (R., pp. 39, 40). The third section prescribes the form of the bond, and the fourth the form of the coupon (R., pp. 40, 41). Section 5 is divided into paragraphs, the first of which prescribes the denominations of the bonds. The other paragraphs are designated by capital letters from A to E inclusively (R., pp. 41-43). Paragraph C provides that after the presentation of not less than twenty-three million dollars:

"after deducting one-third of the principal and interest of such obligations as were issued prior to the thirtieth day of March, eighteen hundred and seventy one, and also deducting one-third of the principal and interest of such obligations as were issued under the act approved the thirtieth day of March, eighteen hundred and seventy-one, as do include West Virginia's proportion, said bondholders' committee may at any time on or prior to the thirtieth day of June, eighteen hundred and ninety-two, present the same in bulk to said commissioners for surrender and exchange as herein provided." (R., p. 42.)

Paragraph D provides that:

> "The said new bonds shall be issued to said bondholders' committee by the said commissioners in the following proportion, to-wit: nineteen thousand dollars of the new bonds to be created under this act shall be issued for every twenty-eight thousand of old outstanding obligations (principal and interest to July first, eighteen hundred and ninety-one), as aforesaid, surrendered by said bondholders' committee to the said commissioners, after the deductions provided for in paragraph C of this section; and a proportionate amount of said new bonds shall be issued for smaller sums of said outstanding obligations so surrendered, provided that no certificates issued on account of the proportion of West Virginia of the obligations of the states shall be funded under this act." (R., p. 43.)

After thus carefully providing for a refunding of that part of the debt not funded under the act of 1882, section 6 of said act of 1893 provides as follows:

> "For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the Commonwealth of Virginia, the said commissioners shall issue certificates substatially in the following form, viz.:
>
> "No. ..... The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ..... dollars, dated ..... day of ....., and No. ....., leaving a balance of ..... dollars with interest from ....., to be accounted for to the holder of the certificate by the state of West Virginia, without recourse upon this commonwealth.
>
> "Done at the capitol of the State of Virginia, this ..... day of ....., eighteen hundred and ninety-two.
>
> ....., Second Auditor.
>
> ....., Treasurer."

(R., pp. 43, 44.)

Section 9 of this act provides that:

> "All the bonds and certificates of debt, and evidences of past due and unpaid interest, taken in under the provisions of this act, shall be canceled by the treasurer in the presence of the commissioners of the sinking fund, or a majority thereof, as the same are acquired, and by him carefully preserved, subject to disposition by the general assembly, a schedule of the bonds, certificates, and other evidences of debt so canceled shall be certified by said commissioners and filed by the treasurer for preservation." (R., p. 45.)

Section 10 of this act provides for a sinking fund for the payment of the bonds issued under this and the act of 1882, and for their cancellation, and it also provides for the cancellation of all bonds issued under the act of 1882 and held by the commissioners of the sinking fund at the time said act of 1892 was approved,

> "as soon as at least fifteen million of dollars of new bonds shall have been issued and delivered pursuant to the provisions of this act." (R., p. 46.)

The thirteenth section of said act of 1892 provides for the payment of the interest on the bonds issued under it, as the same shall become due and payable (R., p. 46). Section 16 repeals the act of 1882, and all other acts amendatory thereof (R., pp. 46, 47).

It will be perceived that the act of 1871 was repealed by the act of 1879, as the two acts were inconsistent with each other, if not expressly repealed by the repeal therein of the act of 1878, as it was in substance an amendment and re-enactment of the act of 1871 (R., p. 26); and the act of 1882 repealed the acts of 1879 by implication, as it treated the adjustment and settlement of the debt, so far as the liability thereon of Virginia is concerned, as an entirety. That such repeal was so effected by the act of 1882, we submit the following authorities:

In *Grant* v. *Railroad Co.*, 66 W. Va. 175, this subject of the repeal of a statute by implication, where a subsequent statute deals with the subject as an entirety, is fully considered and the authorities cited. The opinion in that case deals with the repeal of a statute by implication, resultant upon the enactment of a subsequent act dealing with the subject as an entirety. The court said:

"The principle applied here has been stated by the Supreme Court of the United States in the following terms: Where the later of the two acts covers the whole subject matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one, though the two are not repugnant. *District of Columbia* v. *Hutton*, 143 U. S. 18. This Court in *Herron* v. *Carson*, 26 W. Va. 62, has stated it in these terms: 'A subsequent statute revising the whole subject matter of a former one and evidently intended as a substitute for it, though it contains no express words to that effect, must, on principles of law as well as in reason and common sense, operate a repeal of the former law: it has been applied by this Court in other cases. *State* v. *Harden*, 62 W. Va. 313; *State* v. *Mines*, 38 W. Va. 125. Scores of additional cases of the same class could be enumerated. See *United States* v. *Claflin*, 97 U. S. 546; *Eckloff* v. *District of Columbia*, 135 U. S. 240; *Morris* v. *Crocker*, 13 How. (U. S.) 429; *Mitchell* v. *Brown* 1 Ell. & Ell. 267; *Parry* v. *Croydon Gas Co.*, 15 C. B. (N. S.) 568; *Heckman* v. *Pinckney*, 81 N. Y. 211; *United States* v. *Tyneu*, 11 Wall. 88; *Commonwealth* v. *Killiher*, 12 Allen (Mass.) 480; *State* v. *Campbell*, 44 Wis. 529. Under this rule the implication does not rest on inconsistency or repugnancy, in the restricted sense in which these terms are generally used. It arises as a matter of legislative intention, disclosed by the character of the act, its title or preamble, and subject matter, and inconsistency, so far as it may be deemed to enter into the inquiry, is of a broader kind, namely, inconsistency between the old law and the legislative intent shown by the new. It is not inconsistency or repugnancy between words, phrases or clauses, considered as such, but inconsistency between the acts considered as entireties."

The act of 1892 refunded every part of the debt created by Virginia prior to January 1, 1861, except the one-third thereof which she claims is West Virginia's proportion; and, as to such unassumed and unfunded part, the act remits the holders thereof to West Virginia

without recourse upon the Commonwealth of Virginia. The holders of the part of the debt assumed by Virginia assented to its settlement under the acts of 1882 and 1892, in the manner therein prescribed. Of this the exhibits filed with the bill and made a part thereof afford full proof.

The Status of Virginia as to Her Unfunded Debt by Virtue of the Provisions of Her Four Legislative Acts of 1871, 1879, 1882 and 1892

Virginia, in her act of 1871, declaring its object and clearly expressive of its purpose, says:

> "Now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon *her proportion of said debt* as the same shall become due, therefore,
>
> "1. Be it enacted," etc. (R., p. 18.)

Section 3 then provides for the issuance of certificates for the unfunded part of the said debt, alleged by Virginia to be West Virginia's proportion thereof, providing that,

> "payment" (of such unfunded debt) "will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia at the time of its dismemberment" (R., p. 19).

Thus, Virginia settled with her creditors for two-thirds of the debt, funded in new bonds drawing six per cent interest, with the understanding that the bonds unfunded and canceled, surendered to Virginia, represented by the certificates delivered to the owners, should be held by Virginia *in trust*, to be paid in accordance with a settlement to be made at some future time with West Virginia. It will be seen that Virginia conditionally promises to pay the unfunded part of the debt under the act of 1871, dependent upon the contingency of a

subsequent settlement with West Virginia; payment to be in accordance with such settlement, and no interest is payable on any part of the debt not funded under the act.

It will be observed that this act treats the two-thirds which Virginia assumes as *her proportion of said debt.* All the creditors accepting the provisions of this act thereby assented to this as her portion to be assumed and paid by her, and the residue as West Virginia's proportion, as stated in the act, and with which Virginia was only connected or in which she was only interested under a conditional promise.

The act of 1879 repealed all acts inconsistent therewith and also the act of March 14, 1878 (R., p. 26), and provided again for the funding of the debt, as of the date of January 1, 1879, the principal payable forty years thereafter, bearing interest annually at the rate of three per cent for ten years, four per cent for twenty years, and five per cent for ten years, payable in the cities of Richmond, New York and London, as provided in the bonds issued thereunder (R., pp. 20, 21).

This act of 1879 provided that upon the filing with the governor of the assent of the representatives of the holders of the debt to an acceptance of the terms of this act, such acceptance should create a contract between the Commonwealth and said corporations—that is, the foreign bondholders' and funding associations, treated as corporations, representing the holders of the debt. This assent was accordingly filed. Therefore this act of 1879 created a new and different contract as to the entire debt from that which existed between the Commonwealth and the holders of the debt under the act of 1871. The characteristics or distinguishing features of this contract so created by the act of 1879 were:

First, that the state of Virginia would negotiate, or aid the creditors holding all certificates issued under the act of 1879 or previous acts in negotiating with the state of West Virginia for an amicable settlement of the claims of such creditors against the state of West Virginia, thus relieving her from her conditional liability created as to the unfunded bonds under the act of 1871.

Second, the acceptance of certificates under this act of 1879 for West Virginia's alleged one-third was taken and held as a *just and absolute*

release of the Commonwealth of Virginia from all liability on account of said certificates.

Thus it is seen that Virginia was expressly released from all liability as to the certificates issued under the act of 1879; and as to the certificates issued under the act of 1871 there was substituted for her conditional liability a promise on her part either to negotiate herself directly with West Virginia or to aid the creditors holding the certificates issued under both acts of 1871 and 1879 in negotiating with West Virginia for an amicable settlement of West Virginia's alleged one-third of said debt, being the unfunded portion thereof not assumed by Virginia under said act.

It appears that there had been issued on December 14, 1904, $12,910,555.89, of which $10,639,776.42 were issued under the act of 1871. So that Virginia was released by the very words of the act of 1879 of more than $2,000,000 of the unfunded debt, and released of the residue (amounting to more than $10,000,000) by the acceptance of the terms of the act by the representatives of the holders of all the debt.

Third, another characteristic of the new contract made by Virginia with the holders of the debt under the act of 1879 was the very large reduction of the interest from that provided under the act of 1871.

By the act of 1882 Virginia makes the statement of her entire debt as existing before and on January 1, 1861; and upon the basis of this statement she makes an entirely new contract with reference to the entire debt. This act, thus forming a new contract, is assented to by her creditors. The characteristic changes made under this new act are:

First, a scaling of the debt whereby she pays a certain percentage of each class of bonds (R., pp. 35, 36).

Second, by this she effects a large reduction in the amount of the two-thirds of the debt which she had theretofore assumed under the acts of 1871 and 1879, and secures more favorable terms of interest and changes the place of the payment of the interest, the rate of interest by this act being fixed at three per cent and the place of payment at Richmond, Virginia (R., pp. 34, 35).

After thus fixing the basis of her liability upon the scaling of the debt at the rate designated in the act, the act then arbitrarily prescribes

that "for all balances of such debt, constituting West Virginia's share of the old debt," a certificate shall be issued to be accounted for by the state of West Virginia without recourse upon Virginia (R., p. 36). Virginia thus arrogated to herself the right to fix the amount to be paid by West Virginia without West Virginia's consent and without legal authority.

It will be observed that by this act it is not the certificates issued under it, if any were issued, as to which Virginia is released, but she is released by the terms of the act "for all balances of such indebtedness, constituting West Virginia's share of the old debt." This act provides, as we have seen, for the surrender of all bonds ever issued by Virginia, whether prior to 1861 or subsequent thereto, and for their cancellation. This act of 1882 by its very terms necessarily repealed all previous acts of Virginia relating to the public debt, and creates an entirely new contract between her and her creditors with reference thereto. It is true that the creditors did not bring in the certificates and surrender them which had been issued to them under the acts of 1871 and 1879, for the reason that these certificates represented definitely the unfunded portion of the entire debt, the very part that Virginia declines to assume under the act of 1882, and for which she provides that certificates shall be issued without recourse upon her, and for the very substantial reason that these certificates only represented that part of the debt from which Virginia had been released by the concurrent acts of herself and the holders of these certificates; and they accurately represented the part of the debt which Virginia declined to assume, and specifically designated the bonds for which the certificates were given, being the bonds of the old debt existing prior to and on January 1, 1861. Wherefore, then, bring in the old certificates and take new ones? To do so would not affect the relationship of the holders with reference to the unfunded debt, nor would it affect the liability of Virginia, because she had already exonerated herself, as we have seen, from even a conditional liability by virtue of the act of 1879 for any portion of the debt which these certificates represented. Therefore the certificates which these holders already possessed, issued under the acts of 1871 and 1879, were retained by them as an evidence of that part of the debt

as to which Virginia had been released and as to which, under the act of 1882, as well as the act of 1879, they were to look to West Virginia for payment.

The act of 1892 was designed to fund all that part of the debt which Virginia had assumed that had not been funded under the act of 1882. The debt not funded under the act of 1882, then amounted to about $28,000,000, as we have seen. This act was passed in the light of the agreement between the representatives of the holders of this debt and the Virginia debt commission created two years prior to this act, and they proposed to surrender the said $28,000,000 not funded under the said act of 1882, for new bonds to be issued under the act of 1892, amounting to $19,000,000. So, under said act of 1892, the $28,000,000 in bonds made for all principal and interest were surrendered to Virginia and canceled, and in lieu thereof new bonds amounting to $19,000,000 were issued, as we have already seen; and the act expressly provides for the cancellation of all bonds of the state issued under the act of 1882, then held by the commissioners of the sinking fund, "as soon as at least $15,000,000 of new bonds shall have been issued and delivered pursuant to the provisions of this act"—meaning the act of 1892 (R., pp. 45, 46).

Thus we perceive that, by the very language of the act of 1892, which is filed as exhibit number 4 with plaintiff's bill, Virginia effected a complete settlement as to that part of the debt which she assumed, and that all bonds issued prior to 1892 were canceled, and a complete settlement of the debt as to her liability thereon effected by this act.

And the act then provides:

> "for all balances of the indebtedness, *constituting West Virginia's share of the old debt*, principal and interest,"

a certificate shall be issued, the act prescribing that the amount of the old debt represented by such certificate

> "is to be accounted for to the holders of this certificate by the state of West Virginia without recourse upon the commonwealth." (R., pp. 43, 44.)

Neither the act of 1882 nor the act of 1892 restricts the certificates to be issued to any part of the unfunded debt, but the act applies such

certificates to all balances of the old debt, constituting West Virginia's alleged share thereof. The acts of 1871 and of 1879 restricted the certificates to those issued under the act.

Can there be any doubt now that said act of 1892 constituted a final settlement between Virginia and the holders of the debt as to the part which it was agreed Virginia should assume, and operated to release her from all liability whatsoever upon "all balances" not funded under said act? Indeed, Virginia herself alleges in her bill, after referring to the acts of 1871, 1879, and 1882, as follows:

> "Until at length a final and satisfactory settlement of the portion of the debt of the original state which Virginia should assume and pay was definitely concluded by the act of February 20, 1892." (R., p. 11.)

What are we to understand by the use of the term "final and satisfactory settlement"? If such settlement was final, there could be no further settlement in reference to the debt. If such settlement was satisfactory, it must necessarily have been satisfactory to the parties concerned in it, and these parties were the commonwealth of Virginia and the holders of the debt.

It was final, because the only provision made for the payment of any part of the debt is that contained in the act of 1892, which was brought about by the creditors themselves, and the state of Virginia through her debt commission. This act provides a sinking fund for the principal, and provides for the payment of the interest on the bonds issued under it, as the same should become due and payable (R., p. 46.) No other act exists and is in force in the state of Virginia relating to the debt, except the act of 1892.

Now, when Virginia has been released from all liability as to the unfunded part of said debt which is represented by the certificates mentioned in the bill, she passes a joint resolution to provide a means whereby West Virginia may be induced to assume and pay the said unfunded part of said debt (R., p. 47). In this joint resolution there is a long preamble, the last of which reads as follows:

> "Whereas the present state of Virginia has settled and adjusted to the entire satisfaction of her people and the creditors the liability assumed by her on account of

two-thirds of the debt of the original state; now, therefore, be it resolved," etc. (R., pp. 48, 49.)

This resolution created a commission composed of citizens of Virginia, which is,

> "authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the originai State of Virginia proper to be borne by West Virginia" (R., p. 49.)

But the commission is not to proceed with its negotiation until satisfactory assurances have been received from a majority of the holders of said certificates (exclusive of those held by the state),

> "that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the state of West Virginia in full settlement of the one-third of the debt of the original state of Virginia which has not been assumed by the present state of Virginia. But Virginia shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof."

A majority of the holders of said certificates have requested this commission to proceed with its negotiations, and upon the understanding and agreement that Virginia is only bound for two-thirds of the debt and that she has already provided for it.

Can there be any evidence more conclusive than this that Virginia is no longer liable for any part of the said debt represented by said certificates? She has been as effectually released therefrom as it is possible for positive legislation and the acts of the parties in conformity thereto to effect such a release.

This being in brief the status of the case as made out by the bill, West Virginia in her answer, in section 22 thereof, reciting these various acts, among other things, avers as follows:

> "And so respondent avers that the Commonwealth of Virginia has been wholly relesead from all liability on account of the said certificates and every part of them

> and has no legal or equitable interest in any claim based thereon, and that this suit was instituted and is being prosecuted by the said Commonwealth of Virginia solely as trustee for and on behalf of the holders of the said certificates, and not in her own right; and that she has agreed through her said commission with said creditors that she is to incur no expense on account of this action, and that the whole expense thereof is to be borne by the holders of said certificates, in whose behalf and for whose exclusive benefit the same was instituted and is now being prosecuted" (R., pp. 163, 164.)

Everything that Virginia did toward securing an exoneration from all liability as to the unfunded part of said debt, (she alleging that two-thirds of the orginal debt is her just proportion and which she has assumed and which the creditors have acepted as her just proportion,) appears on the face of the bill and its exhibits; and the allegation of the answer alleging this release must be taken as true for the purposes of this suit, because Virginia has not controverted the truth thereof by any replication to said answer. It is well settled that, in the absence of a statute or rule of court to the contrary, where a cause in equity is set down for hearing on bill and answer alone, the general rule is that the answer is to be considered as true in all its allegations, whether responsive or not, on the ground that the complainant's failure to put in issue by replication the facts alleged in the answer would preclude the defendant from proving them.

Gettings v. *Burch*, 9 Cranch 372 (3 L. Ed. 763).
Leeds v. *Marine Insurance Co.*, 2 Wheat. 380 (4 L. Ed. 266).
Peirce v. *West*, 19 Fed Cas. No. 10, 909.
United States v. *Scott*, 26 Fed. Cas. No. 16, 242.
Reynolds v. *Bank*, 112 U. S. 405 (28 L. Ed. 733).
Bank v. *Manchester*, 128 U. S. 244 (32 L. Ed. 425).
In re Sandford Fork, etc., Co., 160 U. S. 247 (40 L. Ed. 414).

United States v. *Freight Association*, 7 C. A. 15 (24 L. R. A. 74).
Atlantic Trust Co. v. *Chapman*, 145 Fed. 820 (76 C. C. A. 396).

We have here cited some of the decisions of the federal courts in support of the proposition above announced; but all the state courts that have passed on the subject hold the same doctrine, and there is no break in all the authorities. This is the doctrine of the courts of Virginia.

Jones v. *Mason*, 5 Rand. 577 (6 Am. Dec. 161).
Kennedy v. *Baylor*, 1 Wash. 162.
Pickett v. *Chilton*, 5 Munf. 467.
Blanton v. *Brackett*, 5 Call 232.
Cock v. *Minor*, 25 Gratt. 246.

But it is needless to cite authorities here, as there is a wilderness of them in support of the doctrine that all parts of an answer unreplied to must be taken as true.

Accord and Satisfaction Created Between Virginia and Her Creditors as to the Unfunded (One-third) Portion of Her Debt

The acceptance by her creditors of the several acts of legislation of Virginia, hereinbefore cited, effected an agreement between them, whereby Virginia was not to be held liable for the payment of the unfunded debt, nor to suit thereon; which unfunded debt is one-third of the whole orginal debt, and which unfunded debt is evidence as to amount by the certificates issued by Virginia. By this agreement the holders of this unfunded debt, who are also the holders of these certificates, look to West Virginia for payment thereof without recourse upon Virginia. Thus, Virginia was relieved of all liability for this one-third of her debt not funded nor assumed by her, and there was created between her and her creditors, as to the unfunded one-third of the debt upon which the certificates were issued, an *accord and satisfaction.*

If the acts of the legislature of Virginia, the provision whereof were accepted and acted upon by her creditors, show anything at all, they show that these creditors accepted these certificates with the express agreement that Virginia was not to be liable to them for any part of the debt unfunded and which was represented by said certificates. Before considering the law applying to this feature of the case, we call the Court's attention to certain incontrovertible facts appearing in the record.

By the act of 1871, as we have seen, the bonds funded under said act were to be surrendred to Virginia and canceled, but to be retained by her nevertheless *in trust* for the holders of the cereificates representing the unfunded part. The rate of the interest prescribed to be paid upon the new bonds was at the rate of six per cent per annum.

By the act of 1879, which provided for the funding of the entire debt (R., p. 23), all bonds surrendered were likewise to be canceled, and the rate of interest changed from six per cent to three per cent per annum for ten years, four per cent for twenty years, and five per cent for ten years (R., pp. 21, 22); and all certificates issued under that act were to be accepted by the holders *without recourse upon Virginia.*

Under the act of 1882, after a full statement of the debt and fixing Virginia's proportion thereof, a large reduction was obtained from the principal of the debt. The rate of interest was again changed from that fixed by the act of 1879, and fixed at the rate of three per cent per annum. Under the act of 1879, the interest was payable in the cities of Richmond, New York or London (R., pp. 21, 22), while under the act of 1882 the interest was payable at the office of the treasurer of Richmond, Virginia. There was therefore a change in the place of the payment of the interest.

By the act of 1892, Virginia obtained a reduction of the principal and a reduction of the rate of interest to two per cent for the first ten years and three per cent for the remaining ninety years, and the place of the payment of the interest to be at Richmond, New York and London, or either place, might be designated by the state (R., p. 40).

These changes in the contract as to the rates of interest, the places where the interest was payable, the reduction of the amount of principal, and the extension of time for the payment of the debt, the adjustment in this manner being to the satisfaction of the creditors before the maturity of the debt, constitute a valid consideration for an accord and satisfaction between Virginia and the holders of the old debt.

In *Goodnow* v. *Smith*, 35 Mass. 414, the action was assumpsit on a joint and several promissory note made by the defendants, Noah Smith and Joseph H. Adams, dated February 26, 1827, and payable one-half in one year and one-half in two years from April then ensuing. Adams defaulted. Smith pleaded the general issue. The defense was that in the autumn of 1827, before either of the installments of the note became due, it was agreed between the plaintiff and Smith that if Smith would then pay one-half of the note and take of the plaintiff at par a note for $21.14 which he held against one Willis the plaintiff would exonerate and discharge Smith from payment of the other half of this note, and that Smith in pursuance of this agreement then paid one-half of the principal and the interest on the note and took Willis' note at par value and endorsed by the plaintiff without recourse. The court sustained this defense. The syllabus of the case reads as follows:

> "In an action upon the joint and several promissory note of A. and S., brought against both promisors, A. was defaulted, and S. set up, as a defense, an agreement made between him and the plaintiff, before the note became due, by the terms of which the plaintiff exonerated and discharged S. from the payment of one-half of the note, upon his then paying the other half and receiving of the plaintiff, at par, a note of a third person endorsed without recourse to the plaintiff. It was *held*, that the agreement was founded on a good and sufficient consideration; and that it was a good defense to the action so far as respected S.; but that under St. 1834, c. 189 (Revised Stat., c. 100, §7), the plaintiff was entitled to judgment against A."

The court in its opinion said:

> "This case turns upon the distinction between a

> technical release and a covenant not to sue one of two joint obligors or promisors. The distinction is, that a release to one of two joint and several obligors discharges both, whereas a covenant with one not to sue him is not to be construed as a release so as to discharge the other obligor. This distinction is well founded on principle, and is supported by all the authorities."

The court reviews the authorities, and holds that the plaintiff could not maintain any action against Smith.

In *Chicago, Milwaukee & St. Paul Railroad Co.* v. *Clark*, 178 U. S. 353 (44 L. Ed. 1099), points two and three of the syllabus are as follows:

> "The rule that payment of a less sum in satisfaction of a larger sum is not binding for want of consideration only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of a part of it, and the rule itself is considered so far with disfavor as to be confined strictly to the cases within it.
>
> "The payment of a specified sum conceded to be due, but including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole sum where the aggregate amount is in dispute."

An examination of the opinion in this case, delivered by the late Chief Justice Fuller, discloses a very careful consideration of the rule, an examination of many authorties, and the adoption of the principle that any (even the most insufficient) consideration is valid to support an accord and satisfaction based upon the payment of a less sum in discharge of a greater. The learned justice also says that in some of the states the old common-law rule has been changed by statute; the states mentioned as having altered the rule are Alabama, Georgia, Maine, Tennessee, and Virginia.

In *Hutton* v. *Stoddart*, 83 Ind. 539, the syllabus reads as follows:

> "A. employed B. as a traveling salesman at a salary

of $1,200 per annum, and becoming dissatisfied with him sent him a check for $400 in payment of the last half of the salary before the expiration of the year, with instructions to return it if not satisfactory. B. retained the check, collected the money upon it and assigned the residue of the salary, for which suit was brought.

"*Held*, that the action cannot be maintained; that the retention of the money was an acceptance of A.'s proposition, and operated as a complete satisfaction of the claim.

"The payment of a part of a debt in satisfaction of the whole, if made before the debt is due, is a complete satisfaction of the whole debt.

"A dispute about a claim is sufficient to maintain a compromise, and thus render the payment of a part of a debt a complete satisfaction of the whole debt."

In *Allison* v. *Abendroth*, 108 N. Y. 470 (15 N. E. 606), the court in the course of its opinion, discussing the well settled common-law doctrine that a promise by a debtor to pay part of an admitted debt, followed by payment of such part, is not a good accord and satisfaction of the unpaid part, said:

"This rule of the common law, as was said by Nelson, J., in *Kellogg* v. *Richards*, 14 Wend. 117, is 'technical, and not very well supported in reason'; but it has been steadily maintained by the courts in cases coming strictly within it. But it is held that where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be a legal possibility of benefit, to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we have adverted has no application. Upon this distinction the cases rest which hold that the acceptance by the creditor, in discharge of the debt, of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction; as, for example, a peppercorn for a thousand pounds *(Pinnel's Case, arguendo)*, or a negotiable instrument binding the debtor or a third person for a smaller sum (*Curlewis* v. *Clark*, 3 Exch.

375). Following the same principle, it is held that, when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction, if so agreed. The case of accepting the sole liabili of one of two joint debtors or co-partners in satisfaction of the joint or co-partnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors 'may be more beneficial than the joint liability of both, either in respect to the solvency of the parties, or the convenience of the remedy.' *Thompson* v. *Percival*, 6 Barn. & Adol. 925. In perfect accord with this principle is the recent case in this court of *Luddington* v. *Bell*, 77 N. Y. 138, in which it was held that the acceptance by a creditor of the individual note of one of the members of a co-partnership, after dissolution, for a portion of the co-partnership debt, was a good consideration for the creditor's agreement to discharge the maker from further liability."

In *Silvers and Brittin* v. *Reynolds*, 17 N. J. L. 275, judgment was entered against two defendants. Silvers and Brittin, by confession on warrant of attorney, upon the joint and several notes to the plaintiff for $2,400, dated May 14, 1835, as collateral security for three other notes of theirs to the plaintiff of $800 each, payable successively in August, 1836, December, 1836, and January, 1837, with liberty to enter the judgement if either of these notes was not paid at maturity Each defendant obtained a rule on the plaintiff to show cause why this judgment as to himself should not be set aside, or opened so as to allow him to plead. The court in the course of its opinion, in making the rule absolute, said:

"What is now shown by the affidavits, is not denied, that prior to the entry of the judgment, the plaintiff had agreed with the defendants, to take Silvers alone for the debt, and discharge Brittin from it, if he (Brittin) would pay down five hundred dollars toward it; in pursuance of which agreement, Brittin actually paid him the five hundred dollars, and the plaintiff immediately tore Brittin's name from each of the three notes, and delivered up to him the signatures; after which the

> plaintiff applied for judgment against him. It is said that five hundred dollars cannot be a satisfaction for eight hundred dollars, in law; that an agreement to accept a less in satisfaction of a greater sum of money, is void on the face of it, and can never be enforced without a technical release. It is true that the law will not enforce an unexecuted agreement of that kind; but where such an agreement has been executed, as by giving a release of the larger sum, it is then valid and available. Now this case is as strong as that of a release. It was an executed agreement, for by voluntarily tearing the signatures from the notes, it extinguished them forever, as effectually as a release of them; and after this, it was an imposition on the court to apply for a judgment against Brittin."

In *Jones* v. *Perkins*, 29 Miss. 139 (64 Am. Dec. 136), the syllabus is self-explanatory. The first two points are as follows:

> "Agreement to accept less sum, or actual acceptance at the place of payment by the terms of the original contract of a less sum, than the amount due is no defense to the debtor. It is, however, said that this rule is entirely technical, and not very well supported by reasons; hence it requires but slight consideration to support such agreements.
>
> "While general rule is that payment of less sum than the amount due at the place of payment will not discharge the contract, yet if the payment is made, or to be made, at a different place from that appointed by the contract, this is a sufficient consideration for an agreement to accept a less sum."

In *Sonnenberg* v. *Riedel*, 16 *Minn.* 72, the action was tried before a referee, who found that on January 12, 1867, the defendant owed the plaintiff $300 and some accrued interest, which would become due on the 1st of March, 1867; that on said 12th day of January the defendant paid the plaintiff and the plaintiff received the sum of $100 in full of said debt; that the plaintiff's motive in so doing was compassion for defendant's misfortune in having shortly before been burnt out. The referee held that the settlement was binding and a bar to the action. From the action of the court confirming the find-

ing of the referee the plaintiff appealed, and the action of the court below was affirmed. The syllabus of the case is as follows:

> "The payment and acceptance of a smaller sum, in full of a debt before it becomes due, discharges the debt."

In *Brooks* v. *White,* 43 Mass. 283, the point of the syllabus pertinent here is as follows:

> "If a debtor gives, and the creditor receives, in full satisfaction of the debt, the note of a third person for a smaller sum than the amount of the debt, it is a good accord and satisfaction to bar a suit by the creditor to recover the balance of the debt. So if the creditor receives a less sum than is his due, in satisfaction of the whole before the day of payment."

In McKenzie v. *Culberth,* 66 N. C. 431, the question presented was, whether the payment by the debtor and an acceptance by the creditor of a less sum than is due upon a bond, as a payment of the whole, is a discharge of the obligation so as to preclude the creditor from recovering the remainder of the bond. The following are the points decided:

> "1. The principle is too well established and too long acquiesced in to be disturbed, that an agreement by a creditor to receive a part in discharge of the whole of a debt due him by single bill, is without consideration and therefore void.
>
> "2. To this rule there are exceptions, as if:
>
> 1. A less sum is agreed upon and received before the day of payment.
> 2. Or at a different place.
> 3. Or money's worth.
> 4. Or where a general composition is agreed upon."

The agreement of Virginia with her creditors comes within the exceptions noted above.

In *Fenwick* v. *Phillips,* 60 Ky. 87, the point in the syllabus applicable here reads as follows:

> "The doctrine is well settled, that the payment of a less sum is not a good satisfaction, unless it be made

> before the money was due, or at a different place from that at which it was payable."

In *Schweider* v. *Lang*, 29 Minn. 254 (43 Am. Rep. 202), the action was upon a promissory note. The defense was what is known as an accord executory; that is to say, an agreement upon the sum to be paid and received at a future day in satisfaction of the note, a part of the agreement being that the note was to be paid for the lesser sum agreed upon at a future day before the maturity of the note. The holder refused to perform the agreement, and transferred the note, and an action was brought against the assignor for damages for breach of the agreement. The syllabus is as follows:

> "An oral agreement by the maker of a note to pay and by the holder to accept, before maturity, a less sum than the note calls for, in full satisfaction, is valid, and the holder is liable in damages for a breach of it."

In *Bowker* v. *Childs*, 85 Mass. 434, the point in the syllabus is as follows:

> "Payment of less than the face of several promissory notes a portion of which are not due, is a good satisfaction of all of them, if upon the receipt and acceptance of the money by the holder the notes are given up to the maker."

In *Smith* v. *Brown*, 10 N. C. 580, the second point of the syllabus reads as follows:

> "If an obligor pay a less sum than is due, either before the day specified or at another place than is limited by the condition, and the obligee receive it, this is a good satisfaction."

Surrender and Cancellation of the Old Bonds

Virginia, in each of the four acts hereinbefore considered, in each of which she dealt as an entirety with the subject of her debt, took the precaution to provide for a surrender of all the outstanding bonds which Virginia had ever issued under the acts of 1871, 1879, and 1882, and for the cancellation of these bonds as evidences of indebtedness; and the act of 1892 effects the same result. Why did she

stipulate that these old bonds should be surrendered unless it was to get into her possession the evidence of her old debt, which it was her purpose, by these acts, with the agreement with the holders of the debt, that she was discharging and paying off these bonds by the course pursued by her under these various funding acts? The authorities attach great importance to the surrender of an instrument evidencing a debt, when it is sought to show the discharge of such debt by the party against whom it is sought to enforce the unpaid or unsatisfied part. The attention of the Court is called to the following authorities:

In *Murray and Mason* v. *Snow*, 37 Ia. 410, the plaintiffs brought an action against the defendant upon an account. Upon the defendant pleading a settlement of the account by note, the plaintiffs then amended their petition, declaring upon the note, and to the petition as amended the defendant pleaded that the note had been fully paid off, satisfied and surrendered. The amount paid for the surrender of the note was fifty per cent in full satisfaction thereof. The court, in holding that the action could not be maintained, in the course of its opinion said:

> "It appearing therefore, from the pleadings and the findings of fact, that the plaintiffs and the other creditors of the defendant who was in insolvent circumstances, and without any fraud on his part, agreed to accept fifty cents on the dollar in full satisfaction for their respective claims, and that the plaintiffs had been paid such composition in full, and had surrendered the note of the defendant held by them, pursuant to their agreement, they cannot maintain this action. The judgment should have been for the defendant."

In *Draper* v. *Hitt*, 43 Vt. 439 (5Am. Rep. 292), the first point of the syllabus is as follows:

> "The acceptance of a note of $40 in satisfaction of a note of $60, and the simultaneous surrender of the larger note, is a full discharge thereof."

In *Ellsworth* v. *Fogg*, 35 Vt. 355, the second point of the syllabus reads as follows:

> "The acceptance by the holder of a promissory note

of part of the amount due upon it, in satisfaction and discharge of the whole note, and the surrender of the note by the holder to the maker to be canceled, is a full discharge of the note, and no action can be maintained for the unpaid portion."

The court, in the course of its opinion in this case, said:

"We think the surrender of the notes by the owner to the maker may well be put upon the same ground as a release,—as being an act of the highest significance and clearest import to show the deliberate and well understood agreement of the parties. It is their agreement executed,—a release in practical operation. It is free from liability to mistake or fraud. The deliberate surrender of notes by the owner to the maker, to be canceled, is an act which no man of prudence, or of the least knowledge of business, would do, unless he intended to discharge the debt. A release, as well as the surrender of notes, may be procured by deceit and fraud,—but when they are made according to the intent of the parties they should be sustained."

Promise of a Debtor to do Some Act in the Future is Sufficient to Create an Accord and Satisfaction Without Performance by the Debtor

By the act of 1879 Virginia relieved herself from the conditional liability created under the act of 1871 by her promise to her creditors and their acceptance thereof, to negotiate, or to aid the holders of the certificates issued under the acts of 1871 and 1879 in negotiating with West Virginia for an amicable settlement for the payment of the unfunded part of her debt, represented by the certificates. Virginia, when she made this promise, knew that its performance on her part was not a condition precedent to the validity of the accord and satisfaction sought by the said act to be created between her and her creditors as to the old debt; because the acceptance of the provisions of the act, the funding of the old debt under it, the surrender of the old bonds, and the changing of the rate of interest constituted an accord and satisfaction independently of this promise of Virginia to negotiate or aid the creditors in negotiating an amicable settle-

ment with West Virginia for the payment of the unfunded part of the debt.

In *Smith* v. *Elrod*, 122 Ala. 269 (24 So. 994), the court in its opinion said:

> "While it is a general rule that an accord, in order to operate as a discharge of a debt, must be executed, yet it is well settled that a creditor may accept the mere promise of the debtor to perform some act in the future in satisfaction of the debt; and where such is the case the satisfaction is good, and the debt extinguished without performance. 1 Am. & Eng. Enc. Law (2d Ed.) 423; *Knowles* v. *Knowles*, 128 Ill. 110 (21 N. E. 196); *Ports.* v. *Polk Co.*, 80 Iowa 401 (45 N. W. 775); *Averill* v. *Wood*, 78 Mich. 342 (44 N. W. 381); *Railroad Co.* v. *Forrest*, 128 N. Y. 83 (28 N. E. 137); *Babcock* v. *Hawkins*, 23 Vt. 561. That the plaintiff accepted the delivery of the sawmill machinery to him, and the defendant's promise to deliver the 20,000 shingles by March 1, 1896, and to perform the other stipulations in full satisfaction of the notes and accounts, and that defendant made the delivery and promises with this understanding, is, we think, made manifest by the undisputed evidence that plaintiff told defendant he would instruct his wife to deliver the notes to him, and he could call on her at any time and get them, and that one of them was in fact surrendered to defendant by the wife. The accord was executed, in so far as its execution was necessary to the satisfaction of the debt, by the delivery of the machinery and the promise to perform the other acts, and was a complete bar to any action on either the notes or the accounts, unless rescinded for sufficient cause."

Virginia Had the Right Under Her Own Laws to Discharge Herself from Liability by Assuming Two-Thirds of the Old Debt, if Done with the Consent of Her Creditors (and it Was so Done), Without impairing Their Rights (if any They Had) Against West Virginia for the Residue

As shown by her acts of legislation, Virginia treated the liability of West Virginia as direct to the creditors, and not as an obligation enuring to her. She thus dealt with the debt under these acts as if she were liable for a certain proportion thereof and West Virginia for the residue. Without consulting West Virginia, she and the creditors arbitrarily fixed her part at two-thirds, and West Virginia's at one-third. In all these acts, beginning with that of 1871, Virginia assumed that West Virginia was liable, like herself, directly to the holders of the debt; and this being so, that Virginia had the right, under her own laws, to agree with her creditors as to the amount they would exact from her; and this they did, as we have already shown.

Under the laws of Virginia, upon this theory of the case, the creditors might have dealt with the debt with Virginia alone, excluding West Virginia from the negotiations; and after a settlement with Virginia as to her part, hold West Virginia liable (if she be liable at all) for the other part. Such a course was duly authorized under the statute law of Virginia, in subordination to which the negotiations of Virginia with the holders of the debt were carried on.

In 1866-7 Virginia adopted the following provision of law, which appears in the present Code as section 2856:

> "A creditor may compound or compromise with any joint contractor or co-obligor, and release him from all liability on the contract or obligation, without impairing the contract or obligation as to the other joint contractor or co-obligor."

In *Yuille* v. *Wimbish*, 77 Va. 308, this statute was construed and held to be constitutional. It was contended that as to existing contracts it impairs their obligation and is therefore unconstitutional. Overruling this objection, the court in the opinion says:

> "It preserves all rights, and only provides an express,

direct and ready mode of doing, by and between joint contractors, what it was not unlawful to do before the statute was enacted and was done by round-about and difficult indirection. It only removes technical difficulties out of the way of compromise and settlement.

"An English statute cited in *Dewolf* v. *Linsell*, L. R. 5, Eq. Cas. 209, bears close resemblance to our Virginia statute in its purpose and effect, and the courts expressly held that it would apply to existing contracts."

There was inserted in the Code of Virginia of 1887 as section 2858 the following:

"Part performance of an obligation, promise or undertaking, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise or undertaking."

The law in Virginia existing prior to that enactment is clearly stated, after an examination of the authorities, in *Seymour* v. *Goodrich*, 80 Va. 303. The court in discussing the technical rule which, at comon law, forbids the discharge of a debt by the payment of a smaller sum, said:

"But this rule, being highly technical in its character, seemingly unjust, and often oppressive in its operation, has been gradually falling into disfavor; and the courts have therefore not only confined its operation strictly within its own narrow limits but have seized upon every possible opportunity to evade its application. As a consequence, it has been generally, if not universally, held that where any new element entered into the agreement of compromise—as where an earlier day is fixed for the payment, or a different place selected therefor, or where the payment is made in some other thing than what was originally contracted for, *e. g.*, a chattel, or personal services, it will amount to a satisfaction of the whole debt, if the parties so agree. *Bliss* v. *Charter*, 5 Day 359; *Gaffney* v. *Chapman*, 4 Roberts 275; *Watkinson* v. *Ingleby*, 5 John. 386; *Bowker* v. *Harris*, 30 Vt. 424; *Bull* v. *Bull*, 43 Conn. 455; *Perkins* v. *Lock-*

wood, 100 Mass. 249. And in *Goddard* v. *O'Brien*, reported in the 21st Vol. Am. Law Reg. (N. S.) 638, S. C. L. R., 9 Q. B. Div. 37, the court carried this distinction so far as to hold that an acceptance of a check for $100, payable on demand, was a good accord and satisfaction of an indebtedness of £125 7s 9d, then due and payable for the reason that the check was a negotiable instrument, thus holding, in effect, that the supposed advantage to be derived from the negotiability of the check for a part of the indebtedness, was a sufficient consideration for a relinquishment of the remainder. *Foakes* v. *Beer*, L. R. 9 App. Cases 605."

Virginia Has No Such Interest in Any Part of the Unfunded Debt Held by Third Parties, Which It Is Claimed West Virginia Should Pay, as to Enable Her to Enforce Payment by This Suit

If Virginia has any suable interest in the unfunded debt, what constitutes that interest? Is it to ascertain the amount of her public debt existing on January 1, 1861? No; because Virginia had already determined this by her act of 1882, to which the holders of the debt assented, and upon terms of that act and the act of 1892 they agreed to accept and did accept new bonds from Virginia for the share of the debt which it was agreed Virginia should pay. Virginia was thereby relieved from liability as to the residue. (See exhibits 3 and 4 with the bill, record pp. 26-47.)

To the action of Virginia in ascertaining the amount of the debt, as shown by her act of 1882, no objection has ever been made, either by West Virginia or any of Virginia's creditors. What controversy, then, between the two states exists as to this matter? There is none. Does Virginia's interest as to the debt consist in ascertaining the proportion thereof which she ought to assume and be liable for? No; because, as we have shown and as appears from the bill itself and its exhibits, this has already been done by agreement between Virginia and the owners of the debt, and that, too, to their mutual satisfaction. There is no controversy then between the plaintiff and defendant as to this feature of the case.

Is Virginia interested in ascertaining West Virginia's equitable proportion of said debt, if such there be? No; because Virginia, as we have seen, is not liable to her creditors for such part, and because she is to receive nothing in this suit on account of such part. No controversy, therefore, exists between the two states as to what is West Virginia's just or equitable proportion of said debt, if she be liable at all inasmuch as it is neither due nor payable to Virginia, but to the holders of the unfunded part of said debt.

If a controversy exists with reference to what Virginia has done with her creditors touching said debt, upon what is such controversy based? Not under the act of 1871; because while she assumed a conditional liability under such act as to the unfunded part, she has been entirely released as to the certificates issued thereunder therefor by virtue of the acts of 1882 and 1892, whereby the holders of said debt agree to look to West Virginia for payment thereof without recourse upon Virginia. It is not by the form of the certificates issued under the act of 1871 that the holders thereof are to look to West Virginia for their payment, but by the very terms of the acts of 1882 and 1892, which the creditors themselves accepted.

There is no controversy created by the act of 1879; because the certificates issued thereunder representing the portion of the debt not funded under the act of 1871, were accepted under the express agreement that the creditors were to be without recourse upon Virginia.

Inasmuch as Virginia is, by express agreement with her creditors, not liable for the unfunded portion of her debt, represented by the certificates issued by her, and for payment of which portion she sues in this suit; and inasmuch as any liability for such portion of the debt as may attach to West Virginia, is to the holders of the certificates, and not to Virginia, Virginia has no such interest in this suit as enables her to enforce payment of said unfunded part of the debt.

Party Without Interest Cannot Maintain an Action

The principle is well settled that a party cannot maintain a suit when another party is the real beneficiary in any judgment or decree that may be obtained in such suit.

An agent or other like prepresentative cannot bring suit in his own name.

Bissel v. *Spencer*, 9 Conn. 267 (23 Am. Dec. 336).
Gilmore v. *Pope*, 5 Mass. 491.
Gunn v. *Contrie*, 10 Johns. (N. Y.) 387.
The State v. *New London*, 22 Conn. 170.
Townsend v. *Hoyle*, 20 Conn. 6.
People v. *Ingersoll*, 58 N. Y. 1 (17 Am. Rep. 178.
Morris Canal ads. *The State*, 14 N. J. L. 411.
People v. *Booth*, 32 N. Y. 397.
Wilson v. *Shively*, 10 Or. 267.
State v. *Bradish*, 34 Vt. 420.

In *Bissell* v. *Spencer*, 9 Conn. 267, cited above, an action of debt was brought by a state treasurer to enforce the payment of certain judgments rendered for fines against the testator of the defendant, who was sued as his personal representative. The fines were directed to be paid "to the treasurer of the State of Connecticut for the use of the treasury of said State." The declaration was demurred to, on the ground that the state treasurer had no interest in the sum sought to be recovered. The court below overruled the demurrer, and the Supreme Court of Connecticut, reversing the court below, in the course of its opinion said:

> "A person authorized to sue in a court of law must have a legal interest in the subject of the suit. If he is the servant or agent only of the creditor, the action cannot be sustained in his name: 1 Chit. Pl. 3, 5. That a person who has not the legal interest cannot maintain *indebitatus assumpsit*, is too clear to be disputed: 6 Conn. 312; and that even a promise by simple contract to the treasurer of a corporation is, by legal construction a promise to his principal. The point has frequently been decided: *Pigott* v. *Thompson*, 3 Bos. & Pul. 147; *Gilmore* v. *Pope*, 5 Mass. 491; *Bainbridge* v. *Downie*, 6 *Id.* 253, 258; *Gunn* v. *Cantine*, 10 Johns. 387."

In *Gunn* v. *Cantine*, 10 Johns. (N. Y.) 387, it appears that the action was *assumpsit* for money had and received for the use of the

plaintiff. The plaintiff was the holder of a note which was turned over to him by the owner under a power of attorney authorizing him to sue and collect the same. The suit was brought in his own name. The Supreme Court of New York, in holding that the action could not be maintained, says:

> "It appears affirmatively, from the case that the plaintiff had no beneficial interest in the money collected. He was a mere attorney employed by Simmons to collect this debt; and there was no express promise by the defendant to pay the money collected to the plaintiff."

The State v. *New London*, 22 Conn. 163, was an action of debt brought by the State of Connecticut against the town of New London to recover the sum of $1500 as a penalty for a violation of the statute requiring towns to appoint assessors and to cause them to be sworn. It was contended that the State could not maintain this action, but that it should be brought in the name of the financial agents of the State as the collectors of the State's revenue. The Court, in overruling this objection, in its opinion said:

> "The penalties, incurred by a violation of this statute, are for the use of the treasury of the state, and the state alone has the legal interest in them, and not its officers. These officers are but agents, and cannot sue in their own names, unless empowered to do so by some statute. *Spencer* v. *Huntington*, 6 Conn. 312; *Bissell* v. *Spencer*, 9 *Id.* 267."

In *Morris Canal* ads. *The State*, 14 N. J. L. 411, the question arose whether or not the State could be made plaintiff in a writ of *certiorari*. The court, in discussing the question, in the course of its opinion said:

> "But, I apprehend, the state is never properly plaintiff in *certiorari*, where the object of the writ is to relieve individuals in matters affecting their private rights unless the proceeding complained of has been instituted and carried on, by the state, in its corporate and political character, and for political or municipal purposes—in other words, the name of the state cannot be used, as plaintiff in *certiorari;* except in those cases

in which the individual, for whose benefit, or relief, it is sued out, cannot, upon legal principles, be himself the plaintiff; or where the state or the whole community have some rights, or interests, in the subject matter; not speculative or political, but, direct and positive rights and interests, which are to be affected one way or the other. This will be found to embrace an extensive class of cases, relating to the public peace, the public revenue, the public defense, common and public highways, and many other matters of general interest and concern. In short, wherever the authority, or the interest, of the state, in the prosecution of any of the great purposes of government, comes into conflict with individual rights, and the state, either in its corporate name, or by its appropriate agents, is the actor, in carrying into execution those purposes, *then* the name of the state may be properly used by an individual complaining of, and seeking to be relieved against *its* proceedings. In such cases, the state yields a tacit consent to be made plaintiff in *certiorari* where that is the proper remedy, for the purpose of affording the citizen an opportunity of being heard in this court, and having the error corrected, if any has been committed."

In *Wilson* v. *Shively*, 10 Or. 267, the object of the suit was to have decreed the legal title held by the defendant to be in the relators—to have the state patent to certain tide lands alleged to have been procured by fraudulent representations by Shively to be canceled and annulled, and to compel a conveyance of the title held under the patent by the defendant Shively to the relators. In holding that this suit could not be maintained by the state, the court in its opinion said:

"And the question which confronts us at the threshold of our inquiry, is the right of the relators to carry on a litigation in the name of the state for the object sought by the suit, and the authority of the court, in a case so constituted, to adjudicate upon it. For it will hardly be asserted, if the subject matter of litigation concerns the rights of private parties only and exclusively, and the state has no direct interest in

> the prosecution or result of the suit, that state interference in such controversies ought not to be countenanced, or tolerated, either directly or upon the relation of private parties."

The court then considers the relation the state bears to the suit, or rather what interest it has in it, and, determining that the state has no interest in the subject matter of litigation, the court dismisses the action. The concluding sentence of the opinion is as follows:

> "It seems to us in facts thus constituted, in their relation of the state to them and in consequences to be apprehended from such state interference, are objections of too serious a character to maintain this suit."

In *State* v. *Bardish*, 34 Vt. 419, the action was trespass for carrying away a quantity of tools and implements, the property of the State of Vermont. It was contended that the action could not be maintained by the state, but the court, in overruling this contention, in its opinion says:

> "It is evident both upon common law principles and upon inference from the legislation on this subject, that where there are no statutory provision to the contrary, actions by the state or for the benefit of the state are to be brought in the name of the state, in cases where, upon common law-principles, the legal interest in the subject matter is in the state."

In *Lynch* v. *United States*, 13 Okla. 142 (73 Pac. 1095), the action was brought by the United States to set aside a sale of land and cancel a patent issued by the United States. The main question discussed and decided in that case was whether or not the United States as plaintiff had such interest in the suit as authorized its maintenance. In discussing the question, the court in its opinion says:

> "The United States stands in no different relation as a suiter than any individual. When the government comes into a court to submit a question to judicial determination, she is not acting in her capacity as a sovereign, but as a litigant, claiming the same rights, and bound by the same rules, as any of her citizens under similar circumstances. This was expressly held

in *United States* v. *Bank of Metropolis*, 15 Pet. 377 (10 L. Ed. 444.); *Brent* v. *Bank of Washington*, 10 Pet. 596 (9 L. Ed. 547); *United States* v. *Hughes*, 11 How. 552 (L. Ed. 809); *United States* v. *Throckmorton*, 98 U. S. 61 (25 L. Ed. 93); *United States* v. *Minor*, 114 U. S. 233 (5 Sup. Ct. 836, 29 L. Ed. 110). Hence, in determining whether the petition alleges such equities in the United States as against the defendants as will warrant the court in cancelling a patent, we must look to the general rule of chancery pleading in equity cases, and in determining these rules we need look only to the decisions of the Supreme Court of the United States, where every phase of the subject has been discussed and determined."

Classifying the cases in which a suit of this sort may be maintained by the government, and disposing of the second and third classes, holding that the suit did not come under these classes, and which it is not material to consider here, the court comes to the first class, "Where, the government being the only party interested, the patent is charged to have been obtained by fraud," and in its opinion regarding this class the Court says:

"In this class of cases a court of equity will furnish relief where the United States has been defrauded, her interest prejudiced, or to protect the general public from wrongful imposition. But if the United States has not been injured, and will not be benefited by the rescission of the contract and cancellation of the patent, the court will not grant any relief. *Ming* v. *Woolfolk*, 116 U. S. 599 (6 Sup. Ct. 489, 29 L. Ed. 740).

"This case must be tried and tested by the rule stated in the *San Jacinto Tin Co.* case, *supra*, where it was said that the United States can no more sustain an action to cancel a patent than can a private individual, if it is apparent that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited, to sustain an action for his use, or that there is no obligation on the part of the United States to the public. It clearly appears from the petition that the only persons who will be benefited from this proceeding are

> the town site occupants who are residing on the land, by their failure to make the proper town site application and tender the money for the land, and follow the same to a final disposition, they have forfeited all their rights under the law, and it is well settled that equity will not aid one who has had a full and complete remedy at law, and has failed to avail himself of such remedy."

In *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273 (31 L. Ed. 747), a suit brought by the United States to set aside and annul a patent for land issued in its name on the ground that it was obtained by fraud, the Court in its opinion said:

> "But we are of the opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniory interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

In *State* v. *Warner Valley Stock Co.*, 48 Or. 378 (86 Pac. 780), the suit was brought by the state, through its attorney general for the cancellation of a patent for swamp land given by the state. The case turned on the question whether or not the complaint showed on

its face that the state has such interest in the controversy as to authorize it to maintain the suit. In the course of its opinion the court says:

> "Unless the plaintiff has some interest in the land in controversy, it has no right to maintain this suit."

In *City of Atchison* v. *State*, 34 Kan. 379, the syllabus of the case, as found in 8 Pac 367, sufficiently states the matter in controversy and the point decided, without making any futher explanation:

> "Where a city, without authority of law, caused a tax to be levied and extended upon the tax-roll for the purpose of creating a fund with which to pay certain bonds theretofore issued and delivered in payment of bridges that had been built therein, and after the tax-roll had come to the hands of the county treasurer for the collection of the taxes a number of the tax-payers of the city voluntarily paid the illegal tax thus levied: *held*, that the public has no such interest in the money thus paid as will authorize the state to interfere and to maintain an action in the name of the state, enjoining the treasurer from paying out the money so received by him, and from disbursing it in accordance with the will of those who paid the same."

In *People* v. *Stratton*, 25 Cal. 242, the first point of the syllabus is as follows:

> "The attorney general may file an information in the nature of a bill in chancery, to annul a patent for lands granted by this state to an individual, in a case where the matter involved in the suit immediately concerns the rights and interests of the state."

The third point of the syllabus in this case is as follows:

> "If the state has no interest in the subject matter, an information on the relation of the attorney general, on behalf of the state, to annul a patent cannot be sustained."

In the case of *Kansas* v. *United States*, 204 U. S. 331 (51 L. Ed. 510), the bill was filed by the attorney general of Kansas on behalf of the state as trustee for the Missouri, Kansas & Texas Railway Co. of certain lands in the Indian Territory alleged to have been granted

to the state for the benefit of the railway company. The case was dismissed for want of jurisdiction. The Court, in the course of its opinion, said:

> "In our opinion it appears upon the face of the bill that the state of Kansas is only nominally a party, and that the real party in interest is the railroad company. Section 3 provides that patents should be issued not to the state, but to the company direct, which made the state nothing but a mere conduit for the passage of title. And this is so even if it were ruled that the state of Kansas was made trustee under § 9, because it would only be trustee of the bare legal title. In very many cases 'in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued not to the state, for the benefit of the railroad company, but directly to the company itself,' it has been held that the title vested absolutely in the railroad company. *Sioux City and St. P. R. Co.* v. *United States*, 159 U. S. 349, 364, 40 L. Ed. 177, 182, 16 Sup. Ct. Rep. 17, 23. * * * * In these circumstances we think it apparent that the name of the state is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction cannot be maintained."

It seems to us that the case just cited is clearly in point, as the court holds that the real party in interest was not the State of Kansas but the railroad company, and that the name of the state was simply inserted in order to give color to the claim of jurisdiction in the Supreme Court of the United States. The court clearly indicates by this decision that in order to give this court jurisdiction of a controversy between states, the state bringing the action must prosecute it for her own benefit—that it must be a suit to protect the rights of the state as such, and not enure only to the benefit of private persons. The state herself must be interested.

In *Smith* v. *Brittenham*, 109 Ill. 450, 549, one of the main questions determined by the court was the interest of the plaintiff to maintain the suit. The court in passing on this point said:

"It is a well recognized rule that in equity the party having the beneficial interest in the subject matter of the suit must sue in his own name for any invasion of his rights in respect thereto, although the legal title may be in another. (*Frye* v. *Bank of Illinois*, 5 Gilm. 332; *Elder* v. *Jones*, 85 Ill. 384; *Moore* v. *School Trustees*, 19 *id.* 83.) It is also well settled that no one, in the absence of some statute authorizing it, can maintain a suit in chancery with respect to real estate to which he has neither the legal nor equitable title. (*Bowles* v. *McAllen*, 16 Ill. 30; *Hoare* v. *Harris*, 11 *id.* 24.) If such an interest in the complainant is indispensable to the commencement of the suit, as will be conceded, the conclusion would seem to follow that where a party having such interest commences a suit, and before any hearing or disposition of the cause upon its merits voluntarily transfers all his interest to another, and the same is made to appear of record, as is the case here, the whole proceeding will become so defective for want of proper parties, that no valid decree can be entered in the cause until the complainant's assignee, by some supplemental bill, or otherwise, makes himself a party complainant to the suit—and this, indeed, is the well recognized doctrine and practice in such cases. *Mason* v. *York and Cumberland R. R. Co.*, 25 Me. 82."

In *Ashby* v. *Ashby*, 39 La. Ann. 105 (1 So. 282), the suit was instituted by a plaintiff claiming to be judgment creditor of one of the defendants. Exception was taken on the ground that the petition disclosed no cause of action. This exception was deferred for decision to the merits of the case. The court in sustaining this exception announced the following as its decision as shown by the syllabus in the case:

"An action can only be brought by one having a real and actual interest, which he pursues. So, where one claiming to be a judgment creditor of another seeks to annul a mortgage executed by the latter in favor of his children on the ground of fraud, and the record shows that the judgment on which the suit is founded is not in favor of the plaintiff, but in favor of her minor children, for which she is tutrix, and who had attained their

majority before the action of nullity was brought, and they do not join in the action, the suit must be dismissed."

In *Oakley* v. *Bend*, 3 Edw. Ch. (N. Y.) 482, the action was brought in the name of certain persons as bankers who had received the note or paper sued on to collect the same, the authority to collect being transmitted under power of attorney given by the owners of the note. The court in holding that the plaintiffs had no such interest in the subject matter of the suit as authorized a suit in their own names, in its opinion, said:

"A person who is a mere agent to sue for and collect money under a power of attorney cannot be a party to a bill for an account in his own name, nor to be joined as a co-complainant, with his principal. *King of Spain* v. *Machaao*, 4 Russ. 225, 240, recognized in *Clarkson* v. *Depeyster*, 3 Paige 337, as good ground of demurrer. As a general rule, if an agent institutes a suit under an authority from his principal he must do so in the name of his principal. *Leigh* v. *Thomas*, 2 Ves. 313. And, see Calvert, Parties, 229, 232, for the authority on the subject."

"In the present case the bill alleges that the complainants are mere agents for the Bank of Leeds, in England, under the power of attorney transmitted to them by one of its officers duly authorizing the collection of the bill of exchange which the bank discounted and to whom it belongs. This being so, the bill should be filed in the name of the bank, if they have the corporate capacity to sue under the Act of Parliament mentioned in the bill; or if they have it not, then in the names of the individuals composing the bank; and it is no excuse that the names of all have not been transmitted or furinshed to the agents here or that they are very numerous and constantly fluctuating. To avoid the inconvenience of numerous complainants and changes of interest, this court may allow a bill to be exhibited in the names of a few, in behalf of all interested in the bank. Calvert, 40, 41; Story, Eq. Pl. 97, 114-117."

Virginia, Being Without Interest in the Unfunded Debt Held by Third Parties, Cannot Constitute Herself a Trustee, and Thus Create a Controversy Between Herself as Trustee and and the State of West Virginia, and Thereby Maintain This Suit as to Such Unfunded Part of Said Debt

Virginia does not contend that she has any interest in the unfunded debt represented by the certificates issued by her which can in anywise enure to her benefit. She contends that she has a right to enforce payment of the unfunded debt in her capacity as trustee so far as said unfunded debt relates to third parties who own the same. It is settled by the decisions that a mere nominal trustee cannot maintain a suit in his own name.

Malin v. *Malin*, 2 Johns. Ch. (N. Y.) 238 (1 L. Ed. 361.)

Graham v. *Graham*, 3 Barb. Ch. (N. Y.) 24 (5 L. Ed. 801.

Collins v. *Loffters*, 10 Leigh (Va.) 5 (34 Am. Dec. 719, and note 722).

Nichols v. *Williams*, 22 N. J. Eq. 63.

Elmer v. *Loper*, 25 N. J. Eq. 475.

Field v. *Maghee*, 5 Paige Ch. (N: Y.) 539, assignee suing in name of assignor who was without interest in the subject matter of suit.

Dean v. *Seyman*, 11 N. J. Eq. 220.

Wilink v. *The Morris Canal & Banking Co.*, 4 N. J. Eq. (3 Green) 377, 390, 397.

Blake v. *Allman*, 58 N. C. 407.

Elwell v. *Bursinger*, 70 Tex. 120 (8 S. W. 77.

In *State ex rel. Rife* v. *Hawes*, 177 Mo. 360 (76 S. W. 653), the action was mandamus by the state against Hawes and others as a board of police commissioners of the city of St. Louis to compel them to draw a warrant in favor of the relator for payment for himself and others as members of the police force of the city of St. Louis. Judgment was rendered for the relator, and the respondents appealed.

Under the laws of the State of Missouri, a trustee of an express trust may maintain an action in his own name, provided the declaration of trust be in writing. The court found from the record in the case that the real owner of the claim or debt was an individual by the name of Blair; that there was no consideration paid to Blair by the relator or any one else for a transfer of the claim; that Blair never sold his claim to the relator, and never intended to do so; that Blair would receive the fruits of the litigation, and that the action was brought by the relator for himself and his fellows purely as a matter of economy. It was held that Hawes as trustee had no such interest in the matter involved in the action as to maintain it in his own name, and the proceeding was accordingly dismissed for want of interest in the plaintiff.

But we do not concede that Virginia, as to the unfunded debt not assumed by her, is a trustee in reference thereto. To say that Virginia is a trustee of the part of the old debt which Virginia arbitrarily declared is West Virginia's equitable proportion thereof, and for which she is no longer liable, is to announce the proposition that a trust may be created having for its sole object the institution of a law-suit, and that therefore Virginia may bring this suit. Such a proposition is wholly foreign to every principle of the law relating to express trusts. Indeed, after a valid express trust has been created, the legitimate duties of the trustee defined, and the legal title to the property has passed to the trustee, ordinarily the courts will not permit him to bring a suit touching the trust property unless the beneficiaries are also before the court.

The fundamental idea of any kind of a trust contemplates the legal title to the trust subject inhering in the trustee, while the benefits which it carries accrue to and belong to another. This is elementary law.

Wallace v. *Wainwright*, 87 Pa. 263.
Seymour v. *Freer*, 75 U. S. 202 (19 L. Ed. 306).
Commissioners v. *Walker*, 6 How. (Miss.) 143 (38 Am. Dec. 433).
1 Minor on Real Prop., sec. 459.
2 Washb. on Real Prop., 4th Ed. 458.
Tiedeman on Real Prop., sec. 325.

The Court says, in *Seymour v. Freer, supra*:

> "A trust is where there are rights, titles and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lies beneficial rights and interests in the same property belonging to another."

Mr. Minor, speaking of a trust as to real property, says:

> "A trust estate is a right *in equity* to take the rents and profits of lands, whereof the legal estate is vested in some other person, called the *trustee;* and to compel such trustee (subject to the discretion which may be vested in him) to execute such conveyance of the land as the person entitled to the profits, who is cal'ed the *cestui que trust*, shall direct."

Mr. Washburn says:

> "A trust may, therefore, be defined as a use, which, though lawful in itself, the statute does not operate upon to execute in the *cesti que use*, whereby the legal estate is in one, while another has the right to a beneficial interest in and out of the same, the first being termed, a *trustee*, the other a *cestui que trust*."

These few cases, of the very great number that could be cited, clearly establish the doctrine that a trustee is the holder of the legal title for some lawful and beneficial purpose, enuring to the benefit of a third party, usually called the *cestui que trust*.

It is also elementary law that, while the legal title gives the trustee dominion over the property in a court of law, in a court of equity the real owner is the *cestui que trust*. Here his rights are guarded and protected to the same extent as if he were the absolute owner.

To constitute a valid trust there must be a lawful and definite object to which the subject matter is to be devoted.

> 29 Am. & Eng. Enc. L. (2d Ed.) 866, and the many cases there cited.

Here the object of the trust is definite. It is for the purpose, through the agency of the debt commission, by and with the advice and consent of the attorney general of Virginia, in the name of Virginia, to bring a suit against West Virginia for the recovery of this alleged

debt represented by the certificates. This is not a lawful object. In all the multitude of decisions, either in this country or any other jurisdiction where the doctrines of the common law and equity have been recognized and prevail, has such an object of a trust ever appeared? Can a trust have such an object? We believe not. Is it not contrary to public policy thus to encourage litigation?

Virginia herself declined to bring any suit against West Virginia, and for the very valid reason that, as alleged by her, she has already adjusted her equitable proportion thereof and could have no interest in such a suit. She also declined to bring this suit, except at the request of the holders of these certificates and only on the condition that they should be turned over to the debt commission *for that purpose*, and that *the beneficiaries would bear all the expenses of the litigation, even to the payment of the compensation and expenses of her own debt commission.*

Is this suit, therefore, one brought by Virginia in her capacity as a trustee?. That is, does she occupy the attitude before this Court of a lawful trustee acting under an express trust, bringing a suit to enforce a trust having a valid object and purpose? This question certainly caries its own answer in the negative.

But to recur to the proposition that a trustee of a valid trust will not be permitted to bring suit touching his trust property unless the beneficiaries are also before the court, reliance is had upon the following authorities:

Story Eq. Pl. (9th Ed.), sec. 207.
Fish v. *Howland*, 1 Paige Ch. (N. Y.) 20.
Reed v. *Reed*, 16 N. J. Eq. 248.
Monday v. *Vance*, 11 Tex. Civ. App. 374 (32 S. W. 559).
Ebell v. *Bursinger*, 70 Tex. 120 (8 S. W. 77).

In *Ebell* v. *Bursinger*, cited above, the following appears in the opinion of the court:

> "Two questions are presented by the assignment: *First*, was the *cestui que* trust a necessary party to the suit? and, *second*, can the objection for want of a necessary party be taken by motion in the court below after default or upon appeal? As to the first question,

the general rule is well established that, in suits by or against the trustee for the recovery of the trust property, the beneficiary is a necessary party. *Boles* v. *Linthicum*, 48 Tex. 224; *Huffman* v. *Cartwright*, 44 Tex. 296; *Hall* v. *Harris*, 11 Tex. 300; *Holland* v. *Baker*, 3 Hare 72; *Woodward* v. *Wood*, 19 Ala. 213; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256; *Richards* v. *Richards*, 9 Gray 313; *Ward* v. *Hollins*, 14 Md. 158; 1 Daniell Ch. Pr. (5th Ed.) 220, and note; Story Eq. Pl. § 207; 2 Perry, Trusts, § 873."

It is admitted that to this rule there are some exceptions. Thus, if the trustee holds the title to the property to manage and dispose of it and to do all other things to promote the purposes of the trust, he may represent the beneficiaries in a suit, and thus dispense with them as parties.

Kerrison v. *Stewart*, 93 U. S. 155 (23 L. Ed. 843).

So, another illustration is found in the case of trustees in a mortgage to secure a series of negotiable bonds upon the property of railroad companies.

Shaw v. *Railroad Co.*, 5 Gray 162.

Or where the beneficiaries are so numerous that it would be inconvenient to make them parties.

Story Eq. Pl., sec 207*a*.

But it will be borne in mind that these principles are applicable only to valid trusts, to express trusts having a lawful object.

Furthermore, these certificates were not issued by West Virginia. They were issued by Virginia without the consent of West Virginia. West Virginia never has recognized their legality, or Virginia's wrongdoing in issuing them. And these certficates are not held by the State of Virginia, but by seven members of a commission created by a joint resolution of the General Assembly of Virginia, who as such commission are authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the public debt of the original State of Virginia proper to be borne by West Virginia. This joint resolution was approved March 6, 1894, and by an act of March 6, 1900, this commission was to receive and take upon deposit the cer-

tificates or to have the same otherwise placed or held on deposit subject to their control, upon an agreement and contract on the part of the holders of said certificates that if said commission would secure a settlement with West Virginia with respect to said certificates the holders would accept the amount realized upon such settlement from West Virginia "as a full settlement of all the claims thereunder." (R. pp. 47-51.)

Thus, it will be seen that this commission as an independent body holds these certificates by contract with the owners thereof that they will negotiate a settlement with West Virginia in regard to the matter the State of *Virginia disclaiming in the joint resolution any liability on account of these certificates;* and likewise disclaimed such liability in the act of March 6, 1900, giving this commission power to take into its possession and control the certificates and to negotiate a settlement thereof with West Virginia.

The Principles of Law Governing Suits Between Private Persons Are Applied to Constroversies Between States

The principles of equity applicable in cases between individuals must necessarily be applied in the settlement of controversies between states when these controversies have been brought into court for settlement. The authorities are so numerous upon this proposition and the doctrine seems so well settled, that it scarcely seems necessary to cite them here; yet for the convenience of the court we cite a few of the many authorities bearing on this matter.

In considering the question of the rights of the State of Virginia in this suit, it must be constantly borne in mind that her rights as a state, when she becomes a suitor, are no greater or different from those of a private person. The same rules govern in such case as govern in suits between individuals.

In *State* v. *Cloudt,*..... Tex. Civ. App..... (84 S. W. 415), which was an action brought by the state to recover taxes due the plaintiff on a section of land, the court says:

> "When a state appears as a party to a suit, she voluntarily casts off the robes of her sovereignity, and

> stands before the bar of a court of her own creation in the same attitude as an individual litigant; and her rights are determined and fixed by the same principles of law and equity, and a judgment for or against her must be given the same effect as would have been given it had it been rendered in a case between private individuals."

In *State ex rel Taylor* v. *Lord*, 28 Or. 489 (31 L. R. A. 473), which was an action by the State to enjoin the defendants from executing the provisions of a statute relative to the location and erection of a branch insane asylum, the court, speaking of what it had decided on a former appeal of that case, reported in 26 Or. 205, said:

> "When this case was here before (26 Or. 205, 25 L. R. A. 862) we held that a private individual could not have public officers enjoined from using public funds, unless it could be shown that some civil or property rights were being invaded, or, in other words, that the individual was going to get hurt by the transaction. Upon that principle it was decided that he should be required to show that the location and building of the branch asylum in eastern Oregon would be attended with greater cost and expense than if constructed at the capital, thereby increasing the burden of taxation which would be imposed upon him, with others, whose duty it is to contribute to the support of the government. It was also held that the state, suing in its corporate capacity, for the protection of its property rights, stood in no different or better position in this regard than an individual. This doctrine is supported by high authority. Allen J., in *People* v. *Canal Board*, 55 N. Y. 395, says: 'When the state as plaintiff invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the particular relief demanded.' And as is said by the same eminent jurist in *People* v. *Ingersoll*, 58 N. Y. 14 (17 Am. Rep. 178): 'A distinction is to be observed between actions by the people or the state, in right of the prerogative incident to sovereignty, and those founded upon some pecuniary interest or proprietary right. The latter are governed by the ordinary rules of law by which rights are deter-

> mined between inividuals. To the same effect is the doctrine announced in *People* v. *Fields*, 58 N. Y. 514. See also 2 High, Inj., §1327. So that we then concluded the plaintiff herein occupied no better or superior position, from a legal standpoint, for enforcing the remedy sought to be invoked, than the plaintiff in *Sherman* v. *Bellows*, 24 Or. 553. From this position we see no sufficient reason for receding, as we believe it to be sound in law, and supported upon reason and authority."

The first point of the syllabus in the case of *State ex rel Smyth, Atty. Gen.*, v. *Kennedy*, 60 Neb. 300 (83 N. W. 87), is as follows:

> "When a state invokes the judgment of a court for any purpose, it lays aside its sovereignity, and consents to be bound by the decision of the court, whether such decision favorable or adverse."

To the same effect are the following cases:

> *Green* v. *State*, 73 Cal. 29 (14 Pac. 610).
> *Harris* v. *State*, 9 S. D. 453 (69 N. W. 825).
> *State* v. *Parson*, 119 Ga. 730 (46 S. E. 872, 873).

This Court Follows the Former Practice of the Courts of King's Bench and of Chancery, in England, in Cases of Original Jurisdiction in Equity.

The rules of this Court governing controversies between States do not differ materially from those where individuals are parties. The principles of law are the same. This Court, in *California* v. *Southern Pacific Company*, 157 U. S. 229 (39 L. Ed. 683), the late Chief Justice Fuller delivering the opinion, said at page 248:

> "By the third of our general rules it is provided: 'This Court considers the former practice of the courts of King's Bench and of chancery, in England, as affording outlines for the practice of this Court; and will from time to time make such alterations therein as circumstances may render necessary.' This rule is, with the exception of some slight verbal alterations and the addition of the word 'former' before the word 'practice' in the first line, the same as original general rule seven, adopted August 8, 1791. 1 Cranch, XVII; 2 Dall.

411. And in cases of original jurisdiction it has been determined that this Court will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and that the rules of court in chancery should govern in conducting the case to a final issue (*Rhode Island* v. *Massachusetts*, 73 U. S. 12 Pet. 657; 38 U. S. 13 Pet. 23; 39 U. S. 14 Pet. 210; 40 U. S. 15 Pet. 233; *Georgia* v. *Grant*, 73 U. S. 6 Wall. 241) although the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of Justice. *Florida* v. *Georgia*, 58 U. S. 17 How. 478."

The Court further says in the course of the opinion:

"We have no hesitation in holding that when an original cause is pending in the court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

All through the foregoing case this Court keeps constantly before it the well settued doctrine of equity jurisprudence and practice in deciding original cases brought before it on the chancery side.

Many times this Court has been called upon to decide controversies between states. Examination will disclose that in each case there was some well marked ground as the basis of a controversy. We call the Courts attention to some illustrative cases of the principle that this Court, in determining the rights of parties in an equity cause of original jurisdiction, has always been governed by the doctrines obtaining in the English court of chancery.

In the case of *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 519 (14 L. Ed. 249), the Court said:

"The rules of the High Court of Chancery of England have been adopted by the courts of the United States, and there is no limitation to the exercise of a chancery jurisdiction by these courts except the value

> of the matter in controversy, the residence or character of the parties, or a claim which arises under the laws of the United States and which has been decided against it in a state court.
>
> In exercising this jurisdiction the courts of the Union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no courts of chancery have been established. The usage of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed."

See also the following cases:

Rhode Island v. *Mass.*, 15 Pet. 233 (10 L. Ed. 721).
Florida v. *Georgia*, 58 U. S. 478 (15 L. Ed. 181).

This Suit Discloses no Controversy Between the Two States, as to the Unfunded Debt Represented by Certificates Owned by Individuals.

The agreement between the holders of the certificates and the Virginia Debt Commission provides for their return to said holders in case they are not collected (R., pp. 94, 98), and if collected a method is provided for the distribution of the proceeds of such collection among the owners of the certificates. (R., pp. 68, 69, 98.)

So it is apparent upon the record of this suit that the great Commonwealth of Virginia as a State has not an iota of interest in this suit or in its result. *She does not even incur one cent of costs should it be decided against her.* She was not to bring this suit except at the request of the holders of these certificates (R., p. 49), and not even then until she was first indemnified against any expense to her incurred by the bringing and carrying on of such suit. (R., p. 49.) If there be any controversy in reference to said debt, it is between the holders of said certificates and West Virginia, and not between Virginia and West Virginia.

The conditions upon which this suit was instituted were very much like those prescribed by the act of the legislature of New Hampshire, section 2 of which provided as follows:

"Upon each deposit being made, it shall be the duty of the attorney general to examine such claim and the evidence thereof, and if, in his opinion, there is a valid claim which shall be just and equitable to enforce, vested by such assignment in the State of New Hampshire, he, the attorney general, shall, upon the assignor of such claim depositing with him such sum as he, the said attorney general, shall deem necessary to cover the expenses and disbursements incident to or which may become incident to the collection of said claim, bring such suits, actions or proceedings in the name of the state of New Hampshire, in the Supreme Court of the United States, as he, the said attorney general, shall deem necessary for the recovery of the money due upon such claim; and it shall be the duty of the said attorney general to prosecute such action or actions to final judgment, and to take such other steps as may be necessary after judgment, for the collection of said claim, and to carry such judgment into effect, or, with the consent of the assignor, to compromise, adjust and settle such claim before or after judgment."

"*New Hampshire* v. *Louisiana*, 108 U. S. 76 (27 L. Ed. 656, 659).

Section 3 of this act provided:

"Nothing in this act shall authorize the expenditure of any money belonging to this state, but the expenses of said proceedings shall be paid by the assignor of such claim; and the assignor of such claim may associate with the attorney general in the prosecution thereof, in the name of the state of New Hampshire, such other counsel as the said assignor may deem necessary, but the state shall not be liable for the fees of such counsel or any part thereof."

New Hampshire v. *Louisiana*, *supra*.

The State of New Hampshire became the holder, as assignee of one of its citizens, of a part of the bonded obligation of Louisiana for the purpose of requiring payment thereof from Louisiana, and for the purpose of coercing payment suit was brought by New Hampshire against Louisiana.

This Court in its opinion says:

> "No one can look at the pleadings and testimony in these cases, without being satisfied, beyond all doubt, that they were, in legal effect, commenced, and are now prosecuted, solely by the owners of the bonds and coupons. In New Hampshire, before the attorney general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the state can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney general such counsel as he chooses, the state being in no way responsible for fees. All moneys collected are to be kept by the attorney general, as special trustee, separate and apart from the other moneys of the state, and paid over by him to the owners of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the attorney general, is also signed and was evidently drawn by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the state and the attorney general are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the state. * * * * * *
>
> "It is contended, however, that, notwithstanding the prohibition of the amendment, the state may prosecute the suits, because, as the sovereign and trustee of its citizens, a state is 'clothed with the right and faculty of making an imperative demand upon another independent state for the payment of debts which it owes to citizens of the former.' There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignity, but it involves also the national powers of levying war and making treaties,

> As was said in *U. S.* v. *Dickelman*, 92 U. S. 524, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war.
>
> "All the rights of the state as independent nations were surrendered to the United States. The states are not nations, either as between themselves or toward foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political *status* at home and abroad is that of states in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, enter into any agreement or compact with another state. Art. 1, sec. 10, cl. 3."

Discussing the effect of the Eleventh Amendment, taking away the right of an individual to sue a state of the Union, the Court says:

> "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states or aliens, without the consent of the state to be sued and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the constitution, by assuming the prosecution of debts owing by the other state to its citizens."

An examination of the pleadings and exhibits filed with them unquestionably discloses that the real parties to this suit are the holders of the Virginia deferred certificates, representing West Virginia's alleged proporotion of the old debt, on the one side, and the state of West Virginia on the other, and hence cannot be maintained in this Court.

In *Exparte Ayers*, 123 U. S. 443 (31 L. Ed. 216), this court held that—

> "Whether a suit is within the prohibition of the Eleventh Amendment is not always determined by

> reference to the nominal parties on the record, but by a consideration of the nature of the case."

The principle here announced is considered in the opinion at some length, from which we take this excerpt:

> "The very question was presented in the case of *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76. In each of those cases there was upon the face of the record nominally a controversy between two states, which, according to the terms of the Constitution, was subject to the judicial power of the United States. So far as could be determined by reference to the parties named in the record, the suits were within the jurisdiction of this Court; but, on an examination of the cases as stated in the pleadings, it appeared that the state, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof who had transferred their claims to the state for the purpose of suit. It was accordingly unanimously held by this Court, that it would look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit."

In order to create a "controversy between two states," there must be an actual controversy between them in which both parties have an interest. The word "controversy" has been the subject of frequent consideration by the federal courts, and especially as it relates to the removal of causes from a state to a federal court. In all the cases in which it has been the subject of judicial consideration it is treated as meaning an *actual* controversy in which both parties have an interest.

Sheldon v. *Keokuk N. L. P. Co.*, 1 Fed. 789.

Every case that has ever come before this Court involving a controversy between states, has been one affecting boundaries and jurisdiction over lands, or cases directly affecting the property rights and interest of a state.

This is the conclusion deduced by Mr. Justice Shiras from an exhaustive examination of the cases bearing on the subject in *Missouri* v. *Illinois*, 180 U. S. 208 (45 Law Ed. 497), and a review of the cases

by Mr. Justice Brewer in *South Dakota* v. *North Carolina*, 192 U. S. 286 (48 Law Ed. 448).

The cases illustrating the soundness of this deduction may be thus classified:

New Jersey v. *New York*, 5 Pet. 285 (8 Law Ed. 127); *Rhode Island* v. *Massachusetts*, 12 Pet. 657 (7 Law Ed. 1233); *Florida* v. *Georgia*, 11 How. 293 (13 Law Ed. 702); *Virginia* v. *West Virginia*, 11 Wall. 39 (20 Law Ed. 67); *Missouri* v. *Iowa*, 7 How. 660 (12 Law Ed. 861); *Florida* v. *Georgia*, 17 How. 478 (15 Law Ed. 181); *Alabama* v. *Georgia*, 23 How. 505 (16 Law Ed. 556); *Louisiana* v. *Mississippi*, 202 U. S. 1 (50 Law Ed. 913); *Missouri* v. *Kentucky*, 11 Wall. 395 (20 Law Ed. 116), and *Maryland* v. *West Virginia*, 217 U. S. 1 (54 L. Ed. ....), recently decided by this Court, were cases relating to the boundary lines of the respective states bringing the suits.

In *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 18 (14 L. Ed. 249), it appeared that the state had constructed lines of transportation connecting with the Ohio river, a navigable stream, from the tolls upon which the state derived a revenue, and the defendant, a corporation of another state, had constructed a bridge across said river, by reason of which the navigation was obstructed and the revenues of the state decreased. The court sustained its jurisdiction in this case because of the injury resulting directly to the State of Pennsylvania. The case of *Missouri* v. *Illinois*, 180 U. S. 208 (45 Law Ed. 497), involved a threatened injury by the state of Illinois to the health and prosperity of the inhabitants of Missouri and an injury to that portion of the bed or soil of the Mississippi River which lies within the territory of Missouri.

In *South Dakota* v. *North Carolina*, 192 U. S. 286 (48 Law Ed. 448), the title to the bonds sued on was vested absoutely in the State of South Dakota, and they were not held in a representative capacity, as in the case of *New Hampshire* v. *Louisiana*, 108 U. S. 76 (27 Law Ed. 656), as they were given outright unconditionally to the plaintiff state in that case.

In *Florida* v. *Georgia,* 17 How. 478 (15 Law Ed. 181), the United States was permitted to intervene because she was the proprietor of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The State of Florida was also deeply interested as a proprietor.

In the exercise of their jurisdiction, the federal courts have often felt called upon to decide whether or not the state had such an interest in the subject matter of litigation as to uphold or defeat the jurisdiction of the court.

To determine in whom the real interest resides or inheres, the court will look beyond the nominal parties. *Missouri, K. & T. R. Co.* v. *Hickman,* 163 U. S. 53 (46 Law Ed. 78). From the record in the cause it will ascertain whether or not the judgment or decree will operate upon the pecuniary or material interests of the state, or upon the interests of individuals only. In the case last cited this Court in its opinion says: "Was the state the real party plaintiff?" In answering this question, the court discusses the practice after the adoption of the Eleventh Amendment, and shows that in determining whether or not a state is the real party plaintiff or defendant, it will go behind the mere allegation as to the nominal party; and, applying this principle, says:

> "It may fairly be held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson* v. *Ross,* 3 L. R. A. 322, 38 Fed. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the state, and it was held by the circuit court for the eastern district of New York that the action was one in which the real party plaintiff was the state. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery."

The case from which we have just quoted was a suit brought in a

state court of Missouri against certain individuals constituting the State Board or Railroad and Warehouse Commissioners of the state, and in which the state court had refused to order a removal to a federal court. The question involved was, on the motion for removal, whether or not the state was the real party in interest. The Missouri court held that it was, and the state not being a citizen within the meaning of the removal act, of course there could be no removal, if indeed the state were the real party in interest, and not the board of commissioners.

In considering the question whether or not the state was the real party in interest, the Court says:

> "It is true that the state has a governmental interest in the welfare of all citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organied political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation; because the purpose af all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person."

As stated by this Court, the supreme court of Missouri held that the state had a direct pecuniary interest in the result of the litigation, by virtue, first, of its possible liability for costs, and, secondly, because, were the litigation pushed to the extreme, there might be penalties imposed which would, when collected, pass into the school fund of the state. This Court holding that these considerations, actuating the supreme court of Missouri to decide as it did, were not sufficient to make the state the real party in interest, and says:

> "We are of opinion, therefore, that the party named in the record as plaintiff is the real party plaintiff, and that the voluntary assumption by the state of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from a disobedience of the orders of the court, do not make it

> the party to whom alone the relief sought inures, and in whose favor a decree for the plaintiff will effectively operate."

So, it is by invoking this principle that the court will look beyond the mere allegations of the pleadings, with reference to parties, and ascertain and determine, for the purpose of its jurisdiction, who are the real parties in interest. *Ex parte Ayers*, 123 U. S. 443 (31 Law Ed. 216).

In *Louisiana* v. *Jumel*, 107 U. S. 711 (27 Law Ed. 448), though nominally a suit between individuals, the Court held that the real party to be affected by the action of the Court was the state, because its judgment must operate against the state itself. And may we not say, *converso*, that if the judgment or decree of the Court does not operate in favor of the state it is not, nor can it be, a party plaintiff?

In *Antoni* v. *Greenhow*, 107 U. S. 769 (27 Law Ed. 468), it was held that a suit to compel the officers of the state to do the acts which constitute a performance of its contracts by the state is a suit against the state itself, although the state is not nominally a party to the suit.

The cases could be multiplied illustrative of the principle that the court will and must look to the effect of its judgment or decree in determing the question as to whether the state is the real party whose rights or interests will thereby be affected so as to make it a plaintiff or a defendant in the suit, as the case may be.

Alabama v. *Burr*, 115 U. S. 413 (29 Law Ed. 435), was a suit at law brought in this Court by the state of Alabama against citizens of the States of Massachusetts and New Jersey. The defendants demurred generally to the declaration. The demurrer presented the question whether the facts in the declaration were sufficient to support the action. The court in considering the demurrer concluded that the state in her declaration failed to show any such acts affecting the interests of the plaintiff as authorized her to maintain the suit. The Court in its opinion said that the injury to innocent stockholders by the wrongful acts of the company and the defendants was direct and immediate, because their property was taken and fraudulently

converted to the use of the defendants or other wrongdoers. "To the state, however" said this Court, "the injury, if any, was both indirect and remote, because the state had no direct claim upon, or interest in, the property which was misappropriated." Therefore, the Court, by a unanimous opinion, sustained the demurrer and dismissed the action.

New York v. *Connecticut*, 4 Dall. 3 (1 Law Ed. 715), was an application by the plaintiff for an injunction to stay proceedings in certain ejectment causes brought in the State of Connecticut. The prayer for injunction was argued with great force and ability. The plaintiff was not a party to the ejectment suits, but it was contended that New York was interested to preserve peace and good order, to protect individuals, to indemnify those who trusted to her faith and even to prevent dismemberment of her territory; that this political and moral obligation and regard for her public improvements and fiscal operations, created an interest of the highest character in the goverment of New York, and one entitling her to maintain this bill for the purpose of its prayer. But the Court held that the State of New York was not a party to the suits below, nor interested in the decision of those suits, and that the injunction ought not to issue. Thereupon the attorney general of the State of New York said to the Court: "In every grant by New York, there is a reservation of gold and silver mines, and of five acres per cent for roads. The bill might, besides, be amended, by averring the state to be interested in a residuum of the land, if that would be sufficient to sustain the prayer for an injunction." Mr. Justice Washington replied: "The amendment would not satisfy me; for my opinion is founded upon the fact, that New York is not interested in the suits below." The actions of ejectment were brought by grantees of Connecticut against grantees of New York to obtain possession of the land.

An examination of all the cases decided by the federal and state courts discloses no instance wherein the state has been permited to maintain an action or suit, the judgment or decree of which would not inure to the state. In other words, the courts have placed the right to suit on the part of the state upon the same principle with reference to interest, that is always applied in suits by individuals.

An Accounting Cannot Be Maintained by Virginia in This Suit.

One part of the prayer of the bill in this case is

> "that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix in her own right and as trustee" (R., pp. 16, 17).

Whether this bill may be maintained for an accounting as to matters claimed in her own right we shall presently consider; but that it cannot be maintained in her representative capacity as a trustee seems to us quite clear. The suit in her capicity as trustee relates to the unfunded part of the debt in the hands of third parties, from which Virginia has been released, and which is alleged by Virginia to be one-third of the original debt existing on January 1, 1861.

It is a cardinal principle that no bill can be sustained for an accounting when the plaintiff in its own right is not interested in the result of such accounting. Under no circumstances can Virginia be interested in any account that may be taken as to the unfunded part of said debt which is claimed by Virginia and her creditors to be West Virginia's equitable proporation. There are several grounds for this lack of interest:

First, because Virginia and her creditors agreed to the amount which Virginia should assume as her part.

Second, because her bill and its exhibits show she will receive no part of the proceeds of the unfunded debt if West Virginia should pay any part thereof, but that all of it belongs and will go to the holders of said certificates, which represent such unfunded part.

Third, because West Virginia's liability, if any exists, is direct to the creditors and not to Virginia, as heretofore shown by the Wheeling Ordinance, the West Virginia Constitution of 1862 and the acts of the General Assembly of Virginia.

To sustain this suit on the ground of an accounting would violate one of the cardinal principles underlying this branch of the jurisdic-

tion of a court of equity. It is elementary law that the person seeking an acount must have an interest of some sort to promote as a result of the accounting. If there be no such interest, the bill can not be maintained.

Nicholas v. *Anderson*, 8 Wheat. 365 (5 Law Ed. 637).
Ball v. *Carew*, 13 Pick. 28.
McCabe's Appeal, 22 Pa. St 427.

In *Nicholas* v. *Anderson, supra*, a bill in equity was filed by and in the name of the attorney general of Virginia, under the authority of a special act of the legislature of that state, passed on October 15, 1813, for the better locating and surveying of the lands given to the officers and soldiers on continental and state establishments. The act provided that all persons holding officers' and soldiers' warrants by assignment should pay down to the principal surveyor, at the time of the delivery of such warrants, one dollar for every hundred acres thereof, exclusive of the legal surveyor's fees, towards raising a fund for the purpose of paying all contingent expenses, etc. The act further provided that the deputations of officers should appoint two principal surveyors, who were accordingly appointed, one of whom was the defendant, and who immediately took upon himself the duties of the office, and exacted, in virtue of the act of 1783, from all the holders of the military warrants, the one dollar per one hundrer acres as provided in the act. The bill charged that the defendant had received a large sum of money in this way and had refused to account for the same to the complainant and the agents and attorneys appointed for this purpose under the act of 1813. It also charged a misapplication of the money; and that the deputations of officers, under the act of 1783, did appoint superintendents, etc., but that most of them had long since died and that the surveyors had declined to act for many years. The bill proceeded to state the substance of the act of 1813, which authorized one Colonel John Watts, the surviving superintendent, agent to settle with defendant, and to receive the moneys remaining unappropriated in his hands, and, if not paid, to sue for and recover the same in the name of the attorney general of Virginia; and then charge that the

defendant refused to account with Watts, and concluded with a prayer for an account, discovery and general relief.

To this bill the defendant demurred; and the circuit court of Kentucky, upon argument, sustained the demurrer and dismissed the bill. The case then came to this Court by appeal.

Mr. Justice Story, who delivered the opinion of the Court, after stating the case in substance as here stated, said:

> "The question in this case is, whether the demurrer was well taken. In support of the decree, two points are stated at the bar: 1st, that the plaintiff has not shown any interest in the subject, entitling the State of Virginia to maintain the bill; 2nd, that if there was originally any resulting authority to the state to compel an account, that power, by the erection of Kentucky into an independent state, devolved on the latter state, the defendant having been, and still continuing to be a citizen of that state; and that it was not competent for the legislature of Virginia, in 1813, to pass a law which should bind a citizen of Kentucky to account for official duties which were not performed in virtue of any appointment made by the government of Virginia.
>
> "It is unnecessary to consider the last objection, because we are of opinion that the first is fatal to the bill. The act of 1783, for the better locating and surveying the lands given to the officers and soldiers on continental and state establishments, authorizes the deputations of officers, therein named, to appoint superintendents, in behalf of their respective lines, for the purpose of surveying the lands; and also to appoint two principal surveyors, and contract with them for their fees, etc. The third section of the act then provides, 'that every person or persons holding officers or soldiers' warrants, by assignment, shall pay down to the principal surveyor, at the time of the delivering such warrant or warrants, one dollar, for every hundred acres thereof, exclusive of the legal surveyor's fees, toward raising a fund for the purpose of supporting all contingent expenses; or, at the option of such holder or holders, the same may be held up until warrants of all the original grantees have been surveyed; the said

surveyors to account for all the money so received to such person or persons as the said deputations may direct.' This is the clause upon which the bill is founded. And it is apparent, that in terms it provides for an accountability, not to the state, but to persons to be appointed by the deputations of officers; to those for whose benefit the fund was raised, and was to be applied, and not to the state, which had no interest whatsoever in it."

We are now brougth to the second ground of recovery stated in the bill, which relates to

That Part of the Debt Not Held by Third Persons, But Which Virginia Avers She Holds in her Literary and Sinking Funds, in Her Own Right and Not as Trustee.

As to this part of the bill, we refer the Court to the answer; and, so far as pertinent to this phase of the case, the answer of West Virginia is as follows:

"This respondent denies that there was in addition to the above mentioned liability to the general public any other indebtedness evidenced by bonds held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the said State of Virginia as created under her laws, amounting, the former to $1,462,993, and the latter to $1,543,669.05, or to any other sums, as of the same date, as in the said bill is alleged, because this defendant avers that the commissioners of these two funds were and are mere state agencies, and public officials of the state, created by said State of Virginia to have the custody of and to preserve certain of her financial resources and obligations to be made available for specific purposes when necessary, and which now belong exclusively to Virginia and are held for her sole and exclusive use and benefit. Respondent denies that any of the bonds or certificates so alleged to be held by the Commissioners of the Sinking Fund and the Literary Fund were ever negotiated or sold by the State of Virginia, or that the same constituted a part of the public debt of that state on the first day of January, 1861, and denies that the certificates representing

> one-third of such bonds are now a part of the said public debt; and respondent avers that the State of Virginia has long since voluntarily cancelled all of said bonds and the same are no longer of any force or validity."

It will be seen that the answer of the defendant controverts the allegations that the bonds held by the Commissioners of the Sinking and the Literary Funds of the State of Virginia constitute any part of the debt of Virginia within the meaning and contemplation of the said Ordinance of 1861, or of the constitution of West Virginia of 1862, and denies that such bonds so held constitute, or ever constituted, a part of the public debt of Virginia existing on the first day of January, 1861.

The commissioners of these two funds are mere state agencies or instrumentalities created by the Commonwealth of Virginia, to care for and preserve certain of her own financial resources, available for specific purposes, and which belong exclusively to Virginia. A few of the old bonds of Virginia issued prior to 1861 were by her converted into immediately available money by being deposited with these commissioners, and were therefore never sold and the title never transferred from her so as to create a liability against the state herself, and hence at no time was there ever any right of action or liability on account of these old bonds so desposited with the said commissioners which could properly be asserted against the old state. In other words these few old bonds deposited with these commissioners did not create any debt against the State of Virginia. At no time or under any circumstances could these bonds have been made or become a legitimate subject matter of controversy or suit against the Commonwealth of Virginia. To make them such, would present the grotesque spectacle of a sovereign state suing herself for an accounting and payment to herself of her own funds, already under her absolute control.

Again: There can be no liability in favor of the Commonwealth of Virginia against the State of West Virginia on these bonds so held. The moneys in the sinking fund which purchased these bonds previous to the first day of January, 1861, were raised by the revenues of the entire state before the division, and they were therefore the

property of such entire state; and being owned by the state itself, the debtor, they were a dead asset both as to that portion of the state which passed into the new state and the State of Virginia as she remained, and Virginia claiming to be such owner has no more right to institute and prosecute a suit thereon against West Virginia than would West Virginia if a similar bond had fallen into her possession. If there is any liability in respect to said bonds it is a liability of the State of Virginia to the State of West Virginia for a portion thereof

Then, if this were the status of Virginia as to the old bonds held by the commissioners of her Sinking Fund and Literary Fund prior to 1861, and which remained unchanged at the time of the formation of the State of West Virginia, could their refunding and the issuance of the deferred certificates as to the one-third of them, alter this status with reference to her right of suit thereon, or as to any part of them? The propounding of the question must evoke a negative answer.

The idea of debt necessarily implies an obligation payable by the debtor to some third party—a creditor existing independently of the debtor, and over whom, as to the obligation asserted, the debtor can have no control, and in the use or disposition of which the debtor has no right or interest whatever.

Upon what principle or ground or reason can Virginia claim that the old bonds placed by her with her commissioners of the Sinking and Literary Funds, were or are now any part of her *ante bellum debt*? We are wholly unable to perceive any. In fact, there is none.

If it be contended that the commissioners of the Sinking and Literary Funds are distinct entities from the state, persons clothed with an existence distinct and separate from the commonwealth, with the right to assert a liability against Virginia on account of these old bonds acquired by them prior to the erection of the territory contained within the boundries of West Virginia into a state, then this Court cannot entertain jurisdiction of its suit, because these commissioners are necessary parties thereto; and the commission, having been created and existing by virtue of the laws of Virginia, must be a citizen of Virginia, and if a distinct entity, it must necessarily be a corporation having its domicile in Virginia, where it was created.

Thus, it is seen that, in any aspect of the case, this Court has no jurisdiction of this suit so far as the certificates belonging to these commissioners are concerned. This feature itself of this cause can constitute no ground of controversy between the parties to the bill.

In the case of *Roe* v. *Marchand*, 86 Va. 107 (9 S. E. 995), we find the court saying:

> "A debt is an obligation due from one person to another, payment of which the latter has a legal right to enforce."

See also the case of *Harris* v. *Larsen*, 24 Utah 139, 1414 (66 Pac. 782).

The learned Master to whom this cause was referred had before him the question whether or not the bonds held by Virginia through the agency of her Literary and Sinking Funds constituted any part of the debt existing on the first day of January, 1861.

After careful consideration he deduces the following conclusions:

> "I am satisfied that the great weight of reason and authority is against the contention of the plaintiff, and I therefore find that the Sinking Fund with interest, and the Literary Fund with interest., within the meaning of the decree, were not a part of the public debt of the Commonwealth of Virginia on the first day of January, 1861" (Rep., p. 28).

True, Virginia has excepted to this part of the report; but the reasons assigned by the Master for his conclusion are so cogent, and the authorities cited and relied on by him in his report so conclusive, that futher consideration of the question is not necessary. Therefore, we contend that Virginia cannot maintain this suit because of any claim by her on account of the certificates held by the Literary and Sinking Funds.

Virginia Is Not Entitled to Contribution from West Virginia.

The third ground stated in the bill upon which Virginia seeks relief alleges that Virginia has paid off or retired, of principal and

interest of said debt, a sum considerably in excess of $25,000,000, which she owns in her own right, and on account of which she avers that she has

> "a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor" (R., p. 13, Par. XVI of bill).

By reference to exhibit 3 of the bill (R., pp. 26, 38, and especially pp. 27-32), it will be seen that Virginia, by this act of her legislature, makes a full and detailed statement of the whole debt existing on January 1, 1861, stating it with reference to four distinct periods, to-wit: as of January 1, 1861, July 1, 1863; July 1, 1871; and July 1, 1882. Ascertaining by this statement the entire debt as of January 1, 1861, she by this act fixes as her just proportion thereof two-thirds of the entire debt. This statement purports to show the accrued interest and the various payments made by Virginia on account of said debt and its interest. It shows that she credits herself with every dollar paid by her on account of this debt, and deducts the aggregate of such payments from her assumed just proportion of two-thirds of said debt. By repeated declarations she avers this to be her just proportion, at the same time declaring the residue, one third, to be West Virginia's just proportion of said debt. It futher shows that no part of any sum paid by Virginia on said debt was ever paid on account of any part of the one-third of said debt alleged to be West Virginia's just proportion. In fact, as shown by the record Virginia has paid nothing on account of any part of said debt she claims West Virginia should pay.

The answer of West Virginia with reference to this feature of the bill is as follows:

> "For further answer to said bill respondent avers that if any sum has been paid by Virginia, even though amounting in the aggregate to $25,000,000, including principal and interest to date, calculated at the rate of 6 per centum per annum, it was paid by her on account of her admitted just and equitable proportion of said public debt created prior to January 1, 1861; and if she has any claim at all against West Virginia on account of said alleged payment, which is not admitted,

but is denied, it can only be for such amount as may be ascertained upon the basis and according to the principles embodied in section 9 of the ordinance of the Virginia convention, as hereinbefore stated. So this respondent denies that she is liable for any part of the obligations mentioned in paragraph XV and paragraph XVI of the plaintiff's bill, alleged to have been taken up and paid on account of said public debt, and denies that the said Commonwealth of Virginia has, in her own right, a 'just claim' against West Virginia for contribution on account thereof.

"Respondent, for further answer to said paragraph XVI of said bill, avers that all accounts, vouchers and other records relating to the said public debt of Virginia, showing the payment made thereon, if any, and all other facts connected therewith, are now and always have been in the exclusive possession and control of the plaintiff, and respondent has no knowledge or information concerning the alleged payment of $25,000,000, or any other sum, on account of said debt existing prior to January 1, 1861, and therefore denies that plaintiff has paid said sum of $25,000,000, or any part thereof, and demands strict proof." (R., p. 157.

Thus the answer positively denies any payment by Virginia on account of said debt which entitles her to contribution from West Virginia, thereby placing Virginia upon proof of the feature of her bill. The record is entirely barren of any proof in support of this allegation. Virginia could not properly take proof to bring this feature of the bill in issue, by reason of her failure to file a replication to the answer. In fact, the evidence, as shown by the contents of exhibit 3 of the bill, instead of supporting the bill in this regard proves the truth of this part of the answer.

The cardinal principle of contribution is founded in and controlled by the doctrine of equity and natural justice, whereby one of two common debtors who has paid more than his *just share* of the common debt shall be permitted to call upon the other to contribute such sum to the one who has paid it all as will equalize the burden between the two.

White v. *Banks*, 21 Fla. 705 (56 Am. Dec. 283).

Owen v. *McGhee*, 61 Ala. 440.
Golsen v. *Brand*, 75 Ill. 148.
Chaffee v. *Jones*, 36 Mass. 260.
Dec. 570).
Moore v. *Moore*, 11 N. C. 358 (15 Am. Dec. 523).
Armstrong County v. *Clarion County*, 66 Pa. St. 218 (5 Am. Rep. 368).
Screven v. *Joyner*, 1 Hill Eq. (S. C.) 252 (26 Am. Dec. 199).
Jobe v. *O'Brien*, 21 Tenn. 34.

To entitle a party to enforce contribution, the one seeking it must have discharged the entire common or joint liability.

Culmer v. *Wilson*, 13 Utah 129 (44 Pac. 833).

The Bill Multifarious.

The question whether the bill is multifarious is yet open for discussion and decision. This Court, in disposing of the demurrer in this case, says:

> "Consideration of the objections of multifariousness, misjoinder of parties and of causes of action, may properly be postponed until the final hearing of a bill filed by the Commonwealth of Virginia against the State of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original State of Virginia which was assumed by West Virginia at the time of its creation as a state."
>
> *Virginia* v. *West Virginia*, 206 U. S. 290 (51 L. Ed. 1068).

And in a subsequent opinion, in refering the cause to a master, the Court said:

> "The answers to these inquiries to be without prejudice to any question in the cause."
>
> *Virginia* v. *West Virginia*, 209 U. S. 514 (52 L. Ed. 914).

One of the grounds of the defendant's demurrer filed to the plaintiff's bill was that of multifariousness, consisting in uniting two separate and distinct demands in the same bill. One of the grounds for an accounting set out in the bill is the claim or demand which Virginia asserts *in her own right* under two acts passed by the legislature of Virginia, on the 3d of February, 1863, and the 4th of February, 1863. This part of the bill appears in paragraphs VIII. and IX. of the bill at pages 7 and 8 of the record. The first act, under which it is alleged that certain property was transferred by the Commonwealth of Virginia to the State of West Virginia, reads as follows.

> "That all property, real, personal and mixed, owned by, or appertaining to this state, and being within the boundaries of the proposed state of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state." (R., pp. 7, 8.)

By the fifth section it was enacted:

> "That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, provided that no such property, stocks and

> credits shall have been obtained since the reorganization of the state government." (R., p. 8.)

The bill then charges that the property transferred to the state of West Virginia under this act was received and enjoyed by that state, and consisted of a number of items, the value of which amounted in the aggregate to "several millions of dollars," the bank stocks alone having realized to the state about "six hundred thousand dollars." (R., p. 8.)

The second act is as follows:

> "1. That the sum of One Hundred and Fifty Thousand Dollars be, and is hereby oppropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have ben foremed, organized and admitted as one of the states of the United States.
>
> "2. That there shall be and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said state of West Virginia shall become one of the United States, it shall be the duty of the auditor of this state to make a statement of all the moneys that up to that time have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also all moneys that up to the same time have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this state." (R., pp. 8, 9.)

And the bill alleges that the sum of one hundred and fifty thousand dollars, "together with other sums belonging to the State of Virginia," were received and collected by the State of West Virginia, after its formation. It also alleges in said bill in clause four of paragraph XVIII., at page 14 of the record:

> "The State of West Virginia has, since her creation as a state, received from the State of Virginia real and

> personal property amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia." (R., p. 14.)

This feature of the bill is intended to embody the demand made by the Commonwealth of Virginia *in her own right*, separate and distinct from any claim or demand of the creditors of Virginia.

The other feature of the bill presents the claim of Virginia for an accounting with West Virginia for the latter's proportion of the public debt of Virginia prior to January 1, 1861.

It is alleged in the bill that on the 20th of August, 1861, the commonwealth of Virginia, in convention assembled, at the City of Wheeling, adopted an ordinance "to provide for the formation of a new State out of the portion of the territory of this state," and then quotes section 9 of the ordinance. (R., pp. 6, 7.)

It then alleges that West Virginia was admitted into the Union on the 20th of June, 1863, under a constitution which contained the following provisions:

> "5. No debt shall be contracted by this state except to meet casual deficits in the revenue, to redeem a previous liability to the state, to suppress insurrection, repel invasion, or defend the state in time of war."
>
> "7. The legislature may, at any time, direct a sale of the stocks owned by the state, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the state shall not become a stockholder in any bank."
>
> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." (R., p. 9.)

As is shown in the bill and elsewhere in this brief, Virginia settled with the holders of the old public debt by issuing new bonds for two-thirds of the amount thereof, which amount she declared to be her equitable proportion of such debt; and the creditors agreed thereto, and accepted the bonds. Virginia arbitrarily declared that the other one-third of the amount of her debt was the proportion for which West Virginia was liable, and for such one-third she issued certicates; and her creditors agreed thereto and accepted the certicates and released Virginia from all liability therefor. The bill then alleges:

> "By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your oratrix, should be surrendered and held by your oratrix, who either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her." (R., p. 12.)

And it is also further alleged in the bill that:

> "All of the bonds and obligations and other evidence of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent of the aggregate of these liabilities, have been taken up and are now actually held by your Oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto." (R., pp. 12, 13.)

The several acts of the legislature of Virginia under which the debt was adjusted and the contracts made under which the certificates issued by the state have been deposited with the commission *in trust* for the purpose of bringing this suit, are exhibited with and made part of the bill; and it is alleged that "this suit has been instituted at the request and direction of the said Commission, and in strict conform-

ity with the provisions of said Act of March 6, 1900." See paragraph XX. of said bill, at p. 15 of Record.

Virginia seeks to obtain a decree in her own right for an alleged indebtedness against West Virginia, "evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and Literary Fund of the State, as created under her laws amounting, the former to $1,462,993.00, and the latter to $1,543,669.05," in addition to the other claims made in her own right. See par. I. of bill, at p. 3 of Record.

Another feature of the bill is that which sets up a claim on the part of Virginia in her own right against West Virginia for the unfunded debt represented by the certificates held by the Literary and Sinking Funds, financial agents employed by Virginia as part of the policy of facilitating the administration of her state government.

A further demand made by Virginia in her own right is that for contribution, which is purely an equitable demand. This we have already discussed, and again call the court's attention to this feature of the case to present more clearly the proposition of multifariousness.

In *Haines* v. *Carpenter*, 1 Woods 262 (Fed. Cas. No. 5905), a demurrer was filed to the bill, one ground of which was multifariousness. In discussing this point the Court said:

> "By multifariousness is meant the improperly joining in one bill, distinct and independent matters and thereby confounding them: as, for example, by uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent matter against several defendants in the same bill. 1 Coop. Eq. Pl. 182; *Saxton* v. *Davis*, 18 Ves. 72. In this bill the controversy raised by the heirs at law of the testatrix, touching the validity of the bequest of the will, is united with the claim of the heirs of George W. Graves, the husband of testatrix, to the property disposed of by the will; they claiming that the property descended to them, and did not belong to the testatrix, and could not therefore pass by her will, and with the suit of Elias W. Dennis, a creditor of the succession, whereby he seeks to recover judgment against the estate, and

with a demand for an account to be rendered by the executor. I do not think the adjudged cases furnish a better illustration of a multifarious bill. A bill by a creditor sought an account against an executor and trustee of the testator's estate, and also to set aside a sale made by the executor and trustee to a purchaser who was made a party to the bill; it was held demurrable for multifariousness, for the purchaser had nothing to do with the general settlement of the accounts of the estate, and ought not to be involved in any litigation respecting it. *Salvage* v. *Hyde*, Jac. 151. So when devisees and legatees brought a bill against the trustees and executors under the will and against a mortgagee of part of the estates, alleging collusion between the trustees and executors and the mortgagee, and that they refused to compel the mortgagee to account for the rents and profits, or to redeem the mortgage, and the bill prayed for an account of the testator's effects, and that the mortgage might be redeemed; the bill was held on demurrer by the mortgagee to be multifarious, for the the mortgagee had nothing to do with the general settlement of the accounts of the estate. *Pearse* v. *Hewitt*, 7 Sim. 471. The case when unconnected parties are allowed to be joined in a suit are where there is one common interest among them all, centering in the point in issue in the cause. *Ward* v. *Duke of Northumberland*, 2 Anstr. 469."

In this case there was a uniting in the bill of different claims in different rights and the court held that this was the uniting of several matters of a distinct and independent nature against several defendants in the same bill. This decision was subsequently affirmed by the Supreme Court of the United States, in 91 U. S. 254.

In *Cassels* v. *Vernon*, 5 Mason 332 (Fed. Cas. No. 2503), the bill was objected to on the grounds that the plaintiff united in his bill a claim for money as administrator of Mrs. Cassels, and also a claim in his individual capacity. The court in discussing this objection said:

"The bill is certainly incorrect in this union of inconsistent claims; and if the objection had been taken upon demurrer, it would have overthrown the bill,

> unless an amendment was allowed. Courts of equity will not permit distinct and independent titles to be set up in the same bill, for that would be to allow multifariousness; much less will it permit inconsistent titles, or alternative titles, for that might tend to vary inconvenient consequences in point of evident. It is the duty of the party who seeks the assistance of the court to state his own title directly, without any alternatives, and not to put the court upon the duty to select, out of many, any one, which it may ultimately think, upon the evidence, can be supported. See *Salvage* v. *Hyde*, Jac. 151; *Edwards* v. *Edwards*, *Id.* 335; *Mole* v. *Smith*, I Jac. & W. 665. This difficulty, however, could have been gotten rid of by an amendment; and coming on after a full answer, and a hearing by consent of parties, the shortest course will be to dismiss the bill as to all claims except that made in the representative character."

In *Jones* v. *Foster*, 50 Miss. 47, the pertinence of the case and the points of law applicable here appear in the syllabus, which we here copy:

> "Where J. as guardian of certain minors sold real estate on time under an order of the probate court and took notes for the purchase money and F. becoming the purchaser; and afterwards, J sold other real estate, as administrator, and F. became the purchaser again, and executed notes for the purchase money, J. filed his bill to enforce his lien on the notes payable to him, both as guardian and as administrator; *held*, that the bill was bad for multifariousness.
>
> "The bill cannot join several distinct, unconnected subjects, against the same defendant or against several defendants.
>
> "A party cannot be pursued in the same suit in the double capacity of guardian and administrator, because the liabilities are separate and independent. *Wren* v. *Gayden*, 1 How. 365. The complainant, representing in his own person, separate and independent capacities and rights, and the defendant, F. is pursued in respect to separate and distinct estates, acquired in different rights. Where several subjects are united, it must

appear, that as to the subject matters and the relief, all the defendants are connected, though differently, with the entire subject in dispute."

In *Van Mater* v. *Sickler*, 9 N. J. Eq. 483, the court said at page 484:

"Second. The bill is multifarious. One object of the bill is to settle the personal estate of Isaac B. Van Mater. The complainant, as next of kin, calls on the defendant, who is the personal representative of the intestate, to answer in that capacity. But the complainant also, as an heir at law, calls upon the defendant to account for certain rents and profits which have come into his hands. It appears, from the bill, that the persons entitled to the rents, claim them as heirs at law through their mother, who was the wife of the intestate. There are others than the heirs at law entitled to the rent, who, as next of kin, are interested in the distribution of the estate which the defendant represents. It is manifest, therefore, that these accounts cannot be settled in the same suit."

In *May* v. *Smith*, Busbee's Eq. 196 (N. C.) (57 Am. Dec 594), the bill was filed by Peter May as the administrator with the will annexed of Reading Anderson, and part of the prayer is "that the defendants may account with the plaintiff for the assets of the deceased in their hands;" and another prayer is that the defendants may account "for the effects belonging to your orator deposited in their hands by the deceased." The court in holding that the bill could not be sustained said:

"Here are two distinct and independent causes of action united: one to call in and collect the assets of the deceased; and the other to follow the effects of the plaintiff, effects due to him individually and in his own right. At law, an executor or administrator can not join a count for a debt due to him individually with one in his representative capacity. Neither can they be joined in equity: Adams' Eq., 2d. Ed. 567; *Devoue* v. *Fanning*, 4 Johns. Ch. 199; *Bedsole* v. *Monroe*, 5 Ired. Eq. 315. And the reason assigned is, that different decrees and proceedings might be

> required; for convenience therefore, the joinder will not be permitted. For this cause the defendant might have demurred."

In *Bosley* v. *Phillips*, 3 Tenn. Ch., 649, a widow filed her bill to charge the defendant with a fund alleged to have been entrusted to her for delivery to the complainant by the husband, on his deathbed, as a gift *causa mortis;* and upon its being held by the supreme court, that the personal representative of the husband was a necessary party to the suit, the complainant took out letters of administration on the husband's estate, and asked leave to file an amended bill individually and as administratrix, praying relief either in her own right or in her representative capacity. The court refused to permit the amendment on the ground that to do so would be to allow the uniting in the same bill in chancery of distinct and hostile claims.

In *Sylvester* v. *Boyd*, 166 Mass. 445, the plaintiffs filed a bill against James O. Boyd and others. One of the prayers of the bill was that an account be taken of Boyd's doings as trustee in order that justice be done the plaintiffs. None of the other defendants had any interest in the money alleged to have been misappropriated by Boyd, and none of them had any interest in his doings generally and his account as trustee. The plaintiffs also charged the making of a conveyance of valuable real estate and personal property to Peckham, which they averred was in violation of the duty of Boyd as trustee. The court in sustaining the demurrer said:

> "It is clear that different causes of action are joined which cannot properly be tried together, and that the demurrers should be sustained on the ground that the bill is multifarious. *Cambridge Water Works* v. *Somerville Dyeing & Bleaching Co.*, 14 Gray 193; *Metcalf* v. *Cady*, 8 Allen 587; *Sanborn* v. *Dwinell*, 135 Mass. 236; *Keith* v. *Keith*, 143 Mass. 262."

In *Leslie* v. *Leslie*, 84 Fed. 70, a bill was filed seeking to enforce the performance of a trust in real property, and also to quiet complainants title to the same property. The court in holding the bill multifarious, said:

> "Under the state procedure, the complaint, as the pleading was there styled, would have been bad on

account of a misjoinder of causes of action. Code Civ. Proc. Cal. sec. 427; *Reynolds* v. *Lincoln*, 71 Cal. 138, 9 Pac. 176, 12 Pac. 449. The general rules of equity practice which obtain in this court conduce to the same result. The bill is multifarious, in that it joins two distinct and unconnected grounds of equitable relief. 1 Fost. Fed. Prac. secs. 71-74."

In *Inman* v. *New York Interurban Water Co.*, 131 Fed. 997, the bill was filed to settle the right of ownership of stock of a corporation, and asking relief depending upon the ownership of such stock. The court held the bill multifarious, saying:

> "To settle such right and to ask relief which depends upon the right are two independent, disconnected and unrelated questions, and the bill which attempts to join them in one suit is multifarious. *Shields* v. *Thomas*, 18 How. 253, 259 (15 L. Ed. 368); *Walker* v. *Powers*, 104 U. S. 245 (26 L. Ed. 729)."

In *Cumberland Valley Railroad Companys Appeal*, 62 Pa. St. 218, the ninth point of the syllabus reads:

> "Charging two sources of right by a plaintiff renders a bill multifarious."

Point eleven of the syllabus of the same case is:

> "A bill is multifarious by the joinder of distinct, independent and separate causes of complaint, requiring different defenses and different decrees."

In *Alexander* v. *Alexander*, 85 Va. 353, especially at page 363, the court in discussing the doctrine of multifariousness, quoting from Lord Cottenham in *Campbell* v. *Mackey*, 1 My. & Cr. 603, says:

> "It is utterly impossible to lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition. For the cases upon the subject are extremely various, and the court in deciding them seems to have considered what was convenient in the particular circumstances rather than to have attempted to lay down any absolute rule.' Yet, it will seldom, if ever, be found difficult to determine whether multifariousness exists in the particular case, if we will only bear in mind these cardinal rules

> upon the subject, namely, that a bill will always be deemed multifarious, where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite in his answer and defense, different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing."

As has been seen the certificates held by Virginia in her own right through the agency of the Literary and Sinking Funds, constituted no part of her debt, and are therefore eliminated from this suit. Therefore now the only claim asserted by Virginia with reference to the debt is by virtue of her alleged holding of the certificates or canceled bonds *in trust* as to that part of the debt which Virginia claims should be paid by West Virginia to the holders thereof. If anything can be recovered at all in this suit on account of said debt, it must be that part which Virginia alleges she holds in trust for the creditors. She does not pretend to claim anything in her own right by virtue of any part of this unfunded debt. She has no interest in it, but is simply suing in her capacity as trustee for the sole use and benefit of the private persons who are holders of these certificates. This raises a very different controversy from that involved as to the claim asserted by Virginia in her own right.

To settle the claim of Virginia asserted in her capacity as trustee, it is necessary to decide whether or not the ordinance is to control the question, or the provision inserted in the constitution of West Virginia adopted in 1862, or whether the ordinance and the constitution shall read *in pari materia*. In addition to this, the Court must determine whether or not the assumption by West Virginia of a just proportion of this debt was direct to the creditors themselves, so that the obligation inures to them only, or whether it was to Virginia, who might collect the same and distribute it to the creditors. Furthermore in deciding this question of the right of Virginia to sue as trustee many other matters must be considered and decided in order to reach

a proper conclusion as to what constitutes a just proportion of this debt to be borne by West Virginia.

The claim asserted by Virginia in her own right arises under the two acts of February 3 and 4, 1863, R., pp. 7, 8; App. to R., pp. 128, 131)—acts passed by Virginia long after the adoption of the ordinance and constitution by which an assumption of a just proportion of the public debt was made. The determination of the amount of the claim under these acts depends upon the extent of the property received by West Virginia and its market value at the time received. In this part of the bill Virginia as trustee, representing the creditors who hold the unfunded debt, has not a particle of interest. A very different character of evidence is required to establish it, and it is absolutely a distinct and separate claim from that with which Virginia is concerned as trustee.

It is true that courts of equity will so act in the administration of justice, if they may properly do so, as to avoid a multiplicity of suits; but in the language of Judge Woods in *Haynes* v. *Carpenter*, Fed. Cas. No. 5905, "Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits."

In presenting the question of multifariousness, we have done so upon the assumption, which we think we may justly indulge, that this Court will be governed by its rules of practice applicable to cases involving an exercise of its original jurisdiction. In cases of this character, this Court has in many instances determined that its proceedings should be framed according to those which had been adopted in the English courts in analogous cases, and that the rules of courts in chancery should govern in conducting a case to its final determination.

Rhode Island v. *Mass.*, 12 Pet. 57 (9 L. Ed. 1233).
Rhode Island v. *Mass.*, 13 Pet. 23 (10 L. Ed. 21).
Rhode Island v. *Mass.*, 14 Pet. 210 (10 L. Ed. 423).
Rhode Island v. *Mass.*, 15 Pet. 233 (10 L. Ed. 721).
Georgia v. *Grant*, 6 Wall. 241 (18 L. Ed. 848).
Cal. v. *Sou. Pac. Co.*, 157 U. S. 229-249 (39 L. Ed. 683).
Florida v. *Georgia*, 17 How. 478 (15 L. Ed. 181).

Grayson v. *Virginia*, 3 Dal. 320 (1 L. Ed. 619).
Penn v. *Wheeling, etc., Bridge Co.*, 12 How. 518 (14 L. Ed. 249).

Virginia asserts a claim for money against West Virginia; with reference to a part thereof, she asserts it as trustee; with reference to another part she asserts it in her own right. These claims are derived from different sources. It seems utterly irreconcilable, with the principles of justice, that she should be permitted to uphold this demand upon any other doctrines than those which obtain in a court of equity in cases of like character when asserted by the individual citizen. The application of any other principle would involve every controversy between states in the mazes of uncertainty and doubt; and all interstate communication involving transactions resulting in litigation, in the utmost confusion and capriciousness. Virginia cannot enter this Court and invoke any other doctrines than those which prevail in cases of common right as recognized by courts of equity. This Court will not embarrass itself by settling this controversy upon any other grounds or by invoking any other considerations. It is simply a contest between two litigants in a court of equity, whose conduct must conform to its exaction and be measured and determined by its principles.

We here call the Court's attention to that part of the argument made by the late Honorable John G. Carlisle, upon the demurrer to the bill which relates to its multifariousness, and for the convenience of the Court we here copy it:

Mr. Carlisle's Argument.

"We confidently submit that the outline of the bill heretofore given and the exhibits made part of it show conclusively that it is multifarious, and that the demurrer ought to be sustained on that ground, if any good cause of action is shown over which this court has jurisdiction.

"Virginia suing in her own right upon a separate and independent cause of action alleged to belong exclusively to her is not the same party as Virginia suing as trustee upon a different cause of action for the use and benefit of others who have no interest in her claim.

Moreover, the state could not sue in equity in her own right in one bill, upon two causes of action so entirely separate and distinct from each other as the claim for money and property alleged to have been delivered to the defendant under the acts of the legislature, and the claim founded upon the compact for the defendant's just proportion of the old public debt, even if she had paid that debt and was entitled to contribution. The foundations of the two causes of action are wholly different ,and they are of a wholly different nature and require different judgments or decrees. They involve different questions of law and fact, and a defense which would be good against one would be wholly inapplicable to the other."

" 'Multifariousness,' says Foster, 'consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways—by misjoinder of plaintiffs; by misjoinder of defendants, and by misjoinder of grounds for equitable relief held by and against the same parties.'

"Foster Fed. Prac., sec. 71; Calvert on Parties, Book I, ch. VII.

"Story says:

" 'By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them: as, for example, in uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several of a distinct and independent nature against several defendants in the same bill.'

"Story's Eq. Pl., sec. 271.

"Again, it is stated by Story (section 533):

" 'The result of the principles to be extracted from the cases on this subject seems to be that where there is a common liability and a common interest, a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit.'

"In Daniel's Cancery Practice, page 335, it is said:

> "'It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct record.'

"In *Brown* v. *Guarantee Trust Co.* (128 U. S. 404) this Court said:

> "'To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must occur: first, the ground of suit must be different; second, each ground must be sufficient as stated to sustain a bill. *Bedsole* v. *Monroe*, 5 Iredell Eq. 313; *Larkins* v. *Biddle*, 21 Ala. 252; *Nail* v. *Mobley*, 9 Ga. 278; *Robinson* v. *Cross*, 22 Conn. 171.'

"See also *Shields* v. *Thomas*, 59 U. S. 253 (18 How.).

"In *Walker* v. *Powers*, 104 U. S. 245, a case analogous to the present there was a misjoinder of plaintiffs and a misjoinder of causes of action. The opinion was delivered by Mr. Justice Miller, and the case of *Emals* v. *Emals*, 14 McArthur (N. J. Eq.) 114, and *Sawyer* v. *Noble*, 55 Me. 273, were cited and approved.

> "See also *Dial* v. *Reynolds*, 96 U. S. 340.
> "*Goggett, etc.*, v. *Florida R. R. Co.*, 99 U. S. 72.

"In *Salvidge* v. *Hyde*, Jac. 151 (5 Mad. 158), the vice-chancellor said:

> "'In order to determine whether a suit is multifarious, or, in other words, contains distinct matter, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the case, but whether the plaintiff's bill seeks relief in respect of matters which are, in their nature, separate and distinct.'

"In *Church* v. *Citizens' Street Railway Company*, 78 Fed. 529, the court said:

> "'Multifariousness consists in stating against the same party two or more independent causes of action in the same bill; or it may consist in stating one or

> more causes of action against a portion of the defendants and another cause of action against another portion of the defendants.'

"In that action the plaintiffs, who had purchased stock in a corporation, attempted to secure relief for themselves in their own right on one cause of action, and also secure relief against the same defendants for themselves and all other stockholders on another cause of action. The court held the bill multifarious.

> "*Zeigler* v. *Lake City Elevated R. R. Co.*, 76 Fed. 662.
> "*First National Bank* v. *Sioux City*, 75 Fed. 154.
> "*Price, etc.*, v. *Coleman*, 21 Fed. 557, opinion by J. Grey.
> "*Central Bank* v. *Fitzgerald et al.*, 94 Fed 16.
> "*Lewarne* v. *Mexican Internal Imp. Co.*, 38 Fed. 629.
> "*Aetna Insurance Co.* v. *Smith*, 73 Fed. 318.

In *Metropoplitan Trust Co.* v. *Columbus & Hocking Ry. Co.*, 93 Fed. 689, Judge Taft said:

> "'It is also true that a cause of action in favor of one in his own right is as distinct from a cause of action in favor of the same person as trustee as it is from that of a different person. And therefore that a defendant against whom a trustee attempted to unite in the same bill with a cause of action asserted by him as trustee a wholly distinct cause of action in his individual right might object on the ground of multifariousness. In the case before us the defendant railway company might therefore be heard to urge this defect in the bill, because it asks for an enforcement of two different liens held in different rights.'

"But the court held that the objection to the bill for multifariousness could not be taken by Zohorst and the Second National Bank, 'for,' said the court, 'as to that issue made by the complainant as trustee the right is the same." And again the court said: (p. 691):

> "'Upon that issue the complainant as trustee and in its own right has precisely the same interest. And the union of the two causes of action does not embarrass

> Zohorst or the bank in the slightest; for as to them, the cause of action raised but one narrow question.'

"The difference between that case and the case at bar is obvious at a glance. In the case at bar the bill alleges two entirely separate and distinct causes of action arising out of two unconnected transactions, in one of which it alleges an interest in the plaintiff state, and in the other an interest as trustee, and thus presents two distinct series of issues to be investigated and decided. And, besides, it is perfectly clear that the State of Virginia has not the same interest in the cause of action alleged in her own right and in the one asserted as trustee; nor can the State of West Virginia make the same defense to both.

"In *Hall* v. *Fisher*, 20 Barb. (N. Y.), the plaintiff sued in its own name and also as administrator, alleging that he and his intestate were during the lifetime of the latter tenants in common, the intestate owning three-fourths and the plaintiff owning one-fourth of a lot of land; and his claim was that the defendants should account to him individually and to him as administrator for their share of rent and profits. The court held that the cause of action should have been separately stated. It said:

> " 'How else can the defendant, if he has a defense of a different character as to each co-tenant, avail himself of such defense? He might in this case have one defense against the plaintiff as to his personal claim and another defense as to the interest whose rights he claims to represent as administrator. It cannot be regular for a plaintiff to include in the same action claims in his individual right and as administrator of another. It was never allowed at common law and is not sanctioned or allowed by any statute, not even the Code.'

"It is evident that the State of Virginia, having been by contract with her creditors discharged from all liabilty for the one-third of the old debt represented by the certificates, has no pecuniary interest whatever in the alleged claim against West Virginia for which she sues as trustee; and it will not be contended, we presume, that the owners of the unfunded one-third of the ante-war debt, whether it is represented by the canceled bonds held in trust by the

state or by the certificates, have any interest whatever in the claim of Virginia for money and property alleged to have been transferred to West Virginia under the acts of 1863. The unfunded one-third of the old bonds formely held by the Virginia Commissioners of the Sinking Fund and the Literary Fund is in the same position as that belonging to the other creditors. Virginia has solemnly and repeatedly declared that she was not liable for the one-third, has refused to pay it or any part of it, and has cancelled the bonds and issued to the Sinking Fund and Literary Fund the same kind of certificates issued to other creditors. The fact that the commissioners of the Sinking Fund and the Literary Fund are agencies of the state, would simply show that the state owed that part of the debt to herself. But the state has released herself from the obligation for one-third of the bonds originally held by these funds and has thereby withdrawn from them that proportion of the sum which she originally intended they shoud have. Unless, therefore, the two funds, as agencies of the state, now have a valid claim against West Virginia, their demands have been fully satisfied and extinguished. In any aspect, the claim is asserted by Virginia to recover from West Virginia for contribution on account of money which she (Virginia) has never paid.

"The claim against West Virginia under the compact cannot be divided into separate parts, so that Virginia can sue in her own right or for the Commissioners of the Sinking Fund and the Literary Fund for the part represented by the certificates held by those two funds, and also sue as trustee for another part held by different parties. The claim is an entirety and the amount is to be ascertained *in solido*, in the manner provided by the compact, and is to be paid in the manner provided by the compact. Whatever the amount might be, it was all payable to Virginia herself, and not to the bondholders, who never had a cause of action against West Virginia, even if the state had been suable; and they cannot create a cause of action for their own benefit, in the name of the state, by the process of having Virginia transfer the indebtedness, or a part of it, to them by the enactment of statutes or the issue of certificates or otherwise, and then transferring it back to the state as trustee. But whether the

state is, or could be, legally a trustee, or whether, if she be legally a trustee, she could maintain an action in this cause in that capacity, makes no difference in the decision of the question of multfariousness, for the bill and exhibits show that for nearly, if not all, of the unfunded one-third of the debt she actually sues as trustee in this action and not otherwise; and that is sufficient to sustain the contention that there is a misjoinder of parties and a misjoinder of causes of action. Even, therefore, if it should be held that the state is suing in her own right for a judgment and recovery of the amount represented by the certificates held by the two funds and as trustee for the holders of the other certificates, it would furnish another substantial reason for holding the bill to be multifarious. Besides, it would show that there is a conflict between the personal interest of the trustee and the interest of the *cestius que trust*, for whatever the trustee might receive in her own right in the distribution of the sum recovered would, to that extent, diminish the portions of the other beneficiaries; and it is a well established rule that plaintiffs whose interests are conflicting cannot unite in the same action—a rule which ought to be rigidly enforced, especially when one of the plaintiffs sues as trustee for the ohers, and consequently controls the entire proceeding.

"*Walker* v *Powers*, 104 U. S. 245."

The argument of Mr. Carlisle, from which the foregoing extract is taken, is filed in this Court in a printed brief, and will be found also in West Va. Compilation, Vol. I., pp. 157-219.

It will be seen, therefore from the positive statements of the bill, that the plaintiff has sought to unite and assert in this suit at least four different demands; three whereof are claimed to be due to her in her own right, in which her creditors have no interest whatever, and as to which there must necessarily be a separate and distinct defense made by the defendant—a claim for which a decree must be entered, if entered at all, in favor of the Commonwealth of Virginia *alone*. Two of these demands asserted in her own right arise from an entirely different source from the other demand asserted in her own right, one of which is based upon statutes passed long after the adoption of the ordinance of Virginia and the constitution of West Virginia,

and in which the measure of relief to which Virginia is entitled, if she is entitled to any, must be determined upon very different grounds and considerations from those which must determine the liability of West Virginia, if any exists, with reference to the claim by Virginia asserted in the bill as trustee for her creditors; and the other of which claims asserted by Virginia in her own right, being that for contribution, is based upon purely equitable grounds, not necessarily predicated upon the right of accounting, and is of course a subject in which the creditors have not a particle of interest.

The Plaintiff's Suit Barred by Laches.

It seems to us that under the circumstances of this case, a final and complete answer to the claim asserted by Virginia in her representative capacity as trustee, is her laches, or that of those whom she represents as a nominal plaintiff in this suit, especially as to that part of the bill which seeks an accounting as to the unfunded debt, and as to which Virginia herself disclaims all liability.

West Virginia was admitted into the Union on June 20, 1863, and any lability which existed against her with reference to any part of said debt existed and could have been asserted against her at that time. Instead of taking any steps looking to the settlement of West Virginia's just or equitable proportion of said debt, if any existed, Virginia in 1866, three years after West Virginia's admission into the Union, brought a suit in equity in this Court touching the boundries of the two states, which terminated March 6, 1871, when the case was decided in favor of West Virginia.

On March 30, 1871, just twenty-four days after the decision of the case just mentioned, Virginia passed an act arbitrarily making a division of the debt herself, without consulting West Virginia, on the basis of two-thirds to herself and one-third to West Virginia and without any authority issued the so-called West Virginia certificates for such one-third to the holders of the original debt, who, so far as the record in this case discloses, are still the owners of said certificates, Virginia canceling the bonds representing the old debt which had been surrendered to her by the holders thereof, and holding said bonds, as

alleged by her, in trust for the owners of said certificates. In 1879, with these certificates still outstanding, and so far as the record discloses still in the hands of the former owners of the bonds evidencing the original debt, Virginia passed another act relating to the whole debt, refunding the entire debt under the provisions of the act of 1879, and as to so much of the original debt as had not been funded under the act of March 30, 1871, Virginia under this act of 1879 issued certificates for the one-third of such unfunded debt, which certificates were to be taken and held as a full and absolute release of the State of Virginia from all liability on account of such certificates.

This act of 1879 futher provided that Virginia would

> *"negotiate, or aid the creditors holding all such certificates issued under this act or previous acts in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia."*

It will be seen from the foregoing that with this last act of 1879 and the other two acts passed subsequently, namely, the acts of 1882 and 1892, the provisions of which funded the entire debt, the holders of which so far as the record discloses were the holders of all the certificates, Virginia simply assumed to negotiate with West Virginia to secure the payment of these certificates by West Virginia to the holders thereof. The bill itself makes no claim for Virginia to any part of the unfunded debt represented by these certificates, held by third parties, but Virginia has simply constituted herself the holder thereof *in trust* for the creditors, the real claimants as to the part of the debt represented by these certificates, the owners and holders of said certificates being the owners and holders of the bonds evidencing the original debt of the State of Virginia created before and existing on January 1, 1861. An examination of the certificates issued under the acts of March 30, 1871, (R., pp. 83, 84), March 20, 1879 (R., p. 36), and February 14, 1882 (R., pp. 43-4), specifically designates and identifies the bond or bonds representing the former debt, and each certificate shows which of the original bonds was surrendered, the amount thereof assumed by Virginia, and the balance thereof not assumed by Virginia, but for the payment of which the holder of the

original bond, being the holder of the certificate, was referred by Virginia to West Virginia. Therefore, every certificate issued by Virginia was surrendered to the owner of the bond, and when Virginia funded any bond upon the two-thirds basis assumed by her she delivered to the holder of the old bond in lieu thereof a new bond issued by Virginia for two thirds of the original debt and a certificate for the other one-third; or, in the language of the certificate, the balance of such bond, designating the amount, "to be accounted for by West Virginia." So at the time of the delivery of these certificates and new bonds under these various acts, the holder of the original debt was then also the holder of the new bond for two-thirds of the original debt and was at the same time the holder of the certificate representing the other one-third. Such owner, so far as the record shows, is still the holder of the certificates, and was such holder at the time the acts of 1871, 1879, 1882 and 1892 were enacted and put into operation.

The record fails to disclose any change of ownership of these certificates. If such change of ownership did take place by sale or transfer to other parties, there is no allegation to that effect, nor is there any proof showing such sale or transfer.

We say that the owners and holders of the original bonds evidencing the debt of Virginia created prior to and existing on January 1, 1861, are still the owners and holders of the new bonds issued by Virginia and the certificates for the residue, upon the well recognized principle of law that a fact once shown to exist is presumed to continue to exist until the contrary is shown.

1 Greenl. Ev., §41.
McKenzie v. *Stevenson*, 19 Ala. 691.

In *St. Louis A. & T. H. R. Co.* v. *Eggman*, 161 Ill. 155 (43 N. E. 620), objection was made to the introduction in evidence of an ordinance, on the ground that it was not shown to be in force at the time of the accident in question. The court, overruling this objection, says:

> "It having been shown that the ordinances were passed prior to the day on which deceased was killed, the presumption is that they were still in force on that date; for when a fact or state of things is once shown

> to exist the presumption is that the fact or state of things continues to exist as before until the contrary is shown, or until a different presumption is raised."

The authorities in support of this proposition are numerous, and there are none to the contrary that we have been able to discover.

Could the holders and owners of these certificates retain them for a period of thirty-five years, and then arrange with Virginia to bring suit for their payment in her name against West Virginia and obtain a decree, even if such a suit was authorized under the constitution of the United States? Certainly not.

Laches is peculiarly a doctrine of equity. Mr. Pomeroy, in the third edition of his great work, Vol. 1, § 418, discussing the maxim, "Equity aids the vigilant, not those who slumber on their rights," says:

> "The principle embodied in this maxim, the original form of which is, *Vigilantibus non dormientibus aequitas subvenit*, operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs, than as being the source of any particular and distinctive doctrines of the jurisprudence. Indeed in some of its applications it may properly be regarded as a special form of the yet more general principle, He who seeks equity must do equity. The principle thus used as a practical rule controlling and restricting the award of reliefs is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory period of limitation. It is invoked for this purpose in suits for injunction, suits to obtain remedy against fraud, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee."

Discussing the *rationale* of the doctrine of laches, a recent work declares:

> "The rule that the enforcement of a right may be barred by laches is an application of the maxim *vigi-*

lantibus, non dormientibus, subvenit leges. Thus it has been declared with general approval that only conscience, good faith and reasonable diligence can call a court of equity into activity, that stale demands will not be aided where the party has slept upon his rights and acquiesced for a great length of time. The doctrine is based on grounds of public policy and its aim is the discouragement, for the peace and repose of society, of stale and antiquated demands."

18 Am. & Eng. Enc. L. 97, citing the authorities both English and American.

Another recent and reputable work says:

"Long delay in asserting a demand may defeat the remedy by raising a presumption of payment or satisfaction. Delay is always a suspicious circumstance, and if prolonged may create a presumption against validity of a right which might otherwise be deemed established."

16 Cyc. 160.

In *Piatt* v. *Vattier*, 9 Pet. (34 U. S.) 405, Mr. Justice Story, in refusing relief in that case, and especially in the opinion at page 416, says:

"And we are of opinion that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit independently of the statute. There has been a clear adverse possession of thirty years without the acknowledgment of any equity or trust estate in Bartle; and no circumstances are stated in the bill or shown in the evidence which overcome the decisive influence of such an averse possession. The established doctrine—or, as Lord Redesdale phrased it, in *Hovenden* v. *Annesley*, 2 Sch. & Lef. 637, 638, 'the law of courts of equity'—from its being a rule adopted by those courts independently of any positive legislative limitations, is that it will not entertain stale demands. Lord Camden, in *Smith* v. *Clay*, 3 Brown's Ch. Rep. 640, note, stated it in a very pointed manner. 'A court of equity,' said he 'which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his

> rights or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation of suit in this court.' The same doctrine has been repeatedly recognized in the British courts, as will abundantly appear from the cases already cited, as well as from the great case of *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 1. It has also repeatedly received the sanction of the American courts, and was largely discussed in *Kane* v. *Bloodgood*, 7 Johns. Ch. Rep. 93, and *Decouche* v. *Saratiere*, 3 Johns. Ch. Rep. 190. And it has been acted on in the fullest manner by this court, especially in the cases of *Prevost* v. *Gratz*, 6 Wheat. 481 (5 Cond. Rep. 142); *Hughes* v. *Edwards*, 9 Wheat. 489 (5 Cond. 648); *Willison* v. *Matthews*, 3 Peters 44, and *Miller* v. *M'Intire*, 6 Peters 61, 66."

In *Goddin* v. *Kimmel*, 99 U. S. 201, which was a suit brought by the creditors of a decedent for the recovery of real estate and personal property, and seeking to have the same subjected to the payment of the debts of the decedent, the syllabus of the case is as follows:

> "In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law; in many cases they act upon the analogy of the limitations at law: but even where there is no such statute governing the case, a defense founded upon the lapse of time and the staleness of the claim is available in equity where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."

The court in its opinion in this case says:

> "There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim where no statute of limitations governs the case. Such courts in such cases often act upon their own inherent doctrine of discouraging for the peace of society antiquated demands by refusing to interfere where there has been gross laches in prosecuting the claim, or long

acquiscence in the assertion of adverse rights. *Badger* v. *Badger*, 2 Cliff, 154; *Roberts* v. *Tanstall*, 4 Hare 269; *Stearns v. Page*, 7 How. 819.'

The doctrine here announced is supported by an unbroken line of authorities throughout the various state courts of the Union, among which appear those of Virginia and West Virginia.

In *Hatcher* v. *Hall*, 77 Va. 573, we find in point 1 of the syllabus the following as a statement of the law regarding laches:

> "It is an inherent doctrine of courts of equity to refuse relief where there has been gross laches in prosecuting rights or long and unreasonable acquiescence in the assertion of adverse rights. This doctrine is founded on considerations of natural justice and public policy, and is always firmly enforced, especially where the immediate parties to the transaction are dead."

It will be observed that the doctrine here announced has its foundation in want of diligence and the policy of discouraging by courts of equity the assertion of stale demands. It is especially applicable, of course, where all the parties to the transcation are dead. The reason of this is the difficulty of establishing a claim to the satisfaction of the court in the absence of satisfactory sources as to evidence. The doctrine is enforceed in other cases where the parties may all be living. Here, the parties claiming the right never sought the aid of Virginia to bring this suit against West Virginia in her own name until after the lapse of about thirty-five years. Neither did the creditors apply direct to West Virginia for payment. Those persons who were familiar with the territory of the two states at the time of the formation of the new state, who knew its value as well as the value of the personal estate in both states in 1863 and in 1871, also those who knew the extent of the loss suffered by both states as an incident of the civil war, the officers of the goverment who were throughly cognizant of the situation in this regard as to both states, are all dead; in view of which the obtainment of evidence necessary to fix an equitable basis upon which to determine West Virginia's liability, if any existed, is no longer accessible. Furthermore, the witnesses necessary to fix the value or values of the property alleged to have been transferred by Virginia to West Virginia are likewise dead, and the Court cannot obtain any

reliable or satisfactory evidence as to what property was turned over by Virginia to West Virginia, to recover which this suit is in part brought; nor can the evidence as to its value be obtained.

The laches of these creditors suing through Virginia, as well as that imputable to Virginia herself, is absolutely inexcusable. No legal excuse for such laches is offered in the bill or in any manner attempted to be shown. It seems to us that this delay to assert these claims in the name of Virginia, both those demanded in her representative capacity and those in her own right, has been so long continued and is so inexcusably gross as to afford evidence of the injustice of the claim, if not of its actual abandonment on the part of the State of Virginia as well as the creditors.

It is well settled that delay in the assertion of a right, when it does not operate as a statutory bar, may operate in equity as evidence of assent, acquiescence or waiver unless satisfactorily explained.

Kelly v. *McQuinn*, 42 W. Va. 774
Pusey v. Gardner, 21 W. Va. 469.
Bryant v. *Glover*, 42 W. Va. 10.
Nelson v. *Carrington*, 4 Munf. 332.
Coles v. *Ballard*, 78 Va. 139-147.
Eubank v. *Barnes*, 93 Va. 153.

In *Jones* v. *Perkins*, 76 Fed. 82, the second point of the sullabus is as follows:

> "To support the defense of laches it need not be shown that defendant has been injured by the delay."

In the course of the opinion we find the following:

> "It is contended on behalf of the complainant in the case at bar that it must appear to the court, where laches is urged as a ground for defense, that detriment has come to defendant from the delay; that his position has been changed to his injury, or that he has been deprived of evidence which an earlier prosecution of the suit would have enabled him to obtain. This position is not tenable. There are cases where a longer delay than is here complained of has been excused by circumstances, where a court could clearly say that it caused no prejudice to the defendant, but these are exceptions.

> The doctrine of laches as a defense presumes that the lapse of time is constantly destroying the evidence of rights, and that the death of witnesses and the loss of documentary evidence is its ordinary consequence."

From the case of *Speidell* v. *Henrici*, 15 Fed. 753, the decree in which was affirmed in 100 U. S. 377, we take the following:

> "A suitor in equity is required to be 'prompt, eager, and ready' in the pursuit of his rights. Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged. 'Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive and does nothing. Laches and negligence are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court.' *Smith* v. *Clay*, Amb. 645, quoted with approval in *Brown* v. *County of B. Vista*, 95 U. S. 160.
>
> "So, also, says Mr. Justice Swayne in the case last referred to: 'The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded.'
>
> "And again: Courts of equity refuse to interfere after a considerable lapse of time, for considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *vigilantibus et non dormientibus jura subserviunt.*' 1 Story Eq. Jur., § 529."

May the doctrine of laches be imputed to a state? We find in the case of *Atty Gen.* v. *Central R. Co.*, 68 N. J. Eq. 198 (59 Atl. 348),

in the opinion at page 360 of the reporter, the Court applying the doctrine of laches to the demand of a state, using this language:

> "The equitable rules relating to the effect of laches and acquiescence are enforced against the state when it is a suitor for equitable relief, as well as against private suitors. *Atty. Gen.* v. *Del. & B. B. R. Co.*, 27 N. J. Eq. 1, and cases cited at page 27."

So we find in *In re Hepburn*, 3 Bland (Md.) 95, the Court holding that laches is available as a defense against the state.

There are a number of cases decided by this court holding that laches is not imputable to the goverment: *Armstrong* v. *Morrill*, 14 Wall. 120; *Lindsey* v. *Miller*, 6 Pet. 666; *U. S.* v. *Dalles Military Road Co.*, 140 U. S. 599; *U. S.* v. *Thompson*, 98 U. S. 486; *Redfoed* v. *Parts*, 132 U. S. 239. Yet this court holds that the government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there.

> *Cook* v. *U. S.*, 91 U. S. 389. See also *French Republic* v. *Springs Co.*, 191 U. S. 427, 438.

So, too, when the government is only a formal party, and the suit is brought in its name to enforce the rights of individuals, as in the case at bar and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case and the litigation was carried on in the name, as in fact, for the benefit of private parties.

> *U. S.* v. *Navigation Co.*, 142 U. S. 510, 538.
> *U. S.* v. *Beebe*, 127 U. S. 338.
> *Moran* v. *Horsky*, 178 U. S. 205, 214.
> *U. S.* v. *Am. Bell Telephone Co.*, 167 U. S. 224, 265.
> *McNutt* v. *Bland*, 2 How, 9.

So where the government is suing for the use and benefit of individuals or for the prosecution of private and proprietary instead of public or governmental rights, it is clear that it is not entitled to the exemption of *nullum tempus* and that the ordinary rule of laches applies in full force.

French Republic v. *Springs Co.*, 191 U. S. 427, 438.
Maryland v. Baldwin, 112 U. S. 490.
Curtner v. *U. S.*, 149 U. S. 662.
U. S. v. *Beebe*, 127 U. S. 338.
U. S. v. Navigation Co., 142 U. S. 510, 538.

So it is held in *Miller* v. *State, use, etc.*, 38 Ala. 600, that while the statute of limitations does not apply to actions by the state, still it does extend to a suit brought in the name of the state for the use of a particular township to recover lands which constitute a part of a certain section.

In view of the well settled doctrine of courts of equity, and which this court always applies in proper cases, that stale demands are not countenanced and that gross neglect or inexcusable delay in bringing suit to enforce an equitable claim will constitute a bar even to an otherwise meritorious demand, there can be no doubt that Virginia can not maintain this suit so far as it seeks to establish a claim against West Virginia with reference to the unfunded debt held by third parties. This ground of defense is based upon the fact that Virginia is not asserting this claim in her own right but only in her representative capacity as trustee, and that if a decree as to this part of the case can be obtained no part of it can enure to her benefit. Indeed, she asserts this in her bill, alleging that whatever is obtained in this suit is payable to the holders of these certificates. This is none other than an individual claim, and not a case involving the rights of Virginia, either pecuniary or otherwise. In fact, she declined to bring any suit except at the special request of the owners and holders of these certificates. There is no reason or excuse for this delay of thirty-five years on the part of the owners of these certificates in exerting an effort to have West Virginia pay it. It does not answer the charge of laches to say that the holders of these certificates could maintain no suit. They could not maintain a suit against Virginia. They could have been diligent in asking West Virginia to pay, and in case of refusal, in arranging to have Virginia bring this suit long before it was brought with reference to this unfunded debt, the payment of which is to enure to them. But we deny the right of Virginia to sue for the cheditors. They offer no excuse for this delay.

If West Virginia was liable for the payment of any part of said public debt, she has been liable since her admission into the Union, June 20, 1863, forty-three years before the bringing of this suit.

Why this long delay? The only just inference is that they did not regard these claims as constituting a valid demand against West Virginia. Indeed, they evidently knew that they could not be asserted against West Virginia; and the institution of this suit on the account of the holders of these certificates was a mere speculative matter in which Virginia would have no part except at their request and with the understanding that she should incur no costs or expenses in such suit. This long delay certainly affords conclusive evidence against the justice of the demand made by these holders through and in the name of Virginia as plaintiff against this defendant, and was evidently undertaken for the purpose, if possible, of constraining West Virginia by means of this suit to concede their inequitable demand and settle with them for these certificates, notwithstanding their lack of inherent justice and right, and in this way possibly create a demand for these certificates of a fictieious character, and speculate upon them in the markets.

No other construction can be placed upon the long delay of the holders of these certificates in taking steps to bring suit. Virginia could have brought this suit long before she did if she had a right to maintain it, with the same show of right as she could do in 1906.

We therefore confidently insist that, if there were no other ground of defense in this case as to the certificates issued in 1871, that of the laches of the holders thereof is an ample and complete defense.

PART II.

On Exceptions of the Plaintiff and the Defendant to the Report of the Special Master.

In this part of the brief for West Virginia we will consider the facts of the case as shown by the record in connection with the exceptions filed by the plaintiff and the defendant to the report of Hon. Charles E. Littlefield, the Special Master. Questions of law will be argued incidently only. For conveniencee, we will take up the several paragraphs of the decree of reference in the order they are set out in the report of the Special Master, who will hereafter be referred to as the "Master."

PARAGRAPH I. OF THE DECREE.

> "1. *The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861. Stating specially how and in what form the same was evidenced, by what authority of law and for what purpose the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.*"

No exceptions were filed to the report of the Master under this paragraph by West Virginia. Virginia did file an exception to the finding of the Master as follows:

> "For errors of law apparent in the record, complainant respectfully excepts to the statements contained in the Master's report in regard to the Literary Fund, save and except so far as they show the creation, existence, and amount of such fund, and especially does complainant except to the Master's conclusions that the Board of of the Literary Fund (a corporation) had no right to sue and be sued and that the fund was the unconditional property of the State and subject to its control and

ownership, while the said fund was under the law held and controlled by the board and the State in trust for educational purposes alone. See Master's report, pp. 6 to 30, and acts in Appendix to Record, pp. 205-208."

There is no dispute of fact between the parties as to the report of the Master under this paragraph. The only dispute refers to a question of law. Virginia contended originally that the three items known as the Sinking Fund of $1,369,243.92, the Board of Public Works Fund of $150,895.00 and the Literary Fund of $1,116,843.35 were parts of the public debt of the Commonwealth of Virginia on the first day of January, 1861. The Master found against her contentions. Virginia excepted only to the report of the Master in his conclusion as to the literary fund, thereby conceding that the other two funds mentioned were no part of the public debt of Virginia. The Master argues the question at some length in his report, and decided it as he does therein on the ground that Virginia on the first day of January, 1861, was the absolute owner of the bonds in the Literary Fund, as well as those in the Sinking Fund, and that they were not outstanding in the hands of any one who could assert them against the state. In other words, the state could not owe a debt evidenced by said bonds and at the same time be the absolute owner of such bonds with power to do with them as she pleased. It seems to be clearly shown that these funds were simply methods of bookkeeping for the convenience of the state in the administration of her fiscal affairs. It was immaterial whether these funds were fixed and defined by the constitution or by statute. The fact remains that it was absolutely within the power of the state at any time she so willed to destroy these evidences of debt and declare the accounts closed. The funds that Virginia paid for these evidences of debt had been raised by some form of taxation from the people and property of the united state, and in law there can be no reasonable dispute on the question whether or not these bonds had been legally paid and canceled. The officers of the Board of the Literary Fund were by the law the chief executive officers of Virginia. No individuals had any rights or powers in connection therewith. We do not deem it improper to say at this point that the counsel representing Virginia in the argument before the

Master did not really deny the position here taken, and we think that the Master could truthfully have said that his conclusions were conceded by the Attorney General then in office and representing the State of Virginia.

PARAGRAPH II. OF DECREE.

> *2. The extent and assessed valuation of the territory of Virginia and of West Virginia, June 20, 1863, and the population thereof, with and without slaves, separately."*

There is no dispute as to any question of fact under this paragraph and no exceptions to the findings of the Master by either the plaintiff or the defendant.

We respectfully call the Court's attention to the alternative findings under this paragraph, which were made at the request of the defendant. (Masters Rep. pp. 37-8).

PARAGRAPH III. OF DECREE.

> *"3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."*

The plaintiff and the defendant have each filed numerous exceptions to the findings of the Master under this paragraph. For convenience, we will first take up the exceptions filed by West Virginia to the conclusions of the Master under this paragraph, and then we will discuss the exceptions of Virginia thereto.

Exceptions of West Virginia.

Kanawha River Turnpike and Kanawha River Improvements.

Items 10, 11, 12, 13 and 14 (Record, p. 373) were for the following sums:

Kanawha Turnpike	$152,130.54
Kanawha Turnpike	2,593.92
Kanawha Turnpike	7,189.65
Kanawha Turnpike	80,955.28
Kanawha River Improvements	59,572.36
Total	$302,902.15

These were found to be expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia. There is no real dispute as to the facts in relation to this sum, as understood by us.

There is one matter of fact in relation to the alternative finding of the Master, found at the bottom of page 70 of his report, to which we will refer later.

We differ from the Master and except to his findings on the ground that the Commonwealth of Virginia, after expending these sums of money for the purposes set out on the Kanawha River Improvements and the construction of the Kanawha Turnpike, did by her act of March 16, 1832 (App. p. 86), *sell and transfer to a private corporation* the turnpike and the river on which, and for the improvement of which, this money was expended; and the turnpike and the rived so far as travel and navigation thereon were concerned, became the private property of this private corporation by reason of such sale and transfer by the Commonwealth, and for a period of more than twenty-five years prior to the first day of January, 1861, the only interest that the State of Virginia had in the subject matter of such expenditure was that of a stockholder of this private corporation. We do not agree with the argument of the Master and of Virginia that it was immaterial what the commonwealth did before the first day of January, 1861, with the subject created by such expenditure. The principle would be the same if the commonwealth had sold the turnpike for a money consideration and had made a large profit thereon. She could not have more effectually dispossessed herself of the power and control thereof than she did when she sold this turnpike and these river improvements for ten thousand shares of stock in the private corporation, to which she transferred this property. The title to such

turnpike and to such improvements still remained in the James River and Kanawha Company, *a private corporation.*

That this corporation was a private one is conclusively determined by the decision of the Supreme Court of Virginia in the case of *James River and Kanawha Company* v. *Early,* 13 Gratt. 541. This decision was rendered in 1856, and without any thought or imaginary possibility of any future difficulty in relation to this matter. The Supreme Court of Virginia specifically held in that case that the fact, that the state owned a large interest in the stock of the Company, did not in the slightest degree release it from liability for neglect of its officers, and that the rights of the state therein were no more than those of any other stockholder.

Conceding for the purpose of this argument only, that the original expenditure made by the commonwealth through the agency of the James River Company, was an expenditure within the meaning of the decree and the ordinance, we submit that this action of Virginia in selling this turnpike and these improvements should eliminate this whole item from this account. Can it be presumed for a moment that if the commonwealth, after paying $10,000 for the land on which the Asylum at Weston was afterwards built, had decided not to build thereon and had sold this land for either money or stock in some private corporation or for other thing of value, she then could have charged under this head to West Virginia as an expenditure the amount she had originally paid for such piece of land? Let us take another example: If the commonwealth had sold, prior to the first day of January, 1861, the Covington and Ohio Railroad, so far as it had been completed, for money or other thing of value, could the sum expended thereon by Virginia have then been included in this account as a state expenditure within the present limits of West Virginia? Is it not an insult to the intelligence of the able men, including Senator Carlisle, Senator Vanwinkle, Senator Boreman, and the many other men of ability who composed the convention which passed the Ordinance of August 20, 1861, to think that they intended to include under the word "state expenditures" property which had been built, constructed or purchased by the state, and then sold before the date of the separation to an individual or private company?

In the original account filed by Virginia before the Master in this cause is the following item:

"Interest on bonds of the City of Wheeling, $15,115.64."

This item was set up by Virginia and seriously claimed as an expenditure within the limits of the State of West Virginia during the period contemplated by the ordinance, because it had been paid by the commonwealth as interest on some bonds guaranteed by her, which bonds were made by the City of Wheeling, a municipal corporation. No doubt Virginia would be now claiming this expenditures as such if the defendant had not discovered and shown to the satisfaction of the counsel of Virginia, that in the year 1866 this sum with interest had been fully and completely repaid to the State of Virginia by the City of Wheeling. Then the counsel of Virginia withdrew this item from the account. While West Virginia never admitted that a loan to a municipal corporation was a state expendit within the meaning of the decree or oridinance; but if Virginia desires to be consistent with her claim with reference to the Kanawha River Turnpike and Kanawha River Improvements, she should also have insisted that this amount originally loaned by the commonwealth to the city of Wheeling should be included in this account.

The James River and Kanawha Company kept the control of the Kanawha Tunrpike and of the improvements on the river after the first of January, 1861, and also after the separation of the states. All that West Virginia obtained therein was by reason of the stock ownership of Virginia in this private corporation. The ownership of the property of the James River and Kanawha Company remained in the corporation, and the ownership never was invested in West Virginia at all.

By reason of the fact that the Chesapeake and Ohio railway paralleled this turnpike, all its value to the company was taken away. This happened after the Civil War, however.

Record, page 820-A, shows defendant's Exhibit "G-1." On page 11 of that exhibit it will be seen that there was expended by the State of Virginia the sum of $1,216,666.30 on the James River Canal, Blue Ridge Canal, and Kanawha Road and River, which construction work

and improvements were turned over to the James River and Kanawha Company, a private corporation, under the act of March 16, 1832, in return for 10,000 shares of stock of the par value of $100 each in said James River and Kanawha Company. It will be further seen that the State of Virginia thereafter subscribed for 20,000 shares of stock in the same company and paid the sum of $2,000,000 in money therefor. It shows the good faith of Virginia in selling these properties to the private company. It shows that she received what she believed to be the real value of these improvements in 1832. She certainly regarded this stock as a good *investment,* or she would not have paid $2,000,000 in money for 20,000 shares more of it.

In addition to this purchase of 20,000 shares of stock in this company, for which the money was paid, the same record shows that the state loaned to this company large sums of money. The state also guaranteed large amounts of the bonds of this company, which bonds the state afterwards assumed as an original proposition by the act of March 23, 1860, and they are now included in the total of the debt set up under the first paragraph of the decree in this cause. In return for assuming these bonds as an original obligation and for the loans made by the state directly to the company, she received 72,000 shares of the stock of the company.

The Master speaks (Rep., p. 42), of the construction of the provision of the West Virginia constitution and the Wheeling ordinance relating to West Virginia's assumption of a just proportion of the debt, so as to produce an equitable result. If there is any place requiring such application anywhere in this case, it surely is here. Can it be called equitable in any sense of the word to charge against West Virginia as a "state expenditure" money which the old state spent in building a turnpike, which turnpike the old state, *before the separation of the two states,* sells and receives the proceeds? It seems rather shocking to one's equitable sense to propose such a thing. It also seems rather shocking for a plaintiff to ask a court of equity, a court of conscience, to grant such relief. If this suit had been brought solely for the purpose of recovering that one series of items, would not a court of equity have dismissed the suit upon demurrer? Assuredly it would.

On page 70 of this report, under the head "Alternative Finding," the Masters says: "There is nothing in the record to show whether this transfer was actually made." He meant whether the property of the James River Company, including this Kanawha Turnpike and these improvements of the Kanawha River, were ever actually transferred to the James River and Kanawha Company. The case set out above, of *James River and Kanawha Company v. Early*, 13 Gratt. 541, and the case of *Higginbotham's Executor* v. *Commonwealth*, 25 Gratt. 627 both quoted in the Master's report, the reports of the Board of Public Works, the reports of the James River Company, numerous acts of the legislature of Virginia, which are included in the appendix, pages 86 to 112, show conclusively and prove absoutely that the transfer was duly made under the provisions of the act of March 16, 1832. Moreover the Exhibit "G-1" (R., p. 820-A), agreed to by the accountants of the plaintiff and defendant, shows conclusively that the transfer was made by the State of Virginia of all the properties above mentioned to the James River and Kanawha Company according to the provisions of the said act of March 16, 1832.

Brandonville, Kingwood and Evansville Road $10,595.73; Clarksburg & Buchanan Turnpike $19,259,36; and Kingwood and West Union Turnpike $18,140.61.

These three items, which are numbered 25, 28 and 35 in the report and record, were found to be state expenditures by the Master, to which finding West Virginia excepts. It is a question of law, whether or not they shall be charged to West Virginia. It is agreed that each one of these was a turnpike company duly chartered by the commonwealth, that the commonwealth was a stockholder in each one, and that each was a private corporation and managed by a board of directors; and while in this condition the commonwealth generously appropriated the above sums, which were expended upon the property of these private corporations. The state had no more title and no more rights to the property of the corporation after such expenditure than it had before. Under the acts appropriating the money it would appear that these sums were gifts to these corporations. If these gifts had been made to individuals and they then had expended the money

within the limits of West Virginia, would it be claimed for a moment that such gifts came within the purview of the decree ordinance? *Can any gift to a private individual or corporation be a "state expenditure"?* We think not. If Virginia had given this money to a corporation resident of Maryland, or of Virginia itself, and such corporation had chosen to expend the same on a public utility project, such as a turnpike, railroad or canal within what are now the limits of West Virginia, would it have been a "state expenditure" in the meaning of this ordinance? Clearly not.

In the first account filed by Virginia before the Master (R., p. 373, Item 17) she claimed the sum of $7,882.92, which she had paid for stock in a Maryland corporation. This Maryland corporation had built a piece of road in the southwest corner of Garrett county, Maryland, which connected with some Virginia roads at each end. These Virginia roads were built and owned by Virginia. On reflection, at the hearing before the Master, counsel of Virginia asked leave to withdraw this item, and did so. Was it not as reasonable to charge this sum to West Virginia as the one under consideration?

It must not be forgotten that not a single one of these three turnpikes, built by private corporations, were open to free travel by the public, as turnpikes now are almost universally within the United States. Every such corporation in the state then charged and collected tools on each and every one of these roads, as well as tolls on each and every one of the navigable rivers; and some of the road companies paid good dividends on the investment of the moneys therein, as shown by the record in this cause. Can a gift by the state, however generous might have been the impulse of the giver, which simply increased the toll collecting value of the property of a private corporation, and which did not increase the state's power or rights or financial interest therein, be called a "state expenditure," any more than the purchase of stock in that private corporation by the state could be called a state expenditure? Certainly not; but this last question will be elsewhere discussed under the exceptions of Virginia to this same paragraph.

Item 55, Surveys—$60,873.19.

This item is discussed under Paragraph III., page 75, and Paragraph IV., page 134, of the Master's report. It was agreed by the accountants that under the head of "Surveys" there was spent an aggregate of $250,206.56. It was claimed by the defendant that neither this sum of money nor any part thereof could be both a state expenditure under Paragraph III. and an item of the ordinary expenses of the state government under Paragraph IV. *The Master has seen fit to hold that it can be both;* that is to say, that such part thereof as can be shown to have been expended in the territory now West Virginia should be charged as a state expenditure, and such part as could not be shown to have been expended at any particular place should be charged as an ordinary expense of the state government. It is admitted that the total sum was expended as a part of the expenses of a state officer performing certain duties prescribed by a state statute. The Master said: "It is a narrow and close question." (Report, p. 76). It does not seem to us to be either. When we take into consideration the fact that in every other instance all salaries of state officers, without exception, such as judges and executive officers, and the cost of the work done by them and the expenses incurred by them in the performance of their duties, are all charged in this report as ordinary expenses of the state government, we can see no reason for this exception. In fact, it sems to us very clear that this sum of $250,206.56 is properly chargeable as a whole to the ordinary expenses of the state goverment; just as the other salaries and expenses of state officers are charged, as stated above.

Therefore, we earnestly contend that the said sum of $60,873.19, allowed as a state expenditure under this Paragraph, should be stricken out, and that there should be charged to ordinary expenses of the state government, under Paragraph IV. on page 134 of the Master's report, the said total of $250,206.56.

Item 150, Loan to the Town of Bath—$2500.

If it were not for the fact that there is a principle concerned in this small item we would not except to the finding of the Master. This

was a loan to the Trustees of the Town of Bath, and they were compelled to give bond with good security, payable to an agency of the state, to wit, the Board of Public Works, for the punctual payment of the interest annually to the state on this loan. The Master finds that this interest was paid to the state and that the auditor of the state described it as a loan and carried it on the books of the state as such. We do not agree with the Master that this action on the part of the State of Virginia in so carrying it has no weight, and we respectfully submit that the auditor's books quoted by the Master and the action of the state from the time of the loan up to the seperation of the two states, and the action of the trustees of the Town of Bath in paying the interest thereon annually, conclusively fixes its status as a loan, and therefore is no charge against West Virginia. Further on under this paragraph we will discuss the question whether a loan by the state can possibly come under the head of "state expenditures." The Master holds that it cannot.

This *loan* is also recognized by the trustees of the Berkeley Springs, in their report to the legislature of West Virginia, 1869, which report is printed in the back part of the House Journal of the West Virginia Legislature of 1869, along with reports of state officers, other boards, etc. (What is now known as the town of Berkeley Springs, in Morgan county, West Virginia, was formerly known as the town of Bath.) This particular report of 1869 is a comprehensive one, and one of the signers thereto is no less a famous personage than David H. Strother, known in literature by his pen-name of "Porte Crayon." It is pointed out in this report (p. 4) that "the Berkeley Springs and adjacent property do not belong to the state of Virginia or to West Virginia (as its successor)." On page 3, in discussing the finances of the property, the report says:

> "That there were old debts standing against the property * * * * to wit:
>
> "To the estate of Philip C. Pendleton, deceased, $2,600, money borrowed for the purpose of building a row of baths, with a large pool attached, for the use of the ladies.
>
> To the *Board of Public Works, Richmond, Virginia* $2,500, money borrowed for the purpose of constructing

a graded road from Sir John's Station to the Springs." (Sir John's Station is a station on the Baltimore & Ohio Railroad.')

Thus the law authorizing the loan, the auditor of Virginia's books, the creditor, and the books of the trustees, the debtors, *all recognize it as a loan.*

This concludes the discussion of the exceptions of West Virginia to the Master's report so far as the third paragraph is concerned.

Exceptions of Virginia Under Paragraph III.

Virginia specifically excepts under Paragraph III., only to the finding of the Master that certain moneys paid by her for stock in turnpike, bridge and railroad companies, which were private corporations, and that certain moneys loaned by her to such corporations, are not allowed as state expenditures within the meaning of the decree and the ordinance. These items are divided as follows, as shown on pages 375, 376 and 377 of the record:

Items 57 to 65, inclusive, Bridge Companies	$78,412.50
Items 66 to 69, inclusive, Navigation Companies, aggregating	210,500.00
Items 70 to 147, inclusive, Turnpike Companies, aggregating	803,555.83
Item 6 (R., p. 372) Berryville and Charles Town Turnpike Company	11,932.52
The total aggregate of these items	$1,104,400.85

All these items can, to a certain extent, be discussed at the same time, as the same general principle of stockholding investment runs through them all.

Item 6, Berryville & Charles Town Turnpike Company, $11,932.52, in some respects differs from the others, and Item 66, Coal River Navigation Company, $96,000 (R. p. 375), is some what like the principle in Item 6, and so far as they are alike will be discussed together.

The Berryville and Charles Town Turnpike Company was a private corporation chartered by the State of Virginia. It was duly author-

ized to and did construct a turnpike from Berryville, Clark county, Virginia, to Charlestown, Jefferson county, now in West Virginia. There is now of this road in the present limits of West Virginia 58⅓ per cent. Virginia subscribed and paid for stock in this company of the par value of $20,455.74. The special fact in relation to this corporation is that it gave a deed of trust on its property, which was this turnpike, to secure loans to the company. This deed of trust or mortgage was foreclosed in the year 1858, and the physical property of the company sold. The purchaser at this sale was the State of Virginia, and the price paid was $7,236.97. West Virginia admits her liability for 58⅓ per cent of this last sum, but denies any liability whatever as to the stock subscription. This reason is in addition to the other reasons hereinafter given, which will apply to all stock subscriptions. There is no dispute between the parties as to the facts here related (R., pp. 454, 455).

The case of the Coal River Navigation Company is somewhat like this. This is item 66 on page 375 of the Record, and is included by Virginia in her exception to the finding of the Master in relation to Items 66 to 69, inclusive, aggregating $210,500. This particular item is for the sum of $96,000. This is another instance where the state bought stock of a private corporation, in this particular case of the par value of $96,000. The corporation, on July 30, 1858, executed a mortgage or deed of trust on the property of the company to secure a large amount of indebtedness set out therein. The company failed to pay the debts so secured, and the trustees named therein, under the authority thereof, on October 25, 1865, sold all the property of this company to private persons. (R., pp. 990, 1003.) We thus see, as to these two corporations, on the first day of January, 1861, the State of Virginia was not even a stockholder in either. The corporations had in a legal way disposed of their entire properties, and all the state had was stock in a defunct corporation, and the corporations still owed large debts. West Virginia did not, under the laws of nations, nor under the acts of Virginia transferring to her property within her limits, obtain anything from Virginia in these particular cases.

The exception of Virginia to the finding of the Master disallowing

this total sum of $1,104,400.85, is based on her claim that purchases of stock in corporations doing business and owning property within the present limits of West Virginia, were state expenditures in the meaning of the ordinance and decree. The position of West Virginia on this important question is that these were but investment of the funds of the state in private companies with the expectation at least of absolute security of the money invested and in many instances with the expectation of producing large dividends from the investment. These corporations were not the agents of the state for the investment of public funds, and were not controlled by the state as a sovereign. They were under the absolute control of the stockholders, subject to the general laws governing corporations. This was definitely settled in Virginia by the decision of its Supreme Court in 1856.

The case of *James River & Kanawha Co.* v. *Early*, 13 Gratt. 541, was an action to recover for the negligence of the corporation. In discussing the question of the liability of the company, the court said:

> "It is not a *public corporation* representing the *public* and *administering public* funds for the benefit of *the public*, but it is a joint stock company which has undertaken the construction of a work, useful to the public certainly, but *intended for the private emolument* of the stockholders in dividends of the profits" (p. 552).
>
> "That the State owned a large interest in the stock of the company will not vary the case * * * * * a mere interest taken by the commonwealth in the stock would not be sufficient to bring an action against the company for neglect of its corporate duty within the influence of the decision in the case of *Sayre* v. *The Northwestern Turnpike Road*, 10 Leigh. 454 * * *" (p. 553).

As persuasive authority on the same line the case of *Moore* v. *Schoppert*, 22 W. Va. 282, is pertinent. This case was decided in 1883. It arose upon an attempt of the county court of Jefferson county, West Virginia, to take possession of a certain toll-house of

the Cross-Road and Summit Point Turnpike Company, a Virginia corporation. This corporation is Item 71 on page 375 of the record, and is included as such in the exception of Virginia to "Items 70 to 147, inclusive, turnpike companies aggregating $803,555.83." The county of Jefferson, apparently going on the theory that this road and other property of this company belonged to it as a grantee from the State of Virginia under the act of February 3, 1863, (App. to R., p. 128) took possession of a toll-house and a lot of land on which it was situated, and this action of ejectment was instituted by this Virginia corporation, the Cross-Roads and Summit Point Turnpike Company, in the name of Moore, its president, to recover this piece of property. As elsewhere shown in this case, West Virginia granted to the counties in which the roads were situated all the stock received by it in the road corporations under the act of February 3, 1863. In this case the Supreme Court of West Virginia distinctly recognized and enforced th corporate ownership of the turnpike company of the property connected therewith. We quote the second syllabus, as follows:

> 2. "The effect of the legislation of the re-organized government of Virginia and of this state is to transfer to and vest in the different counties of this state the stock or interest of the State of Virginia and of this state in the roads of incorporated turnpike companies and to confer upon the respective county courts of this state the management and control of the stock or interest thus transferred, and also to give to said county courts control of any such roads or parts thereof lying in any county as such county may by agreement, condemnation, or otherwise acquire, or of such roads as may have been entirely abandoned by any such corporation or the private stockholders thereof; but it does not give to the county courts jurisdiction and control over any turnpike road belonging to any incorporated company, which is or shall be managing and controlling its road according to its charter, further than the right to control and represent as a stockholder the stock or interest acquired by the county from the state in such company, and to regulate the tolls of such company" (p. 289).

The Court in this case further says:

> "From the facts as they now appear in this case, it is evident that the county of Jefferson has no other interest in the house and lot in controversy in this action than that of a stockholder representing and controlling the stock formerly owned by the State of Virginia in the Cross-Roads and Summit Point Turnpike Company."

This case clearly shows the attitude of the courts of last resort of the State of West Virginia towards these corporations; and this decision, made twenty-seven years ago, has never been overruled or extinguised, but has always stood as the law of West Virginia in relation to these corporations. The fact remains as to each and all of these items mentioned in this exception, that Virginia subscribed and paid for and received shares of stock in each and every one of these corporations. These shares of stock in her possession were her own private property, subject to sale or any disposition the state chose to make thereof, and which under the laws of nations would not have passed to the State of West Virginia upon the separation, although the actual property of these corporations lay wholly or partly within the present limits of the State of West Virginia. The title of the State of West Virginia to these stocks is based alone on the act of February 3, 1863 (App. to R., p. 128). This act provided as set out in the eighth paragraph of the bill, that West Virginia should duly account for these stocks in the settlement thereafter to be made with Virginia. This provision is practically a contemporaneous construction of the meaning of the ordinance on this subject. West Virginia certainly was not to pay for this property but once. Certainly it was not intended that she should pay the cost of the stock under the ordinance, and then pay for the value of the stock under the said act of February 3, 1863.

In the account filed by Virginia under Paragraph III. she included value of shares of stock in two banks, and insisted that the money invested by Virginia in such stock be allowed as state expenditure. The Master found against her on this contention, and, unless the general exception put at the end of their printed pamphlet of exceptions covers it, Virginia did not except to this finding of the Master.

Certain it is that she did not deem it of sufficient importance to specify those two cases in her exceptions, and we feel justified in the conclusion that she has abandoned her contention as to same. She is not very consistent in such abandonment, because there is no difference in law as to money being a "state expenditure," which is expended by the state in the purchase of stock in a corporation, whether that corporation be the Northwestern Bank of Wheeling, or the Wheeling, West Liberty and Bethany Turnpike Company. As will be set out later, Virginia purchased between 1832 and 1840, 4,500 shares of the stock of the Northwestern Bank of Wheeling, and in her original account attempted to charge West Virginia with $450,000 paid therefor as a state expenditure. In the year 1857 (R., p. 499), Virginia sold 1,082 shares of this stock for the sum of $113,671.42. If an expenditure once made, as claimed in the case of the Kanawha Turnpike and Kanawha River Improvements, could never be changed by the subsequent action of Virginia prior to the separation of the two states, then Virginia was not just to herself when she withdrew from said charge of $450,000 the value of these 1,082 shares of stock, which were sold, paid for, and delivered to the purchaser in 1857. We refer to this here to show an example that Virginia dealt with these stocks as a private person would. It is further shown in this record, especially under Paragraph VI. of the Master's report, that Virginia received large dividends from many of these investments.

Against sustaining this exception of Virginia is the undisputed fact that Virginia did not expend this money or any part thereof in West Virginia. The corporation in each particular case, through its board of directors and other officers, expended the money. There was no control in the state over this expenditure beyond such as might have been given by stock ownership. The legal entity which made the expenditure, was actually the corporation. The title of the property was in the corporation; and the corporation as such managed and controlled the property. In the case of the Northwestern Turnpike, the state, through its own officers, directed the expenditure of the money. The same was true in the case of the Staunton and Parkersburg Turnpike, and of the Covington and Ohio Railroad.

In these three notable instances no one but a state officer or agent had any authority whatever. But in these corporations named in this exception the corporation alone, through its duly elected officers, expended its own money for its own corporate purposes.

On page 12 of the exceptions filed by Virginia is the following:

"VI. COMPLAINANT'S SIXTH EXCEPTION."

> "In addition to the five exceptions above set forth, complainant respectfully asks that all of the alternative statements contained in the Master's report, made at the request of and pursuant to objections interposed before the Master by the complainant, and not covered by any of the foregoing exceptions, may be taken and treated as exceptions made by the complainant to said report because of and with respect to the errors of law appearing on the face of said report and of the record returned therewith, in the particulars to which said alternative statements respectively refer."

We have seen no brief of Virginia in this case, and we are at a loss to know whether counsel for Virginia intends this to mean that every alternative statement made by the Master at her request will be insisted upon at the hearing or not; but in the event that counsel shall do so, we desire to call attention to certain alternative findings made by the Master under Paragraph III., which we will take up in the order in which they are found in the report.

The first one of these is "Item 3, Winchester and Potomac Railroad, $170,532.00." This item is discussed at length by the Master (Report, pp. 47-64.) The total item is $270,000, made up of the sum of $120,000 paid for stock of this corporation by Virginia, and the sum of $150,000 loaned by Virginia to this corporation upon security therefor being given. The property of this corporation consisted of a railroad running from Winchester, in the county of Frederick in Virginia, to Harper's Ferry on the Potomac River, in the county of Jefferson, now in West Virginia. This road was constructed under the acts of Virginia of 1831, and was one of the early railroads projected in the United States. 63.16 per cent of the mileage thereof is in West Virginia. The legislation dealing with this road prior to

the separation of the two states, consisted in incorporating the same, authorizing the subscription of stock, authorizing the loan, and then by the act of February 24, 1846, Virginia commuted the loan and the stock into an annuity of $5,000.00 a year forever (App., p. 30). This annuity was paid annually up to and including the year 1861 (R., p. 489). The ledger account on the books of the Internal Improvement Fund of Virginia which carried the subscription of $120,000 to the stock, was closed with the explanation that the stock had been surrendered for this annuity. All these facts are undisputed. With the beginning of the Civil War the Court will take judicial notice of the fact that no railroad running from Winchester to Harper's Ferry could pay annuities. This annuity accumulated during the years of the war from 1861 to 1865.

The first question that arises is the state's subscription to the capital stock of this corporation. This stands, we think, on the same basis as the subscription of the state to the stock of turnpike companies, banks, and other private corporations; and the same principles and argument apply here that we have applied to the other cases of such stock subscription. They were not "state expenditures," nor were they "ordinary expenses of the state government"; they were merely and only *investments*. The special circumstances in this case of the annuity we will advert to presently.

As to the loan, we are fixed in our opinion. All the loans mentioned in the record, as was this one also, were secured in some way or manner. This record discloses three of them: the one under discussion; Item No. 15 (R., p. 373) Kanawha Board Bonds; and Item No. 150 (R., p. 377), Town of Bath. The first two have the principal and interest both secured by mortgage, and the third had the payment of the annual interest forever secured by a bond. Specific and careful provision was made in each case for this security. We deem the statement of this proposition sufficient to prove itself. In none of these cases was the money expended by Virginia. In each case it was expended by the borrower.

In this case of the Winchester and Potomac Railroad Company, Virginia, by acts passed on February 22, 1866, and April 25, 1867 (App., p. 31-2), provided that the corporation could pay to the

State of Virginia in Bonds of that state at par the sum of $83,333.33, which was designated in the act as the "principal sum owing, together with all interest due thereon," and upon such payment the claim of the state against said company was to be "lifted and discharged." The Master finds (Rep., p. 64) that there was paid into the treasury of Virginia in 1866 in bonds under these acts, $118,518.12. A calculation will show that this was the principal sum of $83,333.33, plus the unpaid annuity from 1861 to time of payment, together with interest thereon. Under the act of 1846 this annuity of $5,000 was to be in lieu of interest on the debt due by this company to Virginia and of dividends on the stock of Virginia in the company, and so long as said $5,000 was paid the payment of the principal of the debt was to be postponed. Thus, we see that in 1867 Virginia capitalized the annuity of $5,000 at six per cent, making the principal sum of $83,333.33. She then exacted from the debtor the unpaid annuity with interest, and then she assigned to the company in consideration thereof all her right, title and interest and beneficial ownership in the loan and stock held by her in said company. In the event that the Court should find that West Virginia would be chargeable with this sum otherwise, then we confidently refer to this action of Virginia as an absolute release of all such claim.

Again: the act of February 3, 1863, (App. p. 128,) provides that there shall be transferred to West Virginia the "stocks of any company or corporation, the principal office or place of business whereof is located within the said boundaries" of West Virginia. The principal office of this railroad company was at Winchester, now and then in Virginia. Hence, none of the stock was transferable to West Virginia. Virginia evidently so understood it, for after the Civil War she legislated about this road, made contracts with it, and otherwise dealt with it, without regard to West Virginia, and quite in contrast with her acts after the war in connection with the Covington & Ohio Railroad. By reference to pages 35 to 49 of the Apendix to the Record, it will be seen that the acts of Virginia respecting this last named railroad were concurrent with acts of West Virginia.

Item 15, Kanawha Board Bonds—$60,000.

This item is referred to above as one of the loans set up in the record, made by Virginia to the James River and Kanawha Company, and secured by mortgage. The bonds were delivered to a private corporation, which had the power to do as it pleased with such bonds and the money derived from the sale thereof. The Master found that West Virginia was not chargeable therewith (Rep., p. 71).

Item 53, Harper's Ferry Raid—$189,715.59.

The Court will take judicial notice of the John Brown Raid and what it meant. It was an invasion of the State of Virginia by an outside armed force. The fact that Brown accidently entered territory that afterwards became a part of the State of West Virginia, and that this large sum of money was expended in the transportation of troops, pay of soldiers, quartermaster's supplies and subsistence of the soldiers called from all over Virginia and most of them from the territory still Virginia, does not, under the meaning of this paragraph and the ordinance, make this a state expenditure within the limits of West Virginia. It was a most extraordinary event—an invasion of the sovereignty of a state, and an armed conflict with the officers of the state. After the prosecution of the invaders were ended, and punishment inflicted by the execution of the judgment of the court, the local evidence of the fact that this large sum had been spent partly in Jefferson county, now in West Virginia, disappeared as quickly as fog before the morning sun. The soldiers returned to their homes in Virginia. This subject is referred to again herein under Paragraph IV.

Item 54; School Commissioners—$830,865.37.

The Master (Rep., p. 74) gives a very succinct statement of this item and the reasons why he disallowed the same. It was the total of the annual appropriations for the education of poor children, which were assigned to the counties now forming the State of West Virginia. It was no more of a "state expenditure" in West Virginia than the payment of the salaries of the judges of the courts was such an

expenditure in that state. Hereafter, when this subject is again reached under Paragraph IV., we will state some reasons why we think that the most of it should be eliminated from this cause. Certain it is that there is no error in the refusal of the Master to allow it as an expenditure under Paragraph III.

Item 56, Trans-Alleghany Lunatic Asylum—$27,000.

Virginia never erected any public building in that part of her territory now in West Virginia. The only building she commenced in what is now West Virginia was an asylum at Weston in Lewis county, and called in the account by the above name. Prior to January 1, 1861, the sum of $125,000 was appropriated for purchase of the site and the construction of this building. On January 1, 1861, there remained of this appropriation the sum of $27,000 in bank to the credit of the board of directors of this asylum and in the hands of the treasurer of such board (R., pp. 484-5). The restored government of Virginia in January, 1861, took over this sum of $27,000 and placed the same in two banks in the City of Wheeling to the credit of the State of Virginia, and used the same for the purpose of the restored government. It needed money at that time to defend the loyal portion of the state. This money was not expended before January, 1861. It was the property of the state and, and the state had the right to take it and use it for other purposes. Some time later, the state appropriated large sums of money for the purpose of completing this asylum, but that does not effect the fact that this $27,000 had not been expended at all on January 1, 1861; in fact this sum was never used for that purpose.

Item 148, Fairmont Bank $50,000; and Item 149, Northwestern Bank of Virginia at Wheeling, $341,800.

These two items were on account of the investment by Virginia of that much money in the purchase of shares of stock in these two banks. As stated heretofore, the original purchase by Virginia in the Northwestern Bank was somewhat larger, and Virginia in 1857 sold 1,082 shares, making a certain profit thereon. She covered this money into her treasury, and on the hearing before the Master she

withdrew the original claim of $450,000 and reduced it to this amount, by reason of such sale.

The attitude of Virginia in this cause has been that where an expenditure had once been made, as claimed by her, no act of hers thereafter in connection therewith would affect or alter the fact. In other words, that such expenditure, when once made, should be charged in this account against West Virginia, regardless of the fact that Virginia may have sold the subject matter thereof prior to the first day of January, 1861, to some private person or corporation. These bank investments were extremely profitable. It will be seen by reference to page 176 of the Master's report under Paragraph VI. of the decree, that he reports the dividends from these identical stockholdings during the period of the accounting as $786,666.98. If Virginia intends to abandon the claim asserted by her for the amount of these bank stocks, and to attempt to distinguish the money invested in them from moneys invested in navigation or bridge company stocks, it must be because the money invested was paid back in double quantity in dividends. If West Virginia is to be charged with the moneys invested, Virginia certainly would be charged with the moneys received on the investment. We, of course, adhere to our original position, that money invested by Virginia in the stocks of all these private corporations was not a state expenditure in the meaning of the decree and the ordinance, but, as shown by the Master in his report by his excerpts from the constitution and laws of Virginia, was intended by the State of Virginia as the investment of funds in private corporations for profit. This view is made well-nigh conclusive by the fact that Virginia, by statute, prohibited the sale or transfer of any of these stocks when productive or could likely be made productive.

PARAGRAPH IV. OF DECREE.

"4. *Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia.*

with and without slaves, as shown by the census of the United States."

This paragraph, like Paragraph III., is based on the Wheeling ordinance. The ordinance used the language "a just proportion of the ordinary expenses of the state government since any part of said debt was contracted." The decree uses the language "government of Virginia," instead of the words "state government." The parties to this controversy have apparently proceeded on the proposition that the language of the decree was intended to mean the same as that of the ordinance. The agreed period for the beginning of this account is the 19th day of March, 1823. There are no disputes as to the amounts under this paragraph. The only questions are whether certain items come under the head of "the ordinary expenses of the state government."

First, we take up the exceptions filed by West Virginia to the findings of the Master under this paragraph to which she objects. As before stated, in this part of the brief the aim is to state the facts only, and discussions of questions of law are merely incidental, and indulged in in connection with the facts only so far as necessary to make clear the position of West Virginia, and justify her exceptions.

Item No. 1, Tobacco Receipts $353,123.96; Master's Report, p. 114.

An explanation is needed to show what this means. Virginia, in her original exhibit (printed as Appendix A hereto and an exhibit herewith) under this paragraph, entered into many details. She divided the ordinary expenses, as based on her theory, into five divisions, to wit: (1) general expenses of the government; (2) administrative expenses of the Board of Public Works: (3) maps, expenses of surveys, and inspection of internal improvements; (4) general expenses of the Literary Fund; and (5) interest charges.

Under general expenses of the government there were included the following subjects, to wit: General Assembly, officers of the government, criminal charges, court charges, lunatic asylums, penitentiary, militia, public warehouses, tobacco sales, slaves transported and exe-

cuted, and many other smaller items. She gave credit on the total of these items for funds derived from the sale of articles made in the penitentiary, and for fees and other moneys earned by her officers and persons whose salaries and wages were paid by the state and which were charged to this account of ordinary expenses of the state government. One of the subjects of state supervision in Virginia was the inspection of tobacco. The Court will take judicial notice of the fact that for two centuries at least tobacco had been an extremely important product of Virginia. The state appointed certain officers, called inspectors of tobacco, and paid them certain sums as salaries, and they collected from the owners of this tobacco certain fees for inspecting their tobacco. These fees were covered into the state treasury as a part of the state's moneys, and the Master finds (Report, p. 116) that the sum set out above was actually paid into the commonwealth s treasury from this source. West Virginia believes that she is entitled to a credit of this sum from the total amount of the ordinary expenses of the state government, and believes it to be very inconsistent with the original admissions of Virginia under this identical head to refuse to allow to West Virginia this credit. Virginia herself says that it is correct to allow a credit of $275,000 for moneys received from the sales of goods manufactured in the state penitentiary. The expenses of the penitentiary are charged to ordinary expenses, and the credit is given by Virginia. Under the laws of Virginia at that time, certain slaves were transported to foreign countries and sold. The owners of such slaves were paid an appraised price from the state treasury. The moneys derived from the sale of these slaves, $272,000, were credited on the total of the ordinary expenses. She had certain state officers called weigh-masters of live stock. They collected certain fees from the persons for whom they did services, and these fees were paid into the state trasury, and Virginia voluntarily gave credit therefor in her statements filed with the Master under this paragraph. We are therefore surprised at her contention that the amounts collected by the inspectors of tobacco and turned into the treasury should not likewise be a credit. When the account of ordinary expenses is charged with all the salaries of all state officers and employees and all expenses of carrying out the state laws, it

seems that as a matter of principle it would necessarily follow that credit must be given for all sums of money earned by, through or under the administration of the affairs of the state by such officers and employees, and we utterly fail to see any difference between the amounts earned by inspectors of tobacco and the amounts earned by weigh-masters of live stock and the other items as above set out and conceded by Virginia in her original exhibit No. 4 under this paragraph, printed as an appendix hereto. We must therefore insist upon this claim of West Virginia, and respectfully ask that this exception be sustained, and that said sum of $343,123.96 be deducted from the total of ordinary expenses of the state goverment.

Exceptions to Item No. 5, maps (board of public works), $11,446.48, will be discussed along with exceptions to Item No. 27, general expenses connected with surveys, $106,983.67.

Items No. 7, International Exchanges, $2,836.19; No. 9, Printing Treasury Notes, $375.74; No. 18, Attorney General fees for prosecuting Seldon, Withers & Co., $500; and No. 19 part of $5,000 expended under the act of February 14, 1844, are in our opinion not properly charged as a part of the ordinary expenses of the state goverment, but a discussion of each would take too much time and space. This is especially true when we have under this identical head an item of $18,574,747.84, to the allowence of which as an ordinary expense we earnestly coject. We therefore waive the exceptions of Items 7, 9, 18, and part of 19 as set out above.

Item 5, Maps (Board of Public Works).....$ 11,446.48
Item 23. Sundry Board of Public Works expenses $ 36,728.50
Item 27, General Expenses connected with Surveys $106,983.67

These three items are found on pages 118, 128 and 134 of the Master's report. The general subject has already been discussed herein, and is also discussed on page 75 of the Master's report at Item 55, Paragraph III. We are of the opinion, as heretofore stated, that the amount allowed by the Master on the last named page of his

report, $60,873.19, was improperly allowed as a state expenditure, and that the whole of the three above items, 5, 23, and 27, together with the additional amount, should be allowed as an ordinary expense of the state goverment, and no part thereof as a state expenditure This would make the total of Item 27, $250,206.56. There are sundry parts of these Board of Public Works expenses which to our mind seem clearly improper to be classed as ordinary expenses, yet considering the comparative smallness of the amounts we will not further insist, for the same reasons that are given above as to other small amounts

Item 25, Harper's Ferry Raid $251,763.65
Item 16, Calling out Militia at Wheeling in 1836.....$ 1,099 00

The Master has allowed both of these items as a part of the ordinary expenses of the state goverment (Rep., p 129). Virginia set up this amount, less a few deductions, as a state expenditure within the limits of West Virginia, and the Attorney General of Virginia stated her position to be that any moneys, which could be shown to have been spent in West Virginia, no matter for what purpose, were to be classed herein as state expenditures. In some instances, she has classed exactly similar expenditures when expended in West Virginia as state expenditures under Paragraph III., but when expended in Virginia she has classed them as ordinary expenses under Paragraph IV. It seems to us that under no possibility of the use of language, can it be said that exigencies of the kind for which these moneys were spent could be called "ordinary." The invasion of a state by an outside armed force for the purpose of freeing the slaves and thus taking away from the people of the state more than $300,000,000 worth of property, was certainly somewhat "extraordinary." It would even come under the definition of one of the accountants of the plaintiff, who, when he testified in this case, said that every expense which was not "ordinary" was "extraordinary". It is true, as stated by the Master, that the maintenance of a military force was admitted as an ordinary expense by the defendant. But the defendant found on an examination of this item, that the state had maintained

such military force ever since its formation, and such maintenance and the laws therefor were general, and in existence on the 19th day of March, 1823, when this account began, and were in existence until the end of this account, as they had been from the year 1788 at least. After the happening of the two events, they were brought to the attention of the legislature of Virginia, and the appropriations were made, we believe, in each case at least two years afterwards. They were most *unusual and extraordinary.* No fixed provision of any kind had ever been made in anticipation of them. The fact is that only two such events happened between March 19, 1823, and January 1, 1861. This statement applies to the whole State of Virginia. It should be noted that, in the prepration for the presentation of evidence in this cause, every expenditure made by Virginia during the entire period of the accounting, has been carefully scrutinized, and counsel for the plaintiff have set up everything that could by any possibility be charged to this defendent. Thus, we see that the great State of Virginia, extending from the Atlantic ocean to the Ohio river, comprising an area of 66,000 square miles, only had within its immense borders, two calls for the malitia in thirty-eight years. To provide funds to meet the expenses of these two extraordinary events, special acts of the legislature, long after the happening of the events, were passed; and the legislature itself fixed the status of the Harper's Ferry case by saying that the moneys therefor were appropriated for the "defense of the commonwealth". One could as well call the expenses of Virginia in defending her soil against the British soldiers in the war of 1812-14 an ordinary expense of the state government. It is true that the expenditure at Wheeling of the $1,099 might be called a part of the criminal expenses; that is, a part of the expenses for enforcing the penal laws of the state, and be allowed on that score; but the same reason does not apply to the Harper's Ferry raid. This historical event stands out as one of the spectacular and extraordinary occasions in the history of the United States; and now, more than fifty years after its happening, the chief actor therein, John Brown, is still looked upon as a martyr in more than half of these United States, and his memory honored as such by the erection of monuments and public celebrations and the like.

Historically, it is simply impossible to say that this was an ordinary event, an ordinary occasion, or that the cost thereof was an ordinary expense. Its status in history is fixed otherwise.

Item 24, Interest on Public Debt, Aggregate $18,547,747.84.

This is the largest item in this account under this paragraph. We do not understand that there are any disputes of fact in relation thereto, but there are certain facts in the record which we think are proper here to be summarized, and which will have a bearing on the discussion of law relating to this item and found in Part III. of this brief. It is not the purpose of this part of the brief to make extended discussions of any questions of law, as heretofore stated.

In plaintiff's original Exhibit D-1 (which was their statement of ordinary expenses of the state government under Paragraph IV., and printed as Appendix A hereof), there is set out a partially detailed account of this interest. Certain credits were there given, amounting to $2,418,116, which were deducted from the total interest paid by the state during the period of accounting in this cause, and that deduction leaves the balance as at the head of this section of the brief, to wit: $18,547,747.84. It is our purpose to take up those deductions and other sums which appear on pages 1056, 1058 and 1059 of the printed record.

As a preliminary to this discussion, we state an undisputed fact, that the entire amount received from the sale of bonds of the State of Virginia was used for the purpose of either constructing some sort of a public work by the state directly, or for the purchase of stock or bonds of some corporation, of which turnpike, bank, railroad, navigation, or bridge companies were the most usual. There was expended during the said period by Virginia in its subscriptions to the capital stock of banks within her *present* territory the sum of $2,108,591. There was expended in the purchase of stock of turnpike and road companies wholly within the *same* territory the sum of $1,897,747. There was expended in the purchase of stock of bridge companies in the *same* territory the sum of $49,622. There was expended on account of purchase of stock of navigation companies

in the *same* territory the sum of $908,173. There was expended for the purchase of stock of railroad companies wholly within the *same* territory the sum of $13,713,256. There was expended as loans to railroad companies within the *same* territory the sum of $2,930,000. There was expended in the direct construction of the Blue Ridge Railroad within the *same* territory $1,604,824. There was expended in the construction of the Covington and Ohio Railroad *in the State of Virginia* the sum of $1,640,668. There was expended for the construction of turnpike and roads wholly on state account, and not for the purchase of any stock in the companies, within the *same* territory, $791,888. There was expended directly on state account in the *same* territory in the construction of turnpikes and roads extending into and between the territory now constituting the two states, the sum of $247,289. This last sum is Virginias proportion on a mileage basis of the actual cost of the construction of such roads. There was expended in the purchase of stock of the Alexandria Canal Company the sum of $272,000. There was expended in the purchase of stock of the Winchester and Potomac Railroad Company and in a loan to said company, the sum of $270,000. On a mileage basis, 41⅔ per cent of this road is in Virginia and 58⅓ per cent in West Virginia. There was expended for the purchase of stock in the Chesapeake and Ohio Canal Company (a Maryland corporation) the sum of $250,000. There was expended for construction work and improvements on the James River Canal, Blue Ridge Canal, and Kanawha Road and River $1,216,666. Stock was taken for this upon the transfer of the canals and Kanawha Road and Kanawha River improvements to the James River and Kanawha Company. There was expended in the purchase of stock of the James River and Kanawha Company directly the sum of $2,000,000 additional. There were cash loans made by Virginia to this company of $890,000 Virginia loaned to this company bonds of the par value of $1,597,000. She guaranteed for this company bonds of the par value of $2,260,000. By the act of March 23, 1860, she assumed all of these bonds as her original debt and took in lieu thereof stock of the James River and Kanawha Company. The expenditures above named, together with others paid in interest on the bonds, amounted to a total of $9,547,582.

(R., pp. 820 L. & M.). These expenditures aggregated a sum in excess of $36,000,000, all of which was expended in the present State of Virginia except $302,000 on the Kanawha Road and Kanawha River. Practically all of this immense sum was paid for in bonds, which either formed a part of the public debt on the first day of January, 1861, or which had been retired through the operations of the Sinking Fund, or by the payment thereof by the state.

It will be seen that each and every one of these expenditures was of an extraordinary character for a state to make. They could not have been then called and would not be now called "ordinary expenditures of the state government."

While these immense expenditures were being made in the territory of the present State of Virginia, there was only expended in the counties now forming West Virginia, according to the claim of the Commonwealth of Virginia in this case, out of the moneys derived from the sale of bonds for the construction of roads, etc., and for the purchase of stocks, the sum of $4,200,000. (West Virginia does not concede that this sum was expended in the meaning of the ordinance and the decree, and the Master finds that only $2,811,000 was so expended in West Virginia, to which amount West Virginia excepts, because too large.) It will thus be seen that according to the claim of Virginia, out of a total of $40,000,000 spent for the purposes above set out, nine-tenths thereof was spent in the present State of Virginia, and one-tenth in the present State of West Virginia.

Naturally these immense investments in stock and loans were not without some returns to the state, and Virginia recognizing this fact, made certain deductions in her "interest schedule" annexed to her original exhibit D-1 under the fourth paragraph. Credit is there given for certain sums paid as interest, as follows:

Interest on bonds in the Literary Fund..	$1,324,051.00
Interest on state stock.....	312,214.00
Interest on state stock.....	639,670.00
Interest on James River and Kanawha Company bonds.....	142,181.00
Total.....	$2,418,116.00

But in addition to the amounts collected by the state and included in the said total sum of $2,418,116, there are many other large items of income from these investments of the moneys made by the commonwealth which should be deducted if West Virginia is to be charged with any part of this interest as an ordinary expense of the state government.

There was received by Virginia the following sums from the following classes of corporations on account of investments made by Virginia therein of the moneys arising from the sale of bonds, to wit:

Dividends on Bank stock	$5,936,000.00
Dividends and interest from Railroad Companies	1,748,000.00
Dividends and interest from Canal Companies	321,000.00
Dividends and interest from Turnpike Companies	119,000.00
Dividends and interest from James River and Kanawha Co.	926,000.00
Tolls from James River Company	588,000.00
Interest and annuity, Winchester & Potomac Railroad Co.	76,000.00
Tolls and Interests	
Northwestern Turnpike, Southwestern Turnpike, Staunton & Parkersburg Turnpike	$ 77,000.00
Total	$ 9,791,000.00

In this sum of $9,791,000 there is included the sum of $1,094,000 for which credit has been given. The true total is therefore $8,697,000.

There was received by the commonwealth from investments in the territory now forming West Virginia, for which no credit has been given to West Virginia in this account anywhere, the following sums:

Dividends from Banks	$786,666.00
Dividends from Turnpike Companies	15,000.00
Dividends from Bridge Companies	6,000.00
Total	$807,666.00

Of these large sums it is probable that part of the bank dividends arose from stock which was not purchased with money derived from sale of the state's bonds; but it is certain that all of the balance was wholly derived from investments made by the commonwealth with moneys derived from the sale of such bonds, and it is futher a certainty that nearly all of the bank dividends from the West Virginia counties and a goodly portion of the bank dividends from the Virginia counties were derived from the stocks which were paid for by the issue of bonds of the commonwealth. It is certain that in Virginia, from companies whose stock was purchased with the proceeds of bonds, and from works which were constructed by the commonwealth with the proceeds of bonds, there was derived as dividends and interest and paid into the treasury, the sum of $3,855,000; but credit was given by the commonwealth in this account for only $1,094,000 thereof, leaving a balance of $2,761,000 so derived, for which no credit is given in this account. There should be added to this last named sum at least $1,500.000 for the dividends received from banks, the stock of which was purchased by the commonwealth out of the proceeds of her bonds. This last named sum is probably too small, but the record does not show the exact amount.

This extraordinary condition of affairs seems to us to constitute very strong reason indeed why this interest on the public debt should not be charged as an ordinary expense of the state government. Investments for profit made by the commonwealth cannot be considered as performing one of the usual, customary or ordinary duties of a state government. This is proven by the investigations made by the commonwealth through Chief Justice Marshall, and many other able men of Virginia before her system of internal improvements was commenced. The matter was in fact considered for a great many years, and many discussions for and against the inauguration thereof were had. Many reports were written by able commissions and many messages on the subject were penned by able executives. It was recognized then as a work of *extraordinary* character and one outside of the usual, *ordinary* functions of a state government.

West Virginia is charged by the Master under Paragraph III. as her portion of the ordinary expenses of the state government, the

sum of $2,811,000. Of this amount about $100,000 was expended prior to the year 1831. A further sum of about $500,000 was expended between 1830 and 1840. Another sum of about $500,000 was expended between 1840 and 1850. The balance between 1850 and 1861, and the greater part of this balance of $1,900,000 was expended between 1855 and 1861. These facts were known to the Master when he made up his report, yet he finds that $18,500,000 of interest on the public debt is an ordinary expense of the state government *under the peculiar circumstances of this case*. The result of this finding is that West Virginia would pay from one-fourth to one-tenth, as this Court may determine, of this huge sum of money. For argument's sake we will suppose that this court will determine that a just proportion of these ordinary expenses to be paid by West Virginia under the ordinance would be one-fourth. That would make West Virginia liable for more than $4,600,000 of this interest on the public debt. This sum would be treble the amount of interest that Virginia actually paid on the amount found by the Master to have been expended by the commonwealth within the present limits of West Virginia.

It must be remembered that under Paragraph VI. of the decree, it is shown that West Virginia paid into the treasury of the commonwealth more than $6,100,000 in taxes during the period. While West Virginia received credit in the settlement under the ordinance for this amount, she does not receive any interest thereon or on any part thereof. Certainly, it would have been just and equitable for the Master to have offset the interest on the state expenditure of $2,800,000 by the use of the $6,100,000.

It must be further remembered that the men who passed or adopted the ordinance knew of this expenditure for interest on the public debt; knew what items entered into the expenses of the state government; knew what expenditures had been made by the state within the limits of the counties now forming West Virginia. It is shown by the historical records of Virginia that many of them had been members of the legislature of Virginia; that many of them had been members of the constitutional convention of 1851, wherein these matters were very throughly discussed; that one citizen of the territory now West Virginia had been at that time (1861) for many years auditor of the

commonwealth; that this auditor had made annual reports, some of which have been filed as exhibits in this cause. These reports were large volumes, and gave the annual details of the moneys received and expended by the commonwealth. It gave the details of the bonds issued and sold, and the purposes for which their proceeds were used. In addition there were the annual reports of the Board of Public Works, which contained all the reports made to them by the state engineer and all the other officers and employees of the state under their authority. A glance at these reports will show how full and complete they were as to the cost of all of these public works.

A controversy had existed for at least forty years concerning the expenditure of the public moneys derived from bonds on these public works. Citizens of the territory now within West Virginia had for that period claimed that a gross injustice was done to the people west of the mountains, and justified their contention by giving details thereof; and even to this day, with the lapse of fifty years for the passion and prejudice and the deep-seated feeling of injustice suffered at that period to pass away, we submit that no unbiased person will say that West Virginia received her share of these public improvements, when it is considered that out of $40,000,000 expended therefor Virginia only *claimed* to have expended one-tenth in the present limits of West Virginia. Virginia spent during this period $20,000,000 and more in purchasing stock and making loans for, and directly building, railroads in her present territory. Between 1855 and 1860 she expended $1,146,000 in the direct construction of one railroad in West Virginia, and that was done, as is plainly to be seen, for the benefit of the Virginia Central Railroad, which was built from her capital at Richmond to a point within fifteen miles of the present limits of West Virginia, and which, as it was then seen, could not be made a successful financial venture unless it reached the Ohio river and tapped the paying traffic of that region and that of counties now in West Virginia. This road and its connections would carry this rich traffic by way of Virginia's capital, to her eastern seaboard, and prove, as it was believed, of immense benefit to that part of the old state.

The division of the old state was not the growth of a few weeks of civil war, but it was the result of what the people of the counties now

forming West Virginia believed and said was the gross injustice done to the counties west of the mountains by the larger population east thereof. The counties of West Virginia found an opportunity in 1861 to do that for which many had hoped for half a century preceding that date.

The record in this cause shows that in 1860 the slave population of Virginia amounted to 490,000 people. Of these only 18,000 were inhabitants of the counties now forming West Virginia. Two-thirds of this number of 18,000 were inhabitants of a half dozen border counties. Slaves were then the most staple and productive property. At $350 apiece this property was worth over $170,000,000, of which about $6,000,000 belonged to the people of the counties now forming West Virginia, and $164,000,000 to the people of the counties now forming the State of Virginia. The estimate of $350 per slave is a very low one indeed. If we were to take the estimate placed upon this class of property by the owners thereof, as shown by the census of the United States for 1860, the value would be more than double our figures. The auditor of Virginia estimated the slaves to be worth $612.63 each. (Auditor's report for 1858-1859, p. 392.)

By the constitution of 1851, which the majority east of the mountains imposed upon the state, it was decreed that none of these slaves under twelve years old, although property and subject to sale, should be taxed, and those above the age of twelve years were taxed at a very small rate which amounted to $1.20 a person. The assessor's books show, as set out in the record, that the assessment of these slaves in number was much less than that shown by the census of the United States. Certain it is that the slaves above twelve years of age would easily average the price of five to seven hundred dollars apiece, but for the selfish reasons of the owners they practically escaped taxation. All the property of the people west of the mountains, except their small and decreasing number of slaves, paid its full share of taxes and had no such exemptions.

By reason of this unjust system of taxation the people living in the territory now West Virginia, from March 19, 1823 to January 1, 1861, the period of accounting in this cause, paid very many thousands of dollars in taxes above their just share. The system worked

a double injustice; for the people west of the mountains not only paid their just share of taxes, but they were compelled to pay in addition what the people east of the mountains ought to have paid and did not pay. This unjust system of taxation was put and kept upon the western counties by an equally unjust scheme of representation in the General Assembly of Virginia, whereby the basis of representation in that body was arbitrarily fixed to favor the eastern part of the state. It provided among other things, that the owner of slaves should have three votes for every five slaves owned by him. By the political power thus given them by their slaves the owners thereof in eastern Virginia practically exempted their slaves from taxation; and also by this unjust power they enacted laws to protect them in the ownership of this property, which entailed great expense upon the state; such items, for instance, as "slaves transported and executed," $311,000; "transportation of free persons of color to Liberia," $26,103.50; "fugitive slave fund," $5201; as well as no inconsiderable part of the large disbursements for military and militia expenses, criminal expenses and penitentiary expenses. By reference to Appendix A hereof, it will be seen, that from 1820 to 1861 the disbursements out of the treasury of Virginia for "criminal expenses," were $1,785,632.11, exclusive of $1,188,212.34 of "court charges;" and that the disbursements, during that period, on account of military expenses, embraced in such items as the "militia," "public arsenals," "public guard," "guards in the country," "military contingent," "armory—manufactory and repairs of arms," etc., etc., aggregated $1,325,000. This does not include disbursements on account of the penitentiary, of $844,000, nor the cost of the Harper's Ferry raid, $255,745.77 (Rec. p. 374). It should be remembered that there was not in the entire territory of Virginia, which is now West Virginia, on the 1st day of January, 1861, a single mile of state-built or state-aided railroad, nor a mile of canal, nor a state building; not even a school, not a public institution of any kind. The asylum for the insane, at Weston had just been commenced. The capitol and all the buildings appertaining thereto, the university, the asylums, the institutes, armories, arsenals, and all other public institutions, as well as all the railroads and canals constructed wholly or partly by state money, and in which

millions of such money had been expended, were all located in eastern Virginia and fell to that part of Virginia upon the formation of West Virginia.

With this knowledge and under these conditions the ordinance was framed and passed. It was believed to be just that West Virginia should pay for the state expenditures within her limits during the period of the contraction of this debt; and also should pay a just proportion of the ordinary expenses of the state government during the same period. These two sections taken together necessarily imply a distinction between these two classes of expenditures. They were made with complete knowledge at first hand of the history of the state for the period. Is it right, reasonable, or just to hold that this ordinance was intended to mean that West Virginia was to pay the full amount of all these expenditures, and in addition thereto to pay a large amount of the interest on the public debt which had been expended in the limits of Virginia, the objects upon which it had been expended being still the property of Virginia and situated within her territory? Is it not more reasonable and just to believe that they intended that the state expenditures should be paid, and that the just proportion of ordinary expenses of the state government meant those expenses which were then, had been in 1823, and are now the usual and customary expenses attached to the running of any state government, to wit, the legislative, executive, and judicial expenses, together with those of the state educational system and the state eleemosynary institutions? No stretch of the imagination can include investment in private corporations as a part of the usual and customary functions of a state.

Again, as stated above, the interest on the moneys with which West Virginia is charged is largely in excess of the interest on the moneys expended in West Virginia.

The act of February 3, 1863, which transferred certain property of Virginia within the limits of West Virginia to the new state, is so near to the time of the passage of the ordinance and the adoption of the constitution of 1862, that it becomes entitled to weight as a contemporaneous construction of these documents. It is inconceivable

that in a little over a year after the adoption of the ordinance they would have passed the act just spoken of if they believed they were to pay the value of the properties received by the act and in addition interest on the money which created the properties?

We can think of no more apt illustration of the falsity of the finding of this interest as an ordinary expense of the state government, than that of the ordinary family. Every one can apply this to himself, whether he be a lawyer or a layman. Every family has certain usual expenses, which can be as justly termed "ordinary expenses of family government and maintenance," as those in this case are termed "ordinary expenses of the state government and maintenance." We use the word "maintenance" advisedly, because the language of the ordinance undoubtedly means those ordinary expenses which are necessary to maintain a state government. The ordinary expenses of a family would surely include food, clothing, a house in which to live, gotten by rent or otherwise, furniture, expenses of education, expenses of illness, and the expenses necessary and incident to the care of a house and things of like nature for the necessities and comfort of the household. With these expenses upon him, if the head of the family should determine upon an investment in the purchase of a corner lot and the erection of a building thereon, for rental, or should invest in stocks for the purpose of receiving dividends, and the funds not being in hand, he would have to borrow the same and pay interest thereon, is it possible to say that the interest on this loan, made for this purpose, wholly unconnected with the usual expenses and purposes of family government and maintenance, is an ordinary family expense?

That was the condition of Virginia in 1822. She owed no public debt. She had no interest to pay. She entered upon this system of borrowing money for purposes wholly unconnected with her usual and customary duties as a state government. Surely this expenditure was extraordinary; the purpose was extraordinary; this payment of interest then was extraordinary and unusual. Can this principle be changed by the fact that Virginia enlarged these expenditures, enlarged her issue of bonds, and necessarily continued and enlarged her payment of interest?

Item 26, Expended for Primary Schools, $2,400,331.11.

The differentiation of the sum of $2,400,331.11 from other funds expended for primary schools, which were derived directly from taxation, is partly based on the source from which it is derived. Virginia had what was known as the Literary Fund. This fund was mostly in hand when our period commenced on March 19, 1823. Some accretions were made to it from time to time from forfeitures, fines and escheats. None of the principal of this fund was expended. This sum of $2,400,331.11 came from the income derived from the investment of the principal of this Literary Fund in bonds, stocks and loans, from which was derived dividends and interest, and these dividends and interest were expended by the state for educational purposes. As stated above, most of the principal of this fund was in hand when our period commenced, and Virginia remained the owner of all of it when our period ended on January 1, 1861. This fund was during that period the property of the entire state. It had come from the property of the entire state, as shown by the record, and it is an historical fact, that the nucleus of the fund was the money collected from the government of the United States by the Commonwealth of Virginia on account of Revolutionary War claims.

A brief analysis of this fund and statement of the methods of its production are pertinent at this point. This analysis is made from the figures found in the record, pages 538-B to 538-H. These figures are agreed to by the accountants of each party. They show that on the 19th of March, 1823, there was in the Literary Fund, in cash and moneys invested, $1,240,000; that on the first day of January, 1861, there was $2,200,000; there was received during the period from all sources $4,869,000; and that there was paid out in cash and charged off on account of losses $3,907,000.

The accretions to the fund, making up the sum of $4,869,000, are divided as follows:

From counties now forming West Virginia under laws then in existence	$114,395.00
From counties now forming Virginia ...	401,972.00

These sums under the law were permanent additions to the fund

and became part of the principal, which was in no way to be expended. These permanent additions were invested from time to time, as they came in, like other parts of the principal, and only the income thereof was permitted to be expended.

There was received from the United States war claims $182,441. This was a permanent addition, and comes under the rule set out above as to the funds.

There was received as dividends on stock and as interest on loans made to persons or corporations other than the commonwealth, the sum of $1,059,695. Of this sum $800,764 were dividends on bank stock owned by this fund, and $155,291 were dividends on James River Company stock owned by this fund.

There was received directly from the treasury of the commonwealth,

1. United States war claims ..... This sum was a permanent addition to the fund and was not to be annually expended like its income.	$	77,216.00
2. Capitation taxes ..... This sum was expended annually through the Literary Fund, as received.		751,481.00
3. Interest on investments in state bonds..		2,230,445.00
4. Dividends on James River Co. stock ...		50,686.00
Total		$4,869,000.00

The expenditures made from this fund, which are charged to the account of "ordinary expenses of the state government" under the ordinance and the decree in this cause, are as follows:

For account of Primary Schools—		
Paid from income from investments	$2,400,331.00	
Paid from capitation tax	655,908.00	$3,056,239.00
University of Virginia		613,000.00
Institution of Deaf, Dumb and Blind..		40,821.90
Virginia Military Institute ..:.....		28,500.00
Salaries and expenses of Board		85,322.00
Total		$3,823,882.00

Each and every one of these items of expenditure, as stated above, are charged to the account of "ordinary expenses of the state government". We have admitted that the sum of $655,908, paid out of capitation taxes, should be charged against us, for the reason that this sum was taken from the taxes collected from the whole state, and West Virginia has received under Paragraph VI. credit for the amount of taxes paid in by her counties to this fund. We have not seriously objected to the amounts paid to the University and to the other institutions named above. We have not objected that the salaries and expenses of the board were charged as part of the ordinary expenses of the state government. We have insisted, and still insist, that the sum of $2,400,000 is *not* a proper charge, because of the reasons set out above and for the further reasons hereinafter given.

The analysis of the figures above given plainly shows that no moneys were expended out of the capital of the Literary Fund as it existed on March 19, 1823. There was added to the capital of this fund during the period $960,000, of which $260,000 came from the United States on war claims, *and this was the property of the whole state.* The additional sum of $516,000 thereof came from redemption of lands, escheats, and things of like nature. Of this sum about two-sevenths came from counties now in the state of West Virginia. The balance of this capital account came from income of the fund which was not expended, and went back into the fund as a permanent addition thereto.

Virginia has seen fit to give credit against the item of interest on the public debt under Paragraph IV., the sum of $1,324,000, being a part of the interest received from the commonwealth on state bonds. Why she did not also give credit for the $926,919 interest received by this fund from the same source, and the $50,686 received from the commonwealth as interest on James River Company stock, we are at a loss to understand. West Virginia is charged twice in this account with these two sums, once as interest on the public debt, and once as expenditures from the Literary Fund. Common justice requires that, if the Court shall be of the opinion that it is proper to charge this sum of $2,400,000 to the account of ordinary expenses under the particular circumstances herein detailed, it certainly will deduct this total of

$977,606, either from this item, or from the item of interest on the public debt in the event that the Court shall overrule our exception to the finding of the Master in reference to the interest on the public debt. But counsel for West Virginia are confident this Court will sustain our exceptions to this item of interest and deny the right of Virginia to charge the same as part of the ordinary expenses of the state goverment.

Virginia in her original exhibit D-1 under Paragraph IV. of the decree (printed as Apendix A of this brief) gives credit against the total of the ordinary expenses therein claimed for many items of income. These credits aggregate the sum of $838,000. She recognized the fact that where moneys were paid into the state treasury, which were the result of expenditures made from that treasury and charged in this account as ordinary expenses of the state goverment, the account should be credited with such receipts. As hereinbefore set out, some of these receipts were moneys received from the sale of goods made by convicts in the penitentiary, moneys received from the sale of supreme court reports which were printed and sold by the state, moneys received from the sale of slaves, which under statute were transported and sold. This admission on the part of Virginia of these credits is a complete and authoritative answer to the position of the Master, that the particular source from which money was derived was immaterial to him, so far as this account is concerned (Rep. p. 134). Virginia admits the right of West Virginia to investigate the source of the moneys paid out for the items claimed by her as ordinary expenses of the state government. She thereby further admits the principle of the right to credits against this account of ordinary expenses for all income into the treasury that arose from the labor of state employes or the managment of state institutions or the investments of state funds. In fact, credit should be given against this account of ordinary expenses for all income into the treasury that arose from sources other than taxes in some form or moneys borrowed.

What was the difference in principle between moneys earned by a state convict by his labor and moneys earned by the loan or investment of the state Literary Fund by its labor? Each is measured alone by the work done by it. Each is a producer. The expenses con-

nected with the work of each were paid by the state and are charged in this account as ordinary expenses of the state goverment. Why should not the earnings of each be treated in the same manner?

We submit that the finding of the Master on this Item 26 is erroneous, and the exception of the State of West Virginia thereto should be sustained.

Exception as to Apportionment.

The defendant further excepts to the following finding:

> "I find that the method adopted by the plaintiff of ascertaining 'the average total population,' is the clearest and most accurate approximation upon which the ordinary expenses can be apportioned to the 'average total population,' as the object to be ascertained, is the population in existence, at the time of the ordinary expenses to be apportioned, were paid, and I therefore adopt the plaintiff's method." Rep., p. 141.)

Paragraph IV. of the decree provides that the proportion of the ordinary expenses of the state goverment chargeable to West Virginia, be ascertained "on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States" (R., p. 173). As understood by West Virginia, this meant the average total population of each census, beginning with the period commencing on the 19th day of March 1823, and ending on the 31st day of December, 1860. This made five census periods, 1820, 1830, 1840, 1850, and 1860. We conceive the language of the decree to mean that the average of these five census periods should be taken. Nothing in the decree or elsewhere, so far as we can find, directed the Master to divide these expenses into four periods, one of seven years and three of ten years.

As shown by the Master's report (p. 139), the only state expense which increased in proportion faster than the population, was the item, "interest on the public debt". In fact, outside of this one item, as claimed by the plaintiff, the ordinary expenses of the state government were in proportion to the population greater in the first decade. For instances, when the population, with slaves, of Virginia in the period between 1823 and 1830 was 928,558, and of West Vir-

ginia was 136,808, the ordinary expenses of the state government, after deducting the claimed interest charged, were $3,394,301.

In the period of 1840 to 1850, when the population of Virginia had increased to 1,120,000 and the population of West Virginia had increased to 302,000, the ordinary expenses outside of this claimed interest charge, had only increased to $5,365,000. The population of West Virginia had more than doubled, but the ordinary expenses of the state government outside of the claimed interest charge, lacked one million and a half dollars of doubling. It will be observed that the first period only covered seven years and the last ten years. The interest charge of the third decade as found by the Master is greater in amount than the total charges for ordinary expenses in the first decade. The interest charge in the fourth decade exceeds in amount the total of the charges, other than interest, in the third and fourth decades. It also exceeds in amount the total of the charges in the first, second and third decades, after the interest charges have been deducted therefrom.

The percentage of the increase in the population of the territory composing the two states was greater in that which is now West Virginia. The percentage of the increase of the expenditures of the state government, outside of the claimed interest charge and the taxes under the constitution of 1851 for school purposes and the Harper's Ferry Raid of 1859, were quite uniform. As shown elsewhere herein, the interest charges were based on the extraordinary expenditures made by the Commonwealth of Virginia in the construction of railroads, canals, and other works of like nature, and in the purchase of stocks in railroad companies, canal companies, and other companies of like nature, and in banks. About $40,000,000 was expended by the commonwealth for these purposes. Nine-tenths of these expenditures and purchases were made in what are the present limits of the Commonwealth of Virginia. One-tenth of these expenditures and purchases was made in what are the present limits of the State of West Virginia. It does not seem to us to be an equitable way of ascertaining "a just proportion of the ordinary expenses of the state government" to apportion three-fourths of this interest to the decade when West Virginia's population was the largest. We sub-

mit that even if the Court should overrule the exception of West Virginia to the finding of the Master, which holds that interest on the public debt is an ordinary expense of the state government, it should nevertheless sustain the exception of West Virginia to this finding of the Master on apportionment.

We further submit that the Master was not called upon to render any decision on this claim of apportionment made by Virginia, as it is plainly not included in the decree of reference.

Exceptions of Virginia to the Finding of the Master Under Paragraph IV. of the Decree.

Virginia does not file any specific exceptions to any finding of the Master under Paragrph IV. Unless they intended to insist upon the same general exceptions as set out herein under Paragraph III., Virginia has no exception to the findings under Paragraph IV. The language of Virginia's general exception would include many findings of the Master under this paragraph.

The items asked for by Virginia, and which were not allowed by the Master, consist largely of one general class, to wit: buildings erected in the present State of Virginia in connection with public institutions. The following is a list thereof:

Item 6, Deaf, Dumb and Blind Institution	$ 80,661.94
Item 11, Virginia Military Institute, new building	151,000.00
Item 12, University of Virginia, repairs and improvements to buildings, and water supply	25,000.00
Item 13, Improvements, Capitol Square	12,278.47
Item 15, Penitentiary Lot, new hospital building	13,947.48
Item 17 Medical College of Virginia, additions and improvements to buildings	25,000.00
Item 19, Eastern and Western Asylum	344,295.57
Item 20, Gun House at Alexandria	900.00
Item 21, Cannon House, Surry County	110.00
Item 22, Cannon House for Richmond Artillery	1,079.00

All of these items were either for the purchase of real estate or the erection of buildings on real estate owned by the commonwealth. The only building in the territory now West Virginia was the asylum at Weston, called the Trans-Alleghany Lunatic Asylum, which was charged to West Virginia as a *state expenditure.* If such an expenditure of money should come under the first section of the ordinance as a state expenditure, then it would be utterly inconsistent to ask that expenditures of the same kind when made in Virginia should be classed as ordinary expenses of the state government. They were permanent investments, and are still owned and used by the State of Virginia. They were not expenditures for the maintenance of the inmates of those institutions. We submit that the Master's finding thereon was absolutely correct and should be sustained.

Three other items, which were claimed by Virginia as ordinary expenses of the state government, and which were not allowed by the Master, are as follows:

Item 2, Constitutional Conventions	$258,906.28
Item 4, Boundary lines	16,704.78
Item 5, Maps of the Commonwealth ...	16,628.04

These items are in the same class in so far as they were moneys expended for occasional acts done in pursuance of law. There were two constitutional conventions within the period, one in 1829 and one in 1851, but they were not ordinary events in any sense of the word. During the period, under special acts of the legislature, certain boundary lines between Virginia and some of her neighbors were ascertained and established, and the sum of money above named as item 4 was specially appropriated for the purpose. The ruling of the Master should be sustained for the very good reasons given by him on p. 117 of his report.

The legislature also saw fit on certain occasions to have made a map of the state. These occasions were rare, and the duty was specially performed under a special act of the legislature. They were unusual in the sense that none of these acts were done except when the legislature specially ordered it, and when the specific order was complied with the whole matter was ended. We submit that the ruling of the Master thereon was correct. (Rep., p. 118.)

PARAGRAPH V. OF DECREE.

> "5. *And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.*"

The exceptions of West Virginia under this paragraph are to the finding of the Master of the "fair estimated value" of the real estate in the counties now forming Virginia and in the counties now forming West Virginia. The assessed valuation of the real estate, on June 20, 1863, in the counties of Virginia was $296,085,460.31; and in the counties of West Virginia, $82,449,252.04.

In finding the valuation of property it has been conceded by both parties that the best evidence obtainable was the assessed valuation made by sworn officers of the state, chosen for the purpose. Their sworn returns of such valuation are *prima facie* correct. The acts were judicial in their character. The only other valuation of official character was that made by the officers of the United States in taking the census of 1860; in which each person for himself put down the real valuation, as conceived by him, of his property, real and personal. This valuation was at least three times as large as the assessed valuation. However, the Master took the assessed valuation as the basis; and the question now under discussion is whether he was justified in taking fifty per cent of the assessed valuation as the fair estimated valuation of such real property. He applied this rule to the *whole of Virginia* and to fourteen counties of West Virginia. This was done on the theory that the ravages of the war had depreciated the values equally in the ninety-nine counties of Virginia, but had only affected the values in fourteen of the forty-eight counties of West Virginia. We contend this is unfair to West Virginia.

Some evidence was taken by Virginia (R., pp 739-785). This was given by witnesses who had admittedly seen but a small part of Virginia and who necessarily knew the exact condition only in a small part of the state. Historically speaking, it is a known fact that up to the 20th of June, 1863, not one-third of the counties of Virginia had been in any way touched by invading armies, and no ravages could have been committed in the other counties where the sentiment of the people was apparently unanimously in favor of the Confederate

cause. The evidence of these witnesses is, we claim, incompetent, is very vague, indefinite, and altogether unreliable. None of them were qualified by reason of travel or knowledge during the particular period to speak of the conditions except in a very small territory. The evidence shows conclusively these facts. It is not the character of evidence sufficient to overthrow the official records of the State. Virginia cannot impeach the integrity of her sworn officers in this manner. Each county had an officer called Commissioner of Revenue and some counties had two or more of these officers. It was their sworn duty to assess the properties situated therein. They had the power *to reduce assessments of real estate* where the value thereof had been reduced by the destruction of any of the buildings or things of like nature thereon. The fact that the assessments of 1863 were made after the allowance of such reductions or depreciation in values, shows the mistaken ideas or the lack of information of these witnesses. The assessing officer fixed the value at the time he saw the property, while these witnesses estimated the value of such property which they casually saw a half century thereafter.

It is a well known historical fact that in the early period of the war there was a great conflict in many parts of the forty-eight counties now forming West Virginia. This is especially true of the southern and eastern counties thereof. It is a further fact that during practically the entire period of the war a destructive internecine conflict continued in at least one-half of the counties of West Virginia between those sympathizing with the Union and those sympathizing with the Confederacy. This condition was much more destructive of property than anything that had been actually done by the armies in the present State of Virginia prior to June 20, 1863.

We submit that there is no reliable or convincing testimony in this record sufficient for the Master to reduce the value of assessed real property in Virginia one-half in order to arrive at what is termed "the fair estimated value" thereof on the 20th of June, 1863. We further submit that if the testimony is sufficient to convince this Court that fifty per cent of the assessed value of real estate in Virginia was the fair estimated value, then the same rule should apply to West Virginia, and there should have been an equal reduc-

tion of the assessed value of the lands in the counties now forming West Virginia.

The fact must not be lost sight of that up to the 20th of June, 1863, the outlook for the success of the Union armies was not particularly bright; and the belief was pretty general, at least within the lines of the Confederacy, that the separation of the states therein from the Union was complete. Many parts of Virginia in the early period of the war reaped large benefits in a money way by the opportunity of her people to sell war supplies at an advanced rate.

It is proved by the evidence of witnesses that in West Virginia there was a decided emigration of many people, according to their sympathies. Those who sympathized with the southern cause sought protection within the lines of the Confederate forces and mostly within the counties now forming Virginia. Those who sympathized with the Union sought protection beyond the Ohio River within the certain lines of Union control. Many of these never returned, but settled upon the cheap lands of the West, and were lost as citizens forever to the State of West Virginia. Virginia still retained, up to the 20th of June, 1863, her labor supply of slaves. It will be remembered that in the Virginia counties, according to the census of 1860, there were 472,000 slaves, while there were only 18,000 in the counties of West Virginia. It is further shown in the record that three-fourths of those were in the counties which, during the greater part of the Civil War, gave allegiance to the Confederate government. Thus, one state had its labor supply at hand and the other state had its labor supply either in the army of one or the other contending parties, or had seen it migrate to the West. It will be remembered that the counties of West Virginia furnished the two contending armies, or used as home guard soldiers, a force of 60,000 men out of a population of only 376,000 white persons, as shown by the census of 1860.

We respectfully insist that under these circumstances the assessed valuation of the real estate should stand as the "fair estimated value of the real property" in the two states.

Exceptions of Virginia.

The first exception of Virginia under this paragraph relates to the

finding of the Master of the fair estimated value of the real and personal property in the counties of Virginia as of January 1, 1861, on the ground that the same is not responsive to the paragraph or any other paragraph of the decree. This finding of the Master was made at the request of the defendant under the following clause in the decree:

> "The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the Court."

It seemed to West Virginia that January 1, 1861, was a much more proper and pertinent date on which to find the fair estimated value of property, than the 20th of June, 1863, and for that reason the defendant requested the Master to make such finding.

Virginia also excepted to the finding of the Master under this paragraph, because he included the value of slaves in his statement of personal property in Virginia, and because he adopted the assessed value thereof as the fair estimated value. We are utterly unable to see any point in either of these exceptions. Slaves constituted the most valuable personal property that Virginia had. Their productive value, as well as their salable value, was much greater than all the other personal property in the whole state. They were assessed annually by the Commissioners of Revenue, and that assessment, made by more than one hundred commissioners representing each county in the state, (all appointed by law and sworn to perform an official duty to the best of their ability), is certainly entitled to more weight than the personal testimony of a few witnesses given forty-seven years after the event. We submit that Virginia cannot at this late day impeach her own official records in any such way or manner.

The last exception of Virginia under this paragraph relates to the question whether or not these assessments were made on the basis of Confederate currency.

It is shown by a comparison of the assessments of 1860 and 1863 that there was relatively the same proportion of such personal prop-

erty as horses, sheep and cattle, and that the increase in the assessed value thereof in many counties was not noticeable, while the greatest seems only to have been a thirty or forty per cent increase. The claim by Virginia that they had been increased at least four times was found to be utterly and entirely refuted by their own records. This question was considered by the Master, and in view of the official records he found against the contention of Virginia thereon. We respectfully submit that this finding was correct. We further submit that all the exceptions filed by Virginia to this paragraph should be overruled.

PARAGRAPH VI. OF DECREE.

> "6. *All moneys paid into the Treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.*"

West Virginia excepted to the report of the Master under this paragraph, because of his refusal to allow any of the four items following as payment of money into the treasury of Virginia from counties now in West Virginia, namely:

Item 7, Dividends from Banks in West Virginia counties	$786,666.98
Item 8, Dividends and interest in Turnpike Companies in West Virginia counties	13,595.48
Item 9, Dividends from Bridge Campanies in West Virginia counties ..	6,028.51
Item 10, Dividends from Interstate Turnpike Companies (proportion)	1,355.92

These four items aggregate $807,646.89. The Master refused to allow them on the ground that they were not public payments, but were simply dividends received by the state on stock owned by it and held in its private capacity. In view of the holding of the Master under Paragraph III. of the decree, that the purchase of the stock of banks and of turnpike, bridge and navigation companies was not a state expenditure within the meaning of the ordinance or decree, we believe that his holding in the present case is the correct one; and if

this Court should approve his holding in that respect, we desire to withdraw these exceptions. But if this Court should hold that the purchase of these stocks by the commonwealth was a state expenditure in the meaning of the ordinance and decree, then we insist that these four items should be allowed, and that our exceptions be sustained. Certainly, if West Virginia is to be charged with the cost price of the stocks, she should be credited with the income received therefrom. The Commonwealth of Virginia, in her original account, and even in her amended accounts, filed under Paragraph III. of the decree, claimed the sum of $391,800, expended for the purpose of bank stocks, as state expenditures. In her exceptions filed to Paragraph III. no mention is made of the refusal of the Master to allow this sum on said account.

It is but human to wonder whether this apparent withdrawal of this item was caused by the showing made by the defendant under Paragraph VI. Virginia certainly must have recognized that if West Virginia was to be charged with the value of these stocks, then she should also be credited with the dividends received therefrom. The dividends received on the bank stock were very large, but those received on the stocks in the turnpike, bridge and navigation companies were so small in amount that the total thereof would have no appreciable influence upon the grand total of $1,104,000 that was expended in the purchase of these stocks, and which total sum Virginia desires to charge to West Virginia under said Paragraph III.

The Master found that

Item 1. Bonus received from Banks	$96,253.62
Item 20. Merchants and Mechanics Bank stock sold (bonus stock)	13,103.35
Item 22. Northwestern Turnpike Road .. Item 23. Staunton and Parkersburg Road, net tolls	12,132.12

were moneys paid into the treasury of the commonwealth, and allowed the contention of West Virginia on that point. We are again in the dark as to the contention of Virginia. Her general exception covers these items, but there was no *specific* exception to the finding of the Master thereon. There can be no real question on these points. The

finding of the Master is absolutely correct. (R., pp. 174, 177, 178.) These sums, except perhaps the tolls, were raised in another form of taxation than that usually employed. Still they were taxes, and nothing else. A license tax or a franchise tax is a tax in the meaning of this ordinance and decree. This Court has recently held that they were taxes in the meaning of the bankrupt act. (*State of New Jersey* v. *Anderson*, 203 U. S., page 483.) The language of the ordinance and of this decree is broader than the word "tax." They use the expression, "All moneys paid into the treasury of the commonwealth." Only sovereigns have a right to levy taxes; that is, sovereigns within their own jurisdiction. Here the state levied a franchise tax, in one case of money, and in the other case of stock. Then the state sold the stock and received the money therefor.

PARAGRAPH VII. OF DECREE.

> "*7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items, and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the Restored Government of Virginia, together with the nature and description thereof.*"

West Virginia excepted to the finding of the Master because he found that on June 20, 1863, the 3418 shares of the capital stock of the Northwestern Bank of Virginia at Wheeling was worth the sum of $427,250. (Rep., pp. 189-192.) We are unable to appreciate the reasoning upon which the Master arrived at this conclusion. This bank was incorporated in 1817. The stock purchased by the state was made for two different accounts: $50,000 of stock was purchased in the years 1832 and 1833 for the Literary Fund, and the balance of $400,000 in 1837, 1838 and 1839 for the Commonwealth Fund. It is shown herein, and not disputed, that all the accounts of the state were carried either in the Commonwealth Fund, the Board of Public Works Fund, or the Literary Fund. They were all funds of the state of Virginia.

The laws of Virginia (Code of Va. 1860, chap. 58, secs. 42-3) required each of its state banks to make quarterly statements to the governor, showing therein the amount of its capital stock paid and unpaid, the value of its real estate, amount of debts due to and from it, its bad and doubtful debts, specie on hand, amount of deposits, its circulation, amount of bills on hand, rate of last dividend, and amount of surplus or contingent fund. There was no provision of law for periodical examination of banks by an expert public officer, as in these days. The only provision found in the laws of Virginia for the inspection of banks, is that contained in section 45 of said chapter 58 of the Code of 1860, wherein it is provided that an examination of the books and proceedings of any bank might be made by a joint committee of the two houses of the general assembly, or by that of either house, or by a commission appointed by the general assembly or the governor. It will be perceived that each bank was the sole judge of the value of its assets—of the value of its real estate, and whether a debt due it was bad or doubtful, etc. With such power, almost any bank, no matter how bad or doubtful its condition, could make a good showing. Modern laws, both of the Federal government, and perhaps of the most of the states, have changed all this. Experience made it necessary. Now, expert examiners are required, at short periods, carefully to examine in detail the assets of banks, inspecting each note, bond, and other details of such assets.

The Northwestern Bank, under statutes of Virginia, had its main or parent branch at Wheeling, in the county of Ohio, now West Virginia; a branch at Wellsburg, in the county of Brooke, now West Virginia; a branch at Parkersburg, in the county of Wood, now West Virginia, and a branch at Jeffersonville, in the county of Tazewell, then and now Virginia. The reports made by these branch banks were made to the parent bank at Wheeling, which made reports to state officers of Virginia of the bank as a whole, and not distinguishing among the branches. Hence, there cannot be ascertained from the books or the records of the State of Virginia the value of the assets of any one of these branches, nor indeed of the parent bank itself separately from the branches. The State of West Virginia, through

one of the counsel employed in this case, made an exhaustive search to find, if possible, the books of the Northwestern Bank at the time of the separation of the two states, or at any period near thereto. It was found that all the books had long since been destroyed.

After the war, in 1865, the parent bank and the two branches in West Virginia were converted into three National Banks, namely: the National Bank of West Virginia at Wheeling, the First National Bank of Wellsburg, and the Parkersburg National Bank. There were certain assets of the old Northwestern Bank at each of these points which the new bank declined to take. These assets were administered by what was called the Board of Commissioners of the Northwestern Bank of Virginia. They acted as liquidating commissioners. The books of all the branches, after the national banks had taken such memoranda from them as they needed, were transferred and delivered to the Board of Commissioners of the Northwestern Bank, and for years remained in the building of the National Bank of West Virginia at Wheeling; but its affairs having been finally wound up a long time ago, no special attention was paid to these old books, and they were deposited in the basement of the building occupied by the National Bank of West Virginia. Since that time Wheeling has been subjected to some extraordinary floods, particularly the one of 1884, and the best information that could be obtained tended to show that these old books of the Northwestern Bank were then completely destroyed. Certain it is that no trace thereof could be found. At the beginning of this suit, every one of the officers connected therewith, and who had any knowledge of the affairs of the bank, were dead. West Virginia was therefore compelled to get the best evidence she could to prove these values.

It is shown by the act of the general assembly of (the Richmond government of) Virginia, and by the report of the Hon. Chester D. Hubbard, which are printed as Appendix B of this brief, that the assets of the branch at Jeffersonville, in Tazewell county, Virginia, were wholly lost to the Northwestern Bank. What were the value of these assets which were practically confiscated by the said act, cannot now be definitely ascertained. The Northwestern Bank claimed a loss thereby of 1642 shares, of the par value of $164,200. (See statement

submitted by Mr. Hubbard in said Appendix B.) The provision of section 7 of the said confiscatory act of the Confederate government of Virginia, limiting the amount of redemption of certain notes to $180,000, seem to show that the estimate of the loss of the Northwestern Bank of $164,200 was not too high. The provisions of sections 2 and 4 of the said act are sweeping; they take from the Northwestern Bank every item of property it owned or held in its Jeffersonville branch.

Whatever the loss was—whether $164,200 or $180,000—it was a large loss, *and the Master takes absoutely no account whatever of this large loss* in arriving at the value of this bank stock as of June 20, 1863. *The best evidence, in our opinion, as to the value of these stocks, was the price put upon them by the National banks which took over the assets.* This was done in March, 1865. In the case of each of the three banks, to wit: National Bank of West Virginia, First National Bank of Wellsburg and the Parkersburg National Bank, the same value was placed upon the stock, that is to say, *fifty cents on the dollar.* At fifty cents on the dollar 3418 shares would have been worth $170,900.

By reference to the said report of Mr. Hubbard, which he made by the direction of the Board of the School Fund of West Virginia, it appears that on March 2, 1865, when these national banks were formed, the directors of the Northwestern Bank charged to the State of Virginia for the loss of the assets of the branch at Jeffersonville the amount of 1642 shares of the stock formerly held by the State of Virginia and canceled that amount, leaving 1776 shares, for which stock was given to West Virginia by the three national banks at the rate of *fifty cents on the dollar.* The stockholders other than the state only received stock in the new banks at the rate of fifty cents on the dollar. This fact shows their good faith in thus dealing with this proposition.

In addition to the 1776 shares of stock, for which West Virginia received stock in the new banks at the rate of fifty cents on the dollar, she also received stock in the new banks at the same rate for 326 shares of bonus stock given by the bank to the state of Virginia, and this makes the total of 2102 shares for which West Virginia received

stock in the new banks of the par value of $105,100. In addition to that West Virginia received out of the remaining assets of the Northwestern Bank the sum of $10,510 on the first day of July, 1867; the sum of $10,510 on the first day of August, 1868, and the sum of $10,510 on the first day of July, 1871. It is not denied that these amounts are all that were received by West Virginia in stocks or moneys out of the assets of the Northwestern Bank of Virginia upon its dissolution and winding up. The total was $136,630.

Suppose for a moment that West Virginia was negligent in permitting the stockholders of the Northwestern Bank to charge up the assets of the branch at Jeffersonville to the state holdings of stock, and that the state should have received also fifty cents per share on these 1642 shares, this would add the sum of $82,100 to the amount heretofore conceded. But we do not think that negligence can be reasonably charged to West Virginia in this matter. How could she prevent the State of Virginia from seizing the property of the branch at Jeffersonville, which was in her own territory and dominated by the arms of the Confederate States? This property of the Jeffersonville branch *was never transferred to West Virginia by Virginia. Virginia kept it and made use of it.* What reasonable claim can, therefore, be made that it should be charged to West Virginia?

We know of no better evidence that could be obtained than these acts of the parties at the time. They were dealing with the matter in a business way and on a business basis. The Master, as has been said, makes no deduction whatever for the loss of these assets of the branch at Jeffersonville, but on the contrary charges West Virginia with the stock as if this great loss had not happened. The Master also goes on the assumption that the fact of the payment of 7½ per cent dividend for a few years prior to the war shows that this stock was of the value of one-fourth more than par. This position is clearly untenable. *The sale by the state in 1857 to this bank itself of 1082 shares for $113,000 shows that the position taken by the Master cannot possibly be sound.*

Virginia, in 1857, when this stock was earning this 7½ per cent rate, was willing to take and did take less than $105 per share for the

stock, the par value of which was $100 per share. Hence, we cannot conceive how the Master could say that, amidst the throes of war, and especially at the time when the destiny of the country hung in the balance, as it did in June, 1863, this stock was worth $125 per share. It must be remembered that banks prior to 1863 and banks of the present day did business on different conditions. Supplemental Exhibit No. 9, filed with the Master after the record was printed, and upon which he based his finding in this particular in part, shows that the deposits in this bank were less than one-fourth of its capital stock, and further shows that the money-making powers of these banks in Virginia prior to the war lay in their exclusive right to issue Virginia notes, which notes passed as the money of that day. Certainly, by the second day of March, 1865, when this bank was nationalized, it was a recognized fact that this power to issue this money was gone; the immense amount of such notes which it had outstanding reduced its assets one-half. Is it to be presumed that, in June, 1863, before the battle of Gettysburg and before the fall of Vicksburg, when everything hung in the balance, the conditions of 1859 and 1860, so far as this bank is concerned, had continued just the same? The Master says that there is a presumption of such continuance of conditions, when there is no proof to the contrary. The Court will certainly take judicial notice of the fact that in this instance there is written on history's pages an immense amount of proof to the contrary. The greatest war of modern times, directly involving the territory of the two states, had drained into their soldiery the largest part of the able-bodied men who lived within the country reached by this bank. Can it be presumed that under these conditions the value of these bank stocks would have continued and grown twenty per cent greater in 1863 than they were in 1857?

The Master draws a comparison between the Fairmont Bank and the Northwestern Bank. He certainly overlooked some important matters in such comparison. He takes the statement made by West Virginia that Fairmont stock was worth par as proof that the stock of the Northwestern Bank must be worth more than par. The concession made by West Virginia as to the value of the Fairmont Bank stock was based solely and alone on the fact that when the Fairmont

Bank was nationalized in 1865, the stockholders thereof received stock in the new National Bank at par for their holdings in the Fairmont Bank. This concession on the part of West Virginia only proves that she was willing to pay for this stock every cent's value she received in it, which value is that which the persons in charge of the banks in 1865 fixed as the value of the stock, when they became incorporated under the laws of the United States. It is certainly reasonable to presume that when these banks became national banks, under the strict inspection given by the United States, they put a just value on the properties; and it is further reasonable to presume that when the stockholders in charge of the bank gave the State the same treatment that they gave themselves and other stockholders, they were acting justly. The comparison made by the Master between the Fairmont Bank and the Northwestern Bank on the basis of the concession that the Fairmont stock was worth par thus falls flatly to the ground. If the concession as to the Fairmont Bank can be regarded as proving anything, certainly the concession made as to the Northwestern Bank should be worth as much, and prove what it admits. Moreover, the Fairmont Bank had no such loss as was suffered by the Northwestern. A considerable part of its assets were not seized and confiscated by the enemy in war. This fact the Master also overlooks in his comparison.

We might recapitulate this case as follows: Virginia conceded in 1857 by her sale that the stock was worthy only $105. A great war came on; there was a great upheaval, involving most of the territory served by this bank; one branch, with a capital stock of $150,000, was wholly lost to the bank; and yet the Master finds that the stock was worth twenty per cent more than the value placed upon it in 1857 by the Virginia state officers. The Master says that this conclusion is largely arbitrary, but he believes it reasonable. We certainly cannot agree with the latter phrase.

Exception by Virginia Under Paragraph VII. of Decree.

Virginia's exception under this paragraph is based on the finding of the Master that West Virginia received nothing in money from Virginia. The Master finds that there was received by West Virginia

from the restored government of Virginia a total of $170,771.46. These moneys were given over to West Virginia by the act of February 4, 1863, passed by the legislature of the loyal restored State of Virginia (App., p. 131). The entire amount of money so turned over was collected by taxation by the restored government from the people and properties of the territory which afterwards formed West Virginia. All of it had been acquired after the organization of the restored government. This is necessarily true, as the restored government had no money whatever when it was organized, and could only raise money by the collection of taxes within the territory where its authority was recognized.

It will be remembered that the act of February 3, 1863 (App., p. 128), transferred to the new state, when it should become one of the United States, certain described properties belonging to the State of Virginia within the boundaries of the proposed State of West Virginia. It further provided that if the new state was formed, and that grant took effect, the new state should account for the same in a settlement between the two states.

After that act had been passed and become law the legislature passed the act of February 4, 1863. By an act passed on May 14, 1862 (App., p. 128), there was appropriated to the new state the sum of $100,000; and this act provided in part as follows:

> "All of the appropriations made by this act shall be charged to the State of West Virginia in the settlement between the States of Virginia and West Virginia."

The act of February 4, 1863, contained the following provision:

> "That the act passed May 14, 1862, making an appropriation of $100,000 to the State of West Virginia be and the same is hereby repealed."

We thus see that it was plainly the intention of the legislature of Virginia not to charge to the new state this sum of $170,771.46. This is directly shown by the passage of the act of February 4, 1863, after the act of February 3, 1863, and by the repeal of the act of May 14, 1862. This was but simple justice to the new state. All this money had been collected on the property and from the citizens of the new state. It was specifically provided in the act of February 4,

1863, that all moneys which had been collected from the counties of Virginia outside of the new state, should be included in a settlement to be made by the auditor of Virginia, and also that all moneys that up to the same time had been expended in such counties should be included in another settlement, and the surplus expended, after deducting the moneys expended in such counties from the moneys collected from such counties, should remain the property of the Commonwealth of Virginia. This plainly shows that it was the intention of Virginia to separate the moneys then in the treasury according to the fact whether its sources were the counties of the new state or the counties of the old state. If it had been collected from the people of the counties of the new state, they justly said that the new state was entitled to it. The converse was also true. The moneys which had been collected from the counties of the old state should be retained by the restored government of Virginia. It was a gift indeed, but still a gift which in justice rightly belonged to the state to which it was given. It was no Indian gift: there was no expectation of any return.

PART III.

Causes of Separation of West Virginia.

Part I. of defendant's brief deals with questions of law which do not go to the merits of the case, and Part II. deals with the exceptions of the complainant and defendant and the report of the Master. This part is intended to deal with the principles of law applicable to the facts admitted by the pleadings, developed before the Master, and matters of common history and knowledge of which the Court takes judicial notice. Such an argument must inevitably involve some repetition in respect of questions covered by Part II.; but this is avoided as far as possible.

1. Rule of Construction to be Applied in This Case.

This Court said in *Scott* v. *United States* (12 Wallace 443), which involves the construction of a contract between the Government and an individual and the ascertainment of the intent of the parties:

> "In cases like this it is the duty of the Court to assume the standpoint occupied by the parties when the contract was made—to let in the light of surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning."

This settled doctrine, so admirably stated by the Court, is peculiarly applicable to this case, both in the construction of the Wheeling Ordiance of August 20, 1861, and of Section 8 of Article VIII. of the Constitution of West Virginia, which was adopted by the Convention that assembler pursuant to the provisions of the Ordi-

nance and under which West Virginia with the consent of Virginia was admitted into the Union as a State. The true construction of these instruments and a just determination of the case, cannot be reached without reference to the relations of Northwestern Virginia and her people and Eastern Virginia and her people, territorily and sentimentally, and to the circumstances under which the movement for the formation of the new State was inaugurated and carried to consummation.

2. PHYSICAL CHARACTERISTICS OF EASTERN VIRGINIA AND NORTHWESTERN VIRGINIA.

Some elements of the problem are not susceptible of proof by the testimony of living witnesses, but are susceptible of accurate ascertainment from the history of that period. This Court will take judicial notice of the physical fact that Northwestern and Western Virginia within the boundaries described by the Ordinance and the Constitution is remote from tidewater, and separated from Eastern Virginia by the Alleghany Mountains; that this region which became the State of West Virginia lies mainly on the western slope of the Appalachian Mountains and is bounded on the North by Ohio, Pennsylvania and Maryland, on the east by Pennsylvania, Maryland and Virginia, and on the south by Virginia and Kentucky, and on the west by Kentucky and Ohio.

> "The Alleghany watershed is in the eastern portion of the State, all except eight of the counties lying on the western slope within the Ohio Basin. In the higher parts of the State, where Pendleton, Pocahontas and Randolph Counties join, five rivers rise which flow across the State—two finally flowing eastward into the Atlantic and three westward into the Ohio. The Ohio forms the western boundary and is navigable throughout its length. The eastern part of the State is drained by the Potomac and its tributaries. The Cheat and Monongahela flow through the northern counties and the latter is now navigable as high up as Fairmont, in Marion County. The Greenbrier and the Elk form the watershed to the southwest and join the Great Kanawha, which flows northwest into the Ohio. The Great

Kanawha is navigable for 90 miles from the Ohio. The Big Sandy, flowing northwest, forms the southern boundary of the State. The river system of the State has been improved somewhat for navigation by government engineers, but the interior rivers will always be more valuable for their water power than for facilities of navigation" (See "West Virginia," the "Americana," published by "Scientific American").

3. COURT MAY RESORT TO SPEECHES OF CHAIRMAN OF COMMITTEE REPORTING A BILL AND OF AUTHOR OF THE BILL.

We are fully mindful of the rule that in construing an Act of Congress the court does not consider itself at liberty to recur to the views of individual members of either body in debate; or to consider the motive which influenced them for or against the passage of the measure. The rule has not always been observed here, and moreover, is not without exceptions.

What is said by the Chairman of a Committee of either body in reporting a measure as to its purpose and meaning, has been resorted to by the Court in aid of its construction. The same is true in respect of the obervations of the author of a measure in exposition of its provisions. And here we, therefore, feel at liberty to quote from the remarks of Senator Wade, Chairman of the Committee on Territories of the Senate, who reported the Bill for the admission of West Virginia into the Union (Congressional Globe, Part 4, 37th Congress, 2d Session, p. 3038).

4. SPEECH OF SENATOR WADE IN SUPPORT OF ACT FOR ADMISSION OF WEST VIRGINIA.

Senator Wade said:

"I have looked at the condition of things in Western Virginia, and I have come to the Conclusion that it is impossible for the people of Eastern and Western Virginia to live together in harmony and peace. It is not a new controversy among these people. When I came to investigate it, I find that it has existed for a long period of years, much of it probably growing out of

> the entire isolation of the two sections, for there is really no communication between the east and west. As Governor Pierpont remarked to me, 'We have no communication whatever, except it be furnishing a few members of the Legislature, and a few inmates of their penitentiary.' In other respects, in commercial feeling, in political feeling, in association, they are entirely isolated. On this subject of slavery they feel entirely different. There is an animosity between them that is more intense, I believe, from what I gather from the best men of that section, than that which exists between any of the northern and southern States. Under these circumstances the question is, shall they be compelled to be joined with the other portions of the State where they will undoubtedly be put under the ban of a hostile legislation for years? They complain that they have been heretofore. It is a standing complaint with them that while taxes and burdens have been imposed upon them by the vast majorities of the eastern section, for internal improvements and the like, they have been awarded no benefit from them whatever, and this has aggravated the difference between them."

5. SPEECH OF SENATOR WILLEY.

Senator Willey, elected to the "Restored" Legislature of Virginia, and the author of the Bill to admit West Virginia as a State (Cong. Globe, Part 4, 37th Cong., 2nd Session, p. 3038), said:

> "Sir, it is with pain that I am compelled to take this stand, but I am justified in doing it. These people have looked for sixty long years to this day. Time and again have the sections of Virginia been upon the eve of an outbreak, of an insurrection. Criminations and recriminations have sounded in our legislative halls at every session of the Legislature for the last thirty or forty years. Threats of violence have been hurled by one section at the other. And today, when the loyal people come with a united voice, having fulfilled all the requisitions of the Constitution and all the forms of the law, and I stand here, where my colleague does not stand representing the voice of the people of Virginia, who ask for freedom, who ask for severance from the

eastern section of the State to whom we have been in bondage in a great degree for fifty or sixty years, he gets up here on the very eve, as I have reason to believe, of the passage of the bill, when the Senate of the United States is about to bestow upon us the long prayed for boon, and he interposes an objection, to postpone and defer our long-cherished hopes and desires.

"Now, sir, I wish to make another remark in answer to the Senator from Illinois. He seems to have fallen into the mistake, common to almost every person, that this movement was conceived in a desire to separate ourselves from the disloyal portion of the State of Virginia, that it grew out of our national difficulties, out of the secession of Virginia from the Federal compact.

No, sir; no. These circumstances may have precipitated action upon it; they may have given us the opportunity to effect the long-cherished desire of our section of the State; but this controversy is older than I am; I have heard it ever since I can remember anything. It grows not out of these national dissensions; grows not out of loyalty or disloyalty to the government; it grows not out of this question of secession; but it grows out of the social, geographical, commercial, industrial distinction and antagonisms that never can be reconciled by the power of man. The Almighty, with His own eternal hand, has marked the boundary between us. We live upon waters that flow in the valley of the Mississippi; our eastern brethren live upon waters that flow into the Potomac and the Chesapeake; and there is a chain of impassable mountain barriers between us that prevent and will forever prevent, all connection, all social relations, all interchange of traffic and commodities by any convenient means of transportation. Owing to these facts, we ask this separation, and we place it upon these large national grounds; not upon the question of secession and disloyalty. If those were the only questions at issue, I would say to the western people, as I have hitherto said to them, stand fast, not only until the Union is restored, but until all Virginia again is made loyal to the national flag, and until we all dwell together again beneath its ample folds in peace and in security. But, sir, we never can dwell

> in harmony, not because now we are separated by principles of secession and anti-secession or loyalty and disloyalty, but because the Almighty, with His own hand, has placed barriers between us that separate our trade and our intercourse, because our social relations are different, because our places of market are different, because our industrial interests are different, and because, on account of these facts, our internal resources have never been developed, and never can be developed while we are connected with Eastern Virginia."

Again he said:

> "It is said, 'Whom God hath joined together, let no man put asunder.' The reverse is true, whom God hath put asunder, let no man attempt to put together. There is no identity of interests, there is no homogeneity between the people of the valley and the people west of the Alleghany Mountains. And we are today fulfilling that remarkable prediction of Mr. Webster, that whenever there was an attempt to withdraw Virginia from the Union, it would be seen that the inhabitants living upon the waters of that State which flow into the Valley of the Mississippi would inevitably go with the people of that valley."

This was said in opposing the amendment reported to the committee which added 140,000 people and several counties to the proposed State. He further said in support of the amendment to strike out the additional counties which had been added by the committee (p. 3037):

> "By so doing you secure a new State, that will be perfectly homogeneous and identical in interests with the great States of Ohio and Pennsylvania; the great breakwater which the selfish policy of the eastern government of Virginia has always interposed between those connections across West Virginia will be swept away, and the people of Ohio, Pennsylvania, and West Virginia will be one people in interest., living together harmoniously; and the great resources of that section of the State will no doubt be speedily developed while all this can be done without detracting one iota

from the interest, the welfare, the rights, or the privileges of the eastern section of the State."

6. SPEECH OF DANIEL WEBSTER.

The historical fact must be remembered, also, that the people of West Virginia were not in sympathy with the institution of slavery and were opposed to secession. Mr. Webster recognized the natural and abiding commercial isolation of western Virginia from eastern Virginia, and in a speech which he made, to which Senator Willey refers, at the laying of the corner stone of the addition to the capitol here in 1851, he warned the people of Virginia against the issue of disunion raised by Mr. Calhoun. After appealing to the people of Virginia, and especially to the men of "James River and the Bay" and to the men "beyond the Blue Ridge," he said:

> "And ye men of western Virginia, who occupy the great slope from the top of the Alleghanys to Ohio and Kentucky, what benefit do you propose to yourselves by disunion? If you 'secede,' what do you 'secede' from, and what do you 'accede' to? Do you look for the current of the Ohio to change and to bring you and your commerce to the tidewaters of eastern rivers? What man in his senses can suppose that you would remain a part and parcel of Virginia a month after Virginia should have ceased to be a part and parcel of the United States?"

7. CONDITIONS AT THE TIME OF CREATION OF WEST VIRGINIA.

When the great transactions occurred which are under review, the Confederate States of America had been formed. The Ordinances of Secession had been passed by South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana. Virginia had passed an ordinance of secession, had borrowed $1,000,000, had called for 10,000 men to serve for twelve months and had arranged with the Confederate goverment for admission to the Confederacy, and in the meantime that her troops should, under that government, be employed against the United States. Her troops had seized the Norfolk and Gosport Navy Yards, the arsenal at Herper's Ferry, the Customs Houses, and other property of the United States within her borders;

had hauled down the flag of the United States and hoisted in its place another. President Buchanan in a message to Congress had taken the position that there was no power in the Federal government under the constitution to coerce a state. Fort Sumpter had been surrendered.

President Lincoln had called for 75,000 troops to serve three months. The battle of Bull Run had been fought in which the Federal troops were disastrously defeated. The "New York Tribune," edited by Mr. Greeley, excerising a most potent influence upon public opinion, advocated a peaceful seperation of the states determined to withdraw, and many eminent men of undoubted love for the Union in both parties seemed to be of the same opinion. There was grave doubt throughout the country as to the ultimate result. *The people of West Virginia could not be blind to the fact that if the Confederacy should be established, that territory would, unless action were taken, be irrevocably a part of that Confederacy.*

Isolated from eastern Virginia, and differing in sentiment from her people in respect to the right of secession and the institution of slavery, her people are not to be justly chided here or elsewhere for embracing that opportunity to become a state in the Union. In this situation, is to be found the genesis of West Virginia; and in the light of this situation, her people are to be judged and her compacts and "constating" instruments are to be construed.

The Rule of Public Law in Regard to the Apportionment of the Debt of a State After Its Division.

1. THIS COURT HAS NEVER DECIDED THAT WHEN A STATE IS DIVIDED THE DEBTS OF THE ORIGINAL STATE SHOULD BE RATABLY APPORTIONED BETWEEN IT AND THE NEW STATE.

It has been assumed, and is now assumed by counsel for the complainant, that this Court has so decided. They cite in support of their contention the opinion of the Court delivered by Mr. Justice Field in *Hartman* v. *Greenhow*, 102 U. S. 672; and *Antoni* v. *Greenhow*, 107 U. S. 769. It may be said here that the opinion of Mr Justice Field in the latter case was a dissenting one. The question was not in any wise involved in either case. The Hartman case was as follows:

By act of March 30th 1871, known as the "Funding Act," by which Virginia made an adjustment with her creditors under which she funded two-thirds of her debt and issued bonds for the same, it was provided that the coupons should be made payable to order or bearer, and it was declared that the coupons should be payable semi-annually, to be "receivable at and after maturity for all taxes, debts, duties and demands due the state," and that this should be so expressed on their face. Hartman a resident of Richmond, and a citizen of Virginia, on the 5th of April, 1878, was indebted to the state for taxes to the amount of $26.53. On that day he tendered to the treasurer of Richmond, who was by law, charged with the duty of collecting the taxes of the state in that city, certain interest coupons, which were overdue, amounting to $24, cut from bonds of the state, (which bonds he did not own), issued under the act of 1871, and $2.53 in lawful money of the United States in payment of the taxes. The treasurer refused to accept the coupons in payment of the taxes, without first deducting therefrom the taxes imposed by Virginia on the bonds to which they were originally attached, and of which the holder of the coupons was not the owner. Upon this refusal, he applied to the Supreme Court of Appeals of Virginia for a writ of mandamus to the treasurer to compel him to receive the coupons, with the money mentioned, in full discharge of his taxes, without any deduction from the coupons for the taxes upon the bonds. The Court of Appeals of Virginia issued a rule or an alternative writ upon the treasurer, he answering that the General Assembly for many years had exercised the right to tax all bonds, choses in action, and other evidences of debt, including bonds of the state; that the taxes assessed upon the latter bonds were according to their market value, the amount being fixed at 50 cents on the $100 of such value; that the law required the taxes to be collected when the interest on the bonds was paid, and made it a high penal offense for any officer to receive coupons in payment of taxes without deducting from their face value the tax levy upon the bonds from which they were taken, etc.

The judges of the Supreme Court of Appeals of Virginia were equally divided upon the question. This operated as a denial and the

petition was denied. The court, however, certified that on the hearing of the case there was drawn in question the validity of the statute of the state authorizing the tax upon the bonds and requiring its deduction from the coupons, on the ground of its repugnancy to the provision of the constitution of the United States, prohibiting any legislation by the states impairing the obligation of contracts; and that the decision was in favor of the validity of the state statute and against the right claimed by the petitioner under the provision of the constitution of the United States.

Thereupon the case was brought to this Court and manifestly it involved only the question of the right of plaintiff in error, Hartman, to pay his taxes with the coupons and the added money. This, by the terms of the law, provided for the issue of the bonds and coupons and by the terms of the coupons themselves, he was entitled to do. The Court based its judgement sustaining the right of the plaintiff in error to pay his taxes with the coupons on the authority of *Murray* v. *Charleston*, 96 U. S. 432, saying:

> "This decision would be decisive here, but the present case is still stronger for the creditor. The Funding Act made the bonds issued under it payable to order or bearer, and made the coupons payable to bearer. They were so far distinct and independent contracts that they could be separated from each other and transferred to different hands."

So it is held:

> "We are clear that this act of Virginia of 1876 (Sec. 11?), requiring the tax on her bonds, issued under the Funding Act of March 30, 1871, to be deducted from the coupons originally attached to them when tendered in payment of taxes or other dues to the state, cannot be applied to coupons separated from the bonds, and held by different owners, without impairing the contract with such bond holders, contained in the Funding Act, and the contract with the bearer of the coupons."

Mr. Justice Field said, however, in the opinion:

> "During the war a portion of her territory was separated from her, and by its people a new state, named

West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But as the whole state had created the indebtedness for which the bonds were issued, and *participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness* should be assumed by that part which was taken from her and made a new state. Writers on public law speak of the principle as well established, that where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On the subject Kent says: 'If a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by *special agreement*, their rights are to be enjoyed and their obligations fulfilled by all the parts in common.' 1 Com. 26. And Halleck, speaking of a state divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the divisions are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts. This principle is established by the concurrent opinions of textwriters, the decisions of courts, and the practice of nations.' International Law, chap. 3, sec. 27." (Italics ours.)

In *Antoni* v. *Greenhow*, 107 U. S., p. 770, Mr. Justice Field, in his dissenting opinion, incorporated very much the same observations, referring to the authorities cited by him in *Hartman* v. *Greenhow*, *supra*. The subject was not involved in either case. If Virginia had never been divided, under the same legislation and upon the same state of facts, the question before the Court would have been precisely the same.

We are constrained, albeit with the utmost reverence for the memory of Mr. Justice Field, to say that, in both opinions, his observations with respect to the liability of West Virginia, upon the rules of international law, for a proportion of the public debt of Virginia, prior to January 1, 1861, seem entirely *obiter*.

2. THE TRUE RULE OF PUBLIC LAW IN CASE OF THE DIVISION OF A STATE. GENERAL DEBTS ARE APPORTIONED ON THE BASIS OF TAXABLE VALUE. LOCAL DEBTS ARE ASSUMED BY THE STATE FOR THE EXCLUSIVE BENEFIT OF WHOSE TERRITORY THEY WERE INCURRED. THE AUTHORITIES.

Publicists seem to be in entire accord as to some phases of debt succession between states: First, that when one state and its provinces, if it have any, are absorbed by another, either through subjugation, or through voluntary merger, the absorbing state is liable for the whole debt of the extinguished state. Second, that when a state is broken up into seperate states, the original state personality having become extinct, the separate states thus formed are each bound for a proportional amount of the debt of the original state. Third, where a state is broken up into fragments, and separate portions of it are absorbed by surrounding states, they are liable for the debts of the original state.

(*a*) HALL.

Mr. Hall, who has been frequently quoted by this Court, and who certainly was a discriminating and learned writer upon the law of nations, says at page 78:

> "When a *new* state splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question, therefore, presents itself with respect to the general rights and duties of a new state. What, however, is its relation to the contract obligations of the state from which it has been separated, to property belonging to and privileges enjoyed by the latter, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new state?
>
> "The fact of the personality of a state is the key to the answer. *With rights which have been acquired*

and obligations which have been contracted, by the old state as personal rights and obligations the new state has nothing to do. The old state is not extinct; it is still there to fulfill its contract duties, and to enjoy its contract rights. The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted; they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account. What is true as between the new state and foreign powers, is true also as between it and the old state. From the moment of independence all trace of joint life is gone. Apart from special agreement no survival of it is possible, and the two states are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old state continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost; so that property enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continues to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, *obligations contracted with reference to it alone*, and property which is within it, and which has theretofore a local character, or which, though not within it, belongs to state institutions localized there, transfer themselves to the new state person.

"Thus treaties of alliance, of guarantee or commerce, are not binding upon a new state formed by separation, and it is not liable for the *general* debt of the parent state. * * * * It is saddled with local obligations such as that to regulate the channel of a river or to levy no more than certain dues along its course, and *local debts*, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it."

On page 80 of his work on International Law is found a note upon the subject of this particular phase of law which is peculiarly instruc-

tive, for his comments upon the indefiniteness with which Grotius and other authors named have written upon it. For the convenience of the Court, it is herein incorporated:

> "The subject is one upon which writers upon international law are generally unsatisfactory. They are incomplete and they tend to copy one another. Grotius, for example, says that if a state is *split up*, 'Anything which may have been held in common by the *parts* separating from each other must either be administered in common or be ratably divided.' De Juri Belli et Pacis, lib. II, c. IX.; Section 10, Kent (Comm. i. 25) does little more than paraphrase this in laying down that 'If a state should be divided in respect of territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed and those obligations fulfilled by all the parts in common.' Phillimore quotes Grotius and Kent adds: 'If a nation be divided into *various distinct societies*, the obligations which had accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the parts; 1 sec. CXXXVII.' "

Mr. Hall adds (and it is certainly justified):

> "It is difficult to be sure whether these writers only contemplate the rare case of a state so *splitting up*, that the original state person is represented by no one of the factions into which it is divided, or whether they refer also to the more common case of the loss of such portion of the state territory and population by secession, that the continuity of the life of the state is not broken. If the former is their meaning, their doctrine is correct so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them. But the obligation is a moral, not a legal one. The fact

remains that the *general debt* of a state is a personal obligation. *The case also of the creation of a new state out of a part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one state to another.* (Italics ours.) When the latter occurs at least as the result of conquest, it is not usual to take over any part of the *general debt* of the state ceding territory. The case of Belgium, which took over a portion of The Netherlands debt, is scarcely in point. The Treaty of 1839 (De Martens' Nouv. Rec. XVI, 782), by which the division of the debt was effected, was part of a general settlement of the countries in question made at the dictation of Europe with a view of dealing with all the interests concerned in the most equitable and advantageous manner and not with the bare object of enforcing law. The true rule is recognized by Halleck (i. 76), who distinguishes the case of a state which is so split up as to lose its identity from that of a state which suffers dismemberment without losing its identity. 'Such a change,' he says 'no more affects its rights and duties than a change in its internal organization or in the person of its rulers. This doctrine applies to debts due to as well as from the state and to its rights of property and treaty obligations except so far as such obligations may have particular reference to the revolted or dismembered territory or province.' "

In the brief of the learned counsel who formerly appeared as *amicus curiae*, but now appears for the bond-holding creditors of Virginia, it is said (page 20):

"Among the writers on public law referred to by the learned justice (whose opinions concurred with the view expressed by him) there may be mentioned the following, citing Puffendorf, Phillimore, Wheaton, Moore, Wharton, Oppenheim."

(*b*) OPPENHEIM.

It is justly conceded that Oppenheim is a learned, accurate and discriminating publicist. He says (sec. 84):

"When, in consequence of war or otherwise, one state cedes part of its territory to another, or when a

part of the territory of a state breaks off and becomes a state and an International Person of its own, succession takes place with regard to such international rights and duties of the predecessor as are *locally connected* with a part of the territory ceded or broken off and with regard to the fiscal property found on that part of the territory. It would only be just if the successor had to take over a corresponding part of the *debt* of its predecessor, *but no rule of international law concerning this point can be said to exist although many treaties have stipulated a devolution of a part of the debt of the predecessor upon its successor.* Thus, for instance, Articles 9, 33 and 42, of the Treaty of Berlin of 1878 stipulate that Bulgaria, Montenegro and Servia should take over a part of the Turkish debt."

He adds in a foot-note:

"Many writers, however, maintain that there is such a rule of international law. (See Huber, Nos. 125-135 and 205, where various treaties are enumerated.")
(The italics are ours.)

(*c*) GLENN.

In Glenn's Work on International Law (Hornbook Series), page 36, under the head "Effect of Change of Sovereignty—Upon the Public Rights and Obligations," it is said:

"Three classes of cases arise: (*a*) When a new and independent state is formed by separation from an existing state; (*b*) When a portion of the state is lost by cession; (*c*) When a state is wholly absorbed.

"In the first case, two separate and distinct international persons exist instead of one and the new state has nothing to do with the personal rights and obligations of the parent state, which still possesses its identity. So also the parent state remains in sole possession and enjoyment of its separate property and the rights connected therewith. Treaties of alliance and guarantee of commerce are not binding upon the new state, nor is it liable for *the general debt of the parent state.* The new state comes into possession of rights, including those under treaties and *obligations, connected with the property within it.* It is entitled to the privileges of

navigating rivers that its citizens possess by virtue of being citizens of the parent state and is bound by the obligations connected therewith, such as regulations in regard to the dues, etc. It becomes liable for *local debts, including those for local objects*, and those *secured by local revenues.*" (Italics ours.)

(*d*) HANNIS TAYLOR.

Mr. Hannis Taylor, who is a writer of great research, and is quoted in the brief of the learned counsel for the bond-holding creditors, in his work on International Law, Section 166, says:

"*When severed territory becomes a distinct state—local rights and obligations.*—A narrower and more technical rule prevails when the parent state is deprived of a portion of its territory *which is erected into an entirely distinct political community.* The cogent reasoning in such a case is that as a man who loses an arm or leg in battle is not thereby relieved of any part of his obligations, so a state that is so dismembered as to suffer no loss of identity remains bound as before for its entire general indebtedness. 'Such a change,' Halleck says, 'no more affects its rights and duties, than a change in its internal organization, or in the person of its rulers.' This doctrine applies to debts due to as well as from the state, and to its rights of property and treaty obligations, *except so far as such obligations may have particular reference to the revolted or dismembered territory or province.*" (Italics ours.)

"In other words, as the old state continues its corporate life without interruption, it retains all general state property, and all general benefits resulting from treaties with full liability for all *general* obligations with which the new creation taken from its side may disavow all legal connection. The new state on its part carries with it *only local obligations*, whether *contracted for local objects* or secured by a lien on local revenues, and such local duties as arise out of agreements to maintain the channel of a river, or to levy no more than certain tolls along its course. As a compensation for such burdens the new state is entitled to property within it of a local character, or to such, not within it, as belongs to state institutions localized

there, and to the privileges arising from treaties specially contracted for the benefit of its territory." etc.

This certainly has the merit of clearness. Summarizing, he says (Section 168): .

> "After a careful review of all the authorities the general statement may be made (1) that no matter whether a state is entirely extinguished by a division into two or more distinct states, or (2) whether it losses its identity by being absorbed into another state, or (3) whether a state without a loss of its identity has a portion of its territory taken from it to form an integral part of another state, or (4) whether such severed part is erected into an entirely new and independent state, all local charges, and guaranteed debts to which certain domains and their revenues are dedicated, survive as charges upon the localities to which they relate, with their equities unimpaired. In the case first named, the *general debt* of the state should certainly be ratably binding, morally, if not legally, on its several parts; in the second it passes as a whole to the absorbing state; in the third the acquiring state should assume a ratable proportion of it; and in the fourth, every principle of equity and good conscience requires that it should be provided for out of the common state property and the residue divided in proportion to the revenues of the two distinct commonwealths. In the notable case of West Virginia that obligation, though formerly recognized, has never been discharged."

He seems to coincide, so far as the moral obligation is concerned, with Hall, Oppenheim and other writers; and to agree with them also that there is no rule of International Law which makes it a *legal* obligation.

(*e*) PRADIER FODERE.

Pradier Fodere, in "Traite de Droit International Public," Vol. 1, Paris, 1885, Section 156, states:

> "The state to which cession is made is bound by *local debts* of ceded territory."

Section 157:

> "But is the state receiving the cession bound by a part of the other obligations resulting from treaties

made with the ceding state and not attached to the ceded territory, merely because it has had the benefit of the cession? In other words, are obligations and rights which are neither local nor personal, resulting from treaties made with a state, necessarily transmitted, in any proportion, to the state to which a cession is made, together with the ceded territory? *No; the ceding state remains bound or vested with the rights, for, it alone made the contract. The same rule holds, when, instead of being ceded, a province becomes an independent State.* The new state is not generally bound by *non-local obligations* of the state from which it is separated. Such at least is the principle; but it can be modified in practice by a treaty. Thus the Kingdom of Italy, after the acquisition of Lombardy and Venice, only took the place of Austria in respect of the local obligations and rights of the provinces acquired, and refused to take upon itself a proportion of the *general debt* (italics ours) of the Austrian Empire. So also no part of the French debt was imposed upon the province of Alsace-Lorraine which France was forced to cede to Germany in 1871; but—and this is an example of the exceptions which treaties can make from the general rule—the Treaty of Berlin, of 1878, imposed part of the public Turkish debt upon Bulgaria, constituting a diminished principality or territory under the suzerainty of the Sultan, and upon Montenegro and Servia; whose independence was recognized."

(*f*) BLUNTSCHLI.

Bluntschli says, Section 59:

"The debts of the state ought not to be divided proportionately to the *population*. Mortgage or landed debts will be adjudged to fall to the state which obtains the land securing the debt. Other debts will be apportioned proportionately to the *taxes* paid by the divers portions of the territory.

* * * * * *

"2. The security of other *public debts* rests on the *taxable fortune* of the members of the state, and is measured by the *actual product of the taxes* which, accordingly, furnish a *juster basis than the number of*

the population. Suppose a state to be divided in two parts, one having a rich urban population, and the other a poor rustic population. One of the parts, in case of a division proportional to the number of the inhabitants, would be overburdened with debt, and the other considerably relieved, in comparison with the taxes previously paid, all to the great prejudice of the creditors."

(*g*) BONFILS.

Manuel de Droit International Public, by Henry Bonfils, Professor of the Faculty of Law of Toulouse, 3d edition, 1901:

SECTION 223. "If a state ceases to exist by being broken up and divided into several new states, each of the latter ought to assume a portion of the debts which concerned the original state as a whole, and each of them ought also to take upon itself *exclusively the debts contracted for the exclusive benefit of its territory.*"

SECTION 224. "The new state formed by the separation of a province, or by the destruction of the bond of vassalage, should equitably assume a part of the public debt of the state of which it was a fraction. The reason of this is evident. The debts contracted by a state, in *the general interest*, have benefitted all the provinces *in globo*, and the creditors had as a guaranty the wealth of all the provinces and the taxes which that wealth could bear."

SECTION 225. "Part of the territory of a state is ceded, annexed to another state. The annexing state should assume the contributive share of the annexed territory in the public debt of the ceding state. It is just that the state taking the cession should assume a part of the debts which, for divers reasons, directly or indirectly have benefitted the territory with which it is enriching itself."

SECTION 226. "In the last mentioned cases, how shall the contributive share of the new state or of the annexing state be fixed? The authors are divided. Some fix upon the number of the population; others upon the extent of the territory. Bluntschli's opinion is better and juster. He determines the contributive

share according to the share of the *taxes borne by the annexed or separated province. There is, indeed, a necessary correlation between the public debt of a state and the taxes imposed upon the inhabitants.* The latter constitute a guaranty for the former.

"The personal debts of the annexed, or separated, provinces, relating to local interests, naturally ought to continue to be the debts of these provinces, and should be paid by the annexing state, or by the newly founded state."

(*h*) FRANZ V. LISZT.

Das Volkerrecht by *Dr. Franz v. Liszt*, Professor of the University of Berlin; second edition; Berlin, 1902:

Section 23, p. 175: The author, discussing the cession by a state of a part of its territory to another state, says:

"In any case, succession takes place as regards the so-called hypothecated debts (dettes hypothequees), that is, those debts which were incurred in the *exclusive interest of the ceded territory* (as for drainage works), and as regards mortgage debts (dettes hypothecaires), that is, those debts for which real property situated in the ceded territory was pledged as security."

(*i*) PIEDELIEVRE.

Precis de Droit International Public, by *R. Piedelievre*, Professor of the Law Faculty at Rennes: Paris, 1894:

Section 154:

"First question: should the annexing state take upon itself a part of the *general debt* of the dismembered state?

"The question is, in theory, at least, controverted. The negative solution is the less generally accepted. Its partisans take the ground that the dismembered state, however important a dimunition of territory it suffers, nevertheless preserves its juridical personality intact, and conclude that it ought not to cease to be bound by the entirety of engagements, no more than an individual could take advantage of the loss of a part of

his patrimony so as to escape in a similar proportion the fulfillment of his obligations.

"The contrary opinion, more usually announced, seems to us better founded. It involves two principal reasons. The first is that the debts contracted by a state with a view to the *general* utility of the inhabitants, weigh *indivisibly* upon all parts of the territory, and, consequently, if one part of the territory is detached, the part of the debt which was incumbent upon it ought to follow it into the hands of its new master; the second reason is that these debts have served to realize improvements from which the annexed territory benefited in the past, and from which it may benefit again in the future; that it is, therefore, equitable that the state to which the cession is made, as it is to have the fruit of these expenses, should assume an equivalent part of their payment."

"Accepting the principle of apportionment of the debt between the two states, there is still a difficulty to resolve: how shall the principle be applied? How are we to determine what share of the debt of the dismembered state belongs to the annexed territory? Several systems have been proposed.

"Some authors consider solely the *territorial* importance of the detached provinces, so that supposing the debtor state to have lost a fourth or a fifth of its total possessions, the annexing state would have to assume a fourth or fifth of the former state's public debt. While we recognize the simplicity of this system, we think it should be rejected, for the reason that the wealth of a country has less connection with its territorial extent than with the activity of its inhabitants and the direction it has taken. With equal extent of territory, an industrial region is evidently wealthier than a purely agricultural region. But the proposed solution does not take account of this fact; it wrongly supposes the wealth of a state to be mathematically apportioned among its provinces, in proportion to their territorial extent. In practice, the result would be to give one of the states concerned an advantage at the expense of the other.

"A second system has been proposed which is sub-

ject to nearly the same criticism: this is the system of dividing the public debt between the two states in proportion to the number of the *population* of the annexed provinces. To the foregoing observations we may here add that annexation generally has the effect of creating a current of emigration, the importance of which it is difficult to foresee, and for this reason, the governments concerned would have great difficulty in finding the basis for an equitable apportionment.

"A third doctrine remains, which seems to us the best. It is that the debts should be apportioned in proportion to the figure which represents, in the whole amount of *taxes* collected by the dismembered state, the taxes paid by the ceded territory. In fact, the value of the different provinces of a state can only be measured exactly by the actual amount of the taxes paid by each of them. Besides, this system is easily applied and fully protects the rights of the creditors. The annexing state cannot complain, since before consenting to the cession it must have ascertained what were the rights and obligations of the annexed provinces with regard to the dismembered state, and the financial law which fixed the amount of taxes they were to pay sufficiently informed in respect to the debts with which it would be burdened in consequence of the annexation; on the other hand, there is no danger of the dismembered state's raising any objection in regard to the contributive share of the territory lost by it; for it fixed this share itself on the basis of the actual resources of the territory taxed.

Section 156:

"Whatever may be the solution adopted with reference to the question whether the annexing state, by reason of the annexation, ought to contribute to the payment of the public debts of the dismembered state, there are two categories of debts about which there can be no doubt:

"The first includes the *special debts* belonging to the annexed territory, that is to say, the debts which were contracted for their exclusive benefit, and which, like our department or communal debts, are not chargeable to the state. Diplomatic language calls them

dettes hypothequees, because of their particular destination. These debts the annexing state ought certainly to assume, or at least to cause them to be borne by the provinces which they specially affect. In any case, the *ceding state no longer has to pay them*. Thus by the treaties of Campo Formio of Oct. 17, 1797 (Arts. 4 & 10), and of Luneville of Feb. 9, 1801 (Art. 8, France assumed the debts hypothecated on the soil of the ceded countries which were acquired or exchanged.

"The second category includes the mortgage debts (dettes hypothecaires): these naturally are charged to the state which becomes the proprietor of the real property securing their payment."

(*j*) RIVIER.

Principes du Droit des Gens, by *Alphonse Rivier*, Professor at the University of Brussels. Paris, 1896; Volume 1, p 213 (Art. 40, V):

"It is a general principle that ceded territory passes to the acquiring state just as it is, particularly carrying with it the obligations with which it is charged. *'Res transit cum suo onere.'*

"This principle, in the first place applies to obligations of a private nature, to the debts which specially belong to the ceded territory; the territory is transferred with its debts which remain special to it under the new sovereign as they were special to it under the old sovereign.

"This principle *should also be applied to the debts of the dismembered state* which *were contracted for the benefit of the ceded territory* and for the security of which that state gave pledges as mortgages in this territory; lastly, *the principle applied to the proportion* of the *national* debt of the dismembered state which ought to be taken over by the ceded territory.

"The authors disagree in regard to the disposition of the national debt in case of dismemberment of a part of the territory. According to some authors, the dismembered state continues to bear the whole burden. According to others, the debt is divided between the dismembered state and the annexing state, and this equitable system was put into practice in 1860 between

France and Sardinia, in 1866 between Austria, Prussia and Denmark, between the Holy See and Italy, in 1878 between Turkey and the new states, Bulgaria and Montenegro. M. Appleton, and also M. Cabonat accept the principle of division, but between the dismembered state and the ceded territory 'we favor the division of the debt between the dismembered state and the fragment detached therefrom.' *The proportion of the debt to be borne by the latter should be determined in accordance with the relative wealth of the detached portion and of the remainder of the dismembered state, and this wealth is disclosed by the taxes.*"

(*k*) FIORE.

Il Diritto Internazionale Codificato (International law codified), by *Pasquale Fiore*, Professor of International Law at the University of Naples:

Section 132:

> "In the absence of express agreement they" (the debts of the ceding state) "should be divided equitably upon the basis of the economic importance of the ceded territory, taking into account the proportional amount of the *taxes* borne by it."

Nouveau Droit International by *Pasquale Fiore*, Professor at the University of Naples; Paris, 1885.

Section 360:

> "When only a part of the territory is ceded the public debt ought to be equitably apportioned. On this subject we consider the principle laid down by Bluntschli to be correct, that the apportionment should *not be made proportionally to population.* In the case of mortgage or landed debts (foncieres), the state which receives the real property securing these debts, ought to assume their burden. Ordinary debts should be apportioned proportionally to the taxes paid by the respective parts of the territory."

(*l*) PRADIER FODERE.

P. Pradier Fodere, *Traite de Droit International Public*; volume 1; Paris, 1885.

Section 156: The author states that the state to which cession is made is bound by *local debts* of ceded territory.

Section 157:

> "But is the state receiving the cession bound by part of the other obligation resulting from treaties made with the ceding states and not attached to the ceded territory, merely because it has had the benefit of the cession? In other words, are obligations and rights, which are neither local nor personal, resulting from treaties made with a state, necessarily transmitted, in any proportion, to the state to which a cession is made, together with the ceded territory? *No. The ceding state alone remains bound or vested with rights, for it alone made the contract.* The same rule holds when, instead of being ceded, a province becomes an *independent state. The new state generally is not bound by non-local obligations of the state* from which it has separated. Such at least is the principle, but it can be modified in practice by treaty. Thus, the Kingdom of Italy, after the acquisition of Lombardy and Venice only took the place of Austria in regard to the local obligations and rights of the provinces acquired, and refused to take upon itself the payment of a portion of the *general debt* of the Austrian Empire." (Italics not the author's.) "So also no part of the French debt was imposed on the province of Alsace-Lorraine, which France was forced to cede to Germany in 1871. But—and this is an example of the exceptions which treaties can make from the general rule—the treaty of Berlin of 1878 imposed part of the public Turkish debt upon Bulgaria constituted an autonomous principality tributary under the suzerainty of the Sultan (Arts. 1 & 9), and upon Montenegro and Servia, whose independence was recognized (Arts. 26, 33, 34 & 42)."

(*m*) HUBER.

Max Huber, in his work on Staaten succession (1898) says (p. 90 § 34):

> "Without reference to those numerous cases in which a sum is fixed on account of the confusion of the financial conditions and when, therefore, it is difficult to ascertain the separate proportions, we are confronted in the practice of international law with four different methods of the assumption of the debt:
>
> "1. Territorial division (*i. e.*, Geographical).
>
> "2. Division in proportion to population.
>
> "3. Division in proportion to the tax return of the original domain.
>
> "4. Division in accordance with the nationality of the creditors.
>
> "In cases of doubt the most frequent and also the most equitable calculation of the sum to be assumed is the division in proportion to the tax return which the seceding country bears to the whole of the country."
>
> (A reference (paragraph 226) shows that in the treaty between Prussia and Saxony, May 18, 1815, this was the basis of the division and in accordance with the agreement entered into August 28, 1819, between Prussia and Saxony, which provided for all of the details of the succession the *tax conditions* were used as a measure.)
>
> "As in the countries of this day taxes are divided equally throughout the entire territory, the tax return of a particular portion of the country is a fairly accurate measure of its financial value to the state. Of course, the grantor always suffers a loss in favor of the grantee in so far as he loses the tax returns of the seceding country, but up to this time this has in no way been taken into consideration on account of the difficulty of the calculation.
>
> "In confederations such as Switzerland this measure would, however, seem to be the only right way since the budgets of this country are based chiefly upon their duty returns. In such case only a division in accordance with the population would in case of necessity be permissible since the consumption of each individual

country cannot accurately be known, while at the same time it may be assumed that the imports will be in proportion to the population, and that the more densely populated districts are as a rule the wealthiest.

(Page 92): "The division *'pro regionis'* has no reasonable basis since a mere extent of territory bears no direct relation to the fiscal value of the country or with the political power of its government."

Section 136 (page 96). *Special Debts.*

Debts which arise out of a particular domain or which *have been incurred in the interest of a particular domain.*

"By reason of their legal nature these debts should also be considered together with those dealt with in the foregoing abstract (*i. e.*, debts borne by the entire state or country). The debtor is the entire country. The liquidation will arise out of the debts of the entire country. Only the purpose is a different one. Such debts arise either in the interest of a particular portion of a country or they may be assumed by the main government as an already existing debt of a particular portion of it, in which latter event, of course, this would relieve such smaller or particular portion. In this respect these are the debts of the main government in the interest of a particular portion of it.

"According to the European practice these debts are always assumed by the seceding state; that is the seceding state has the obligation to assume them."

Section 272:

"Certainly the territorial principle applies to debts which have reference to particular portions of the country. Regarding these, the owner of the particular portion interested incurs the indebtedness. We have designated these debts as 'special capital' and they should always follow the fate of their territorial foundation."

(*n*) APPLETON.

Henri Appleton makes the following statement in his book entitled: "Des Effets des Annexions de Territoires Sur Les Dettes de L'Etat

Demembre ou Annexe," etc. *Paris 1895*, Chapter IV., Section II., Section 65:

"As soon as the principle is admitted that the debt of a dismembered country should be divided between it and the state which takes one or more of its provinces, a new question arises. In what proportion shall the division be made? Very evidently the more important the annexation, the greater will be the contributory part to be charged to the annexing state. If a tenth of the dismembered country is taken, the annexing state will pay a tenth of its debt. If a fourth it taken, it will assume a fourth of the debt.

"But we must be precise. When a fourth, a tenth of the dismembered country is mentioned, is the reference to the extent of its territory, to the number of its population, or to its wealth?

"What criterion shall we take, what basis must be adopted for such an apportionment?

"On this point opinions have not always been in harmony. The practice has varied, and the authors themselves have not always agreed. We do not speak, to be sure, of authors like Hall, Dudley Field, etc., who leave the entire burden of its debts upon the dismembered state. For then the question cannot arise, and none of them treats it, because they reject the principle itself of apportionment. The problem exists only if one admits apportionment of debt in principle, whether from the point of view of payment, as we have treated the matter, or from the double point of view of collection and payment, as is generally done.

"Three systems of apportionment: on the basis of extent of territory, on the basis of population and on the basis of wealth, have been recommended and applied. In 1866 Italy took upon herself the papal debt in proportion to the population of the provinces of Roumania which she had conquered.

The treaty of Berlin left the question in doubt. Bulgaria, Montenegro and Servia, which took important territories from Turkey, were required in consequence of this to assume a part of the Turkish debt 'calculated upon an equitable basis.'

SECTION 66. "But at the present time one may say that the two first systems have had their day. The third system receives support

from the unanimous opinion of the publicists and in practice. It seems to be the most just, and, in truth, the only really equitable system. Indeed, the extent of territory acquired by the annexing state cannot be taken as a criterion; if the conquered territory is that of a great city, the conquest is infinitely more valuable, than if it consisted of mountains or desert regions. The city has infinitely greater resources and furnishes more taxes, which enables the conquerer to assume a heavier part of the debt. As M. Cabouat says very well: 'With equal area, an industrial region is superior to a purely agricultural region, and even between territories of equal extent, devoted either to agriculture or to industry, it would be rash to affirm a constant equilibrium. Now, the system we are combating, completely ignores these facts; it reasons as if the wealth of a state could be mathematically divided among each of its provinces in proportion to their respective extents. Such a system could not be followed except upon the altogether chimerical hypothesis of dealing with the debt of an exclusively agricultural or manufacturing state whose various parts should have attained an equal degree of development. In practice the clearest result of such a system would be to procure for one of the interested states a reduction of the obligations incumbent upon it, and, consequently a gain, wholly at the expense of the other state.'

"An apportionment of the debt according to the number of the population inhabiting the annexed provinces would be subject to the same criticism. The new population acquired by the annexing state may be poor and capable of paying only small taxes; it may be, on the contrary, rich and prosperous. It would be unjust, in the two cases, to charge the annexing state with the same part of the debt. On the other hand, annexation always starts a current of emigration more or less strong. The population which the annexing state gains by annexation is always more or less inferior in number to that of the province at the moment of the annexation. This diminution, this decrease, cannot be foreseen, with any precision, at the moment of the treaty, and the apportionment which the negotiators might wish to make would lack a solid basis."

* * * * * * * *

§ 67. "The conclusion drawn by the authors from these observations is that a single criterion is admissible: that of wealth. Wealth will be disclosed by the amount of taxes paid up to the annexation by the two portions of the dismembered state; the annexed portion and the portion which keeps its independence. To eliminate as much as possible causes of error, the taxes taken are not those paid during the year preceding the annexation, but an average calculated over a space of several years. If the ceded province supplied a tenth, a fourth of the taxes levied by the ceding state, that state will be discharged of a tenth, a fourth of its debt. We are bound, like everybody else, to approve of this criterion. It is plain justice to take as a basis of apportionment, wealth as disclosed by taxation."

3. APPLICATION OF INTERNATIONAL LAW DOCTRINE IN THIS CASE.

Quotations from publicists have been indulged with much liberality in the hope that they may be found convenient to the members of the Court, also for the purpose of showing the unanimity with which they recognize the distinction, in respect of debt succession among nations, between a *general* or *national debt* and a *special* or *local debt*, and the consequences resulting from the distinction; and for the further reason that they supply the international law standard for debt apportionment, which counsel have assumed to be either area, population or taxable values, and that they agree that the latter is the just and adopted standard.

Even if the Court should be of opinion that the rule of international law does not govern the present case, yet if the the Court, apart from the method prescribed by the ordinance and notwithstanding the provision in the Constitution of West Virginia referring the matter for ascertainment to the legislature of that state, should undertake to determine the equitable proportion of the old Virginia debt which West Virginia should assume, then we submit that the Court cannot fail to give great weight to the authorities on international law which we have cited. The rules of international law are based entirely upon consideration of equity and fairness. They have no force nor sanction except from the consent of nations by reason of their evident justice. This Court, therefore, in determining what would be an

equitable apportionment of the Virginia debt, would undoubtedly desire to take into most careful consideration the unanimous opinion of the modern international law authorities that, in apportioning the debt of a state after its division, equity requires a distinction to be made between the portion of the debt which is local or special in its character and that which is general, so that the parent state and the new state are bound respectively to assume the whole of the *local debt* relating to their respective territories, leaving only the *general debt* to be apportioned on the basis of taxable value.

4. RECOGNITION OF DISTINCTION BETWEEN GENERAL AND LOCAL DEBTS IN DIVISION OF TERRITORY OF DAKOTA.

The authority for the rule of international law in the present case is peculiarly confirmed and strengthened by the fact that it was adopted and applied in the only case in our history which is directly anologous to the present case. We refer to the division of the territory of Dakota into the two states of North Dakota and South Dakota. The territory of Dakota had a bonded indebtedness incurred for the purpose of erecting certain public buildings and institutions. It also had incurred certain other liabilities of a general character.

The Sixth Section of the Act of Congress providing for the division of Dakota into two states (25 U. S. Stat. at Large, p. 676) required the constitutional conventions of North Dakota and South Dakota to appoint a joint commission, whose duty should be to agree upon an equitable division of all property belonging to the territory of Dakota and to adjust and agree upon the amounts of the debts and liabilities of the territory which should be assumed and paid by each of the proposed states of North Dakota and South Dakota. The Act of Congress further required the agreement respecting the territorial debts and liabilities to be incorporated in the respective constitutions of the new states, and required each of them to obligate itself to pay its proportion of such debts and liabilities, the same as if they had been created by such states respectively.

A joint commission was duly appointed and made an agreement for the two new states respecting the territorial debts and liabilities, which agreement, in accordance with the enabling Act of Congress,

was incorporated in the constitutions of North Dakota and South Dakota. The provisions concerning the apportionment of the territorial debt which we shall quote, are taken from the Constitution of South Dakota. (Similar provisions will be found in Art. 16 of the Constitution of North Dakota.)

Section 6 of Article 13 of the constitution of South Dakota is as follows:

> "In order that the payment of the debts and liabilities contracted or incurred by or in behalf of the Territory of Dakota may be justly and equitably provided for and made, and in pursuance of the requirements of an Act of Congress approved Feb. 22, 1889, entitled 'An Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states.' the states of North Dakota and South Dakota, by proceedings of a joint commission duly appointed under said Act, the sessions whereof were held in Bismarck in said State of North Dakota, from July 16, 1889, to July 31, 1889, inclusive, have agreed to the following adjustment of the amounts of the debts and liabilities of the Territory of Dakota which shall be assumed and paid by each of the States of North Dakota and South Dakota, respectively, to-wit:"

The agreement follows.

Paragraph 3 of the agreement provides:

> "The said State of North Dakota shall assume and pay all bonds issued by the Territory of Dakota to provide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of North Dakota, and shall pay all warrants issued under and by virtue of that certain act of the legislative assembly of the Territory of Dakota, approved March 3, 1889, entitled 'An Act to provide for the refunding of outstanding warrants drawn on the capitol building fund.'"

Paragraph 4 provides as follows:

> "The said State of South Dakota shall assume and pay all bonds issued by the Territory of Dakota to provide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of South Dakota."

Paragraphs 5 and 6 specify the particular bonds to be assumed respectively by North Dakota and South Dakota, and specify the local situations of the buildings and institutions on account of which the bonds assumed by the two states were issued.

Paragraph 6 provides:

> "The States of North Dakota and South Dakota shall pay one-half each of all liabilities now existing or hereafter and prior to the taking effect of this agreement incurred, except those heretofore and hereafter incurred on account of public institutions, grounds or buildings, except as otherwise herein specifically provided."

Paragraph 7 provides in part:

> "Nor shall either state be called upon to pay or answer to any portion of liability hereafter arising or accruing on account of transactions heretofore had, which liability would be a liability of the Territory of Dakota had such territory remained in existence, and which liability shall grow out of matters connected with any public institution, grounds or buildings of the territory situated or located within the boundaries of the other state."

Paragraph 8 provides in part:

> "A final adjustment of accounts shall be made upon the following basis: North Dakota shall be charged with all sums paid on account of public institutions, grounds or buildings located within its boundaries on account of the current appropriations since March 8, 1889; and South Dakota shall be charged with all sums paid on account of public institutions, grounds or buildings located within boundaries on the same accounts and during the same time. Each state shall be charged

> with one-half of all other expenses of the territorial government during the same time."

The Court will observe that the apportionment of the debt of the Territory of Dakota between the new States of North Dakota and South Dakota under their agreement was absolutely in accordance with the rule of international law that when a state is divided *local debts* must be assumed in their entirety by the state taking the territory with reference to which such debts were incurred. Each of the States of North Dakota and South Dakota assumed the bonds which had been issued on account of institutions located within its boundaries. General liabilities, on the other hand, were apportioned equally between the two states, as appears in paragraphs 6 and 8 of the agreement quoted above.

No contention can be made that this was merely the case of a special agreement, from which no principle of general application can be derived. The constitutions of the two states expressly declare the result of their agreement to be just and equitable. Section 6 of Article 13 of the South Dakota constitution (a similar provision will be found in paragraph 3, section 203, article 16 of the North Dakota Constitution) declares:

> "In order that the payment of the debts and liabilities contracted or incurred by and in behalf of the Territory of Dakota may be *justly and equitably* provided for and made * * * the states of North Dakota and South Dakota * * * have agreed to the following adjustment of the amounts of the debts and liabilities of the Territory of Dakota," etc.

Hence the apportionment of the debt of the Territory of Dakota can only be regarded as an equitable settlement between the two states. The full recognition in this settlement of the distinction between *local* and *general debts* not only confirms the doctrine of international law on this subject, but must impress the Court as an unique and valuable precedent for the purposes of the present case.

5. DISTINCTION BETWEEN GENERAL AND SPECIAL DEBT DISCUSSED IN NEGOTIATION OF TREATY BETWEEN UNITED STATES AND SPAIN.

His Honor Mr. Justice Day will remember that the distinction between a *general* or national debt and a *special* or *local debt*, from the standpoint of international law, involved a prolonged discussion between the American and Spanish commissioners at Paris in negotiating the Treaty of Paris, under which the United States secured to Cuba her independence and brought under our sovereignty Porto Rico and the Philippines. The Spanish Commissioners contended that the United States should assume, either for herself or for Cuba, that portion of the indebtedness which had been incurred and for which Spain had issued obligations *primarily secured by an hypothecation of the revenues of Cuba.* They contended that it was, to all intents and purposes, a Cuban debt; in other words, *local or special,* as contradistinguished from the *general or national* debt of Spain.

The American commissioners recognized the distinction, but refused to accede to the demand of Spain, upon the ground that Cuba had had no debt, but, on the contrary had been a self-supporting colony, and that the indebtedness was incurred, and its proceeds used to wage war upon Cuba, and to resist by arms the aspirations and struggles of her people to be freed from long-continued despotism and misrule and was a part of Spain's *national or general debt.*

If we had taken over Cuba in the absence of *strife between Cuba and Spain and the United States and Spain,* and *there had been found an indebtedness incurred by Spain,* the *proceeds of which had been expended in public improvements in Cuba and for the benefit and betterment of the island and its inhabitants,* the question would have been a different one, and from the standpoint of international law and justice, our attitude must have been different.

6. THE DISTINCTION BETWEEN GENERAL DEBT AND LOCAL DEBT IS SUBSTANTIAL AND JUST.

And this distinction between a *general* and a *special* or *local debt* is a substantial one. It rests upon a sound principle, and is essentially

just. Obviously, there is no such distinction when we consider the relation of a state and its creditors. There, the purpose for which the loan was effected is immaterial; but, in respect of the apportionment of the debt of a state between itself and a new state, erected out of its territory, the distinction is not only apparent but important.

A *general debt,* using the phrase as the publicists use it, with reference to debt succession, one would say is a debt, the object and result of which inures to the benefit of all the people subject to the dominion of the state, the expenditures of which are not susceptible of localization, and which cannot be said to benefit one section more than another, or one class of citizens more than another.

The debt incurred by the United States during the war in maintaining the Union would fall, from every standpoint, within the definition of a *general debt.* It was to preserve the Union as the fathers made it, and its benefits inured to all the people in all the states.

If the Southern Confederacy had become an established government, a nation, the indebtedness which it had incurred in the establishment of that government would have been a *national* or *general debt* as contradistinguished from a *special* or *local debt.*

This expenditure of its proceeds would have been made for the general and indivisible benefit of the people living under its sovereignty.

Such a debt is not, in its nature, apportionable except by special agreement, or, ratably upon some basis recognized by international law.

On the other hand, the *special* or *local debt,* however large it may be, incurred by a state or a nation, upon a division which results in the erection of a part of the national territory into another nation or state, *apportions itself.*

If it had happened that every dollar of the public debt of the Commonwealth of Virginia, prior to January 1, 1861, had been expended in the construction of railways which Virginia owned, and canals and public buildings, toll highways, improved navigation, the utilization of which by the public required the payment of tolls, all owned by Virginia and within her borders, after the separation, could it, with any justice, be said that West Virginia, upon the division of the

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two states and the erection of West Virginia into a state, should in equity assume any portion of that burden, when not a dollar of the money had been expended within her territory, and if there were not within it a work of internal improvement erected by Virginia out of the proceeds of that debt? Such improvements are on the land, and, of necessity, are transferred with it.

Suppose, on January 1, 1861, the only debt resting upon the Commonwealth of Virginia had been a debt of $10,000,000, the proceeds of which had all been *directly expended within the limits of the present State of West Virginia, and thereupon for the benefit of its people*, in the construction of railways and public buildings, in the making of highways and other improvements, important in their character and beneficial to that people remote from tide-water, and West Virginia had been admitted as a state into the Union, with no provision as to apportionment of debt. Can there be any doubt upon principles of international law, and upon principles of common justice that it would *have been the duty of the new state to take that entire debt upon her shoulders?* It would have been incurred with reference to her territory. It would have been expended within her limits, and for her benefit. Although such a debt, like any other, as between Virginia and her creditors, would have bound Virginia, yet, as between Virginia and West Virginia, it would have been a special debt which West Virginia ought to assume and pay. If this proposition is not sustained by all writers on international law who have touched the subject, we are mistaken. What answer could West Virginia have made to it? Between nations, a refusal to adjust it upon that basis might very well have resulted in war.

7. THE PUBLIC DEBT OF VIRGINIA PRIOR TO JANUARY 1, 1861 WAS A LOCAL OR SPECIAL AND NOT A GENERAL DEBT.

It is averred in the first paragraph of the bill, that:

> "On the first day of January, 1861, your oratrix was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory."

It is admitted, in the first paragraph of the answer:

> "That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in 'about' the sum of $33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvement within her then territory."

The investigation before the Master, as shown by the exhibits, clearly makes it appear that Virginia had no *general* public *debt* in 1823, and that the $33,000,000 was expended in works of internal improvement.

Here we are logically led to an analysis of this debt and of the purposes for which it was incurred and the expenditure of its proceeds.

8. THE NATURE OF THE DEBT, AS SHOWN BY THE LEGISLATION UNDER WHICH IT WAS INCURRED.

Let it be said first, that Virginia, in 1823, the initial year of the period ending with December 31, 1861, during which the debt of the commonwealth here involved was created, appears to have had outstanding no general debt.

Virginia embarked early on a system of internal improvement. She passed, on February 5, 1816:

> "An act to create a fund for internal improvement, to be applied exclusively to the purpose of rendering navigable and uniting by canals the principal rivers, and of more intimately connecting, by public highways, the different parts of this commonwealth."

This fund consisted of the shares held by the commonwealth in the stock of the following companies; Little River Turnpike Company, Dismal Swamp, Appomattox, Potomac and James River Canal Companies, of the Bank of Virginia and also the Farmers' Bank of Virginia,

> "together with such dividends as may from time to time accrue to such shares of stock, and such bonds and premiums as may be hereafter received for the incorporation of new banks or the augmentation of the capitals or the extension of the charters of existing banks."

She, at the same time, provided that, for the purpose:

> "of preserving and improving this fund, and of disbursing such portions of it as the General Assembly may, from time to time, direct, to be applied to any object of internal improvement, it shall be, and the same is, hereby, vested in a corporate body to be styled 'the president and directors of the Board of Public Works,' in which name they shall have a common seal, etc."

The governor was made, *ex officio*, the president of the board of public works. The directors were to consist of the treasurer and attorney general of the commonwealth, for the time being, and of ten citizens thereof, three of whom were to reside westward of the Alleghany Mountains, two between the Alleghany and the Blue Ridge, two between the Alleghany and the Great Post Road, and the residue between that road and the sea coast.

The act provided that the fund should be deposited in the Treasury, subject to the order of the president and directors of the board, paid out or delivered by the treasurer of the commonwealth upon the order of the board, and required accounts of the disbursements and the certificates upon which the same shall have been made to be preserved, and an annual account to be rendered to the general assembly.

Section 11 provided that the president and directors of the board of public works shall be, and they are hereby, authorized to subscribe, in behalf of the commonwealth, to such public works as the general assembly may, from time to time, agree to patronize, such portions of the fund for internal improvement as may be directed by law; but that no part of the said fund shall be subscribed towards the stock of any canal, turnpike or other company until three-fifths at least of the whole stock necessary to complete such canal, turnpike or other public works of such company, *shall have been otherwise subscribed;* or until, of the stock so subscribed, one-fifth thereof shall have been actually paid by the resident subscribers, or the payment thereof effectually secured by bond of approved security, or a deed of trust upon the real estate of such subscriber, of twice the value of such one-

fifth part; such bond to be taken payable to the president and directors of the company authorized to complete such public work.

It was then provided that the dividends on the stock subscribed by the president and directors of the board of public works should go exclusively to other subscribers than the commonwealth until such portion of the stock of those subscribers shall have netted to them six per centum per annum from the specified time of such payment; that any increase of profit after that net income should have been assured to the subscribers, should belong exclusively to the fund for internal improvements, until the net annual income of the whole stock actually expended by any company shall reach six per centum per annum;

> "*after which the commonwealth and the other subscribers to the stock* of the company shall divide the net profits on such stock in proportion to their respective interests."

It then provided that the president and directors should vest in some productive fund the undivided dividends accruing upon any of the stock, until the same was specially appropriated by law to some internal improvement; and adds:

> "And shall have power, subject to the control of the general assembly, to sell, from time to time, as may be ordained by law, the whole or any part of the shares held by the commonwealth of the stock of any canal, turnpike or other company subscribed for under the provisions of this act, *for the purpose of investing the proceeds of such sale in the stock of some other similar company,* subject to the like conditions as have been before expressed in this act."

The board of public works were given power, in behalf of the commonwealth, to appoint such number of directors of every public work as shall bear to the whole number of directors of such work the proportion of the commonwealth's shares of stock in such work, which may be subscribed in pursuance of this act to the whole number of shares thereof.

Section 16 provided:

> "That the public faith shall be, and the same is, hereby, solemnly pledged to fulfill the obligation of this act, and that the said appropriation shall continue in force until the first day of January of the year one thousand eight hundred and sixty-six; except at such time as the United States of America may be involved in war, or the safety of this commonwealth, may, in the opinion of the general assembly, require when the general assembly may, withdraw (during the period of actual hostilities or of such imminent danger) the whole or any part of such fund, for the purpose of defense, provided such withdrawal can be made without a violation of any engagement made under this act."

The provision above quoted, by which the state withheld herself from dividends until the citizen subscribers had netted six per cent on what they had paid in, was changed by an act of February 20, 1829, chapter 21, in which it was enacted:

> "And all dividends upon subscriptions hereafter authorized or required to be made by the general assembly to any canal, road, bridge, company or other corporation, shall be made and stand upon the same footing with subscriptions made by individuals."

The legislature of the commonwealth passed February 7, 1817, chapter 38, a general act providing certain general regulations for the incorporation of turnpike companies, entitled:

> "An act prescribing certain general regulations for incorporation of turnpike companies."

This act provided that:

> "Whenever it may be deemed expedient for the general assembly to make a turnpike road, and an act shall actually pass the general assembly for such purpose, the following general provisions shall be deemed to be contained as part of the said charter or act of incorporation, as if the same had been actually re-enacted in reference to such grant or charter, except in so far as such grant, charter or act may expressly provide."

And then provides that:

> "The commissioners named in any special act, or a majority of them, shall have power to open books for subscriptions to the stock at the places named in the act, and to divide the capital stock into as many shares, not exceeding one hundred dollars each, in amount, as they may deem proper, to appoint any number of deputy commissioners, to open books of subscription to the stock of the company, and the subscriptions shall be made and the payment of moneys received on subscriptions to the president and directors by the commissioners; that the books shall remain open until at least one-half of the capital stock of the company shall have been subscribed, when a general meeting of the subscribers is to be called by the commissioners."

and provided other details for the purpose of organization.

It also prescribes the tolls which may be exacted, and provides for changing them, either raising or lowering the amounts, upon certain contingencies.

By section 28, it is provided that:

> "If the said president and directors do not begin the said work within two years after the passage of the act for *incorporating* the company, or shall not complete the same within ten years thereafter, in the manner hereinbefore directed, then the interest of such company in the said tolls and roads aforesaid shall be forfeited and cease."

It provides for reports of the receipts and profits to the board of public works.

It also provides that:

> "If the commonwealth shall desire to purchase the stock of such company, and shall vest authority to make such purchase in any person, corporation or body politic, it shall not be lawful for the *proprietor* of any such stock to sell or transfer the same to any person whatever until he shall actually and with good faith have offered the same for sale, for the price for which he is

> willing to take therefor, to the person, body politic or corporation, authorized to purchase by the commonwealth."

And also provides that after such offer to such person, body politic or corporation, no transfer or assignment to any other person, shall be entered or registered in the books of such company, or vest any right whatever, unless it shall have been proven to the satisfaction of the president and directors that the stock so transferred had been, with good faith, previously offered to the person, body politic or corporation, so authorized, at a price at least as low as that at which it had been sold to such assignee or transferee.

A general act was passed February 11, 1832, prescribing certain general conditions on which subscriptions to certain joint stock companies shall be made on behalf of the commonwealth. This act provides as follows:

> "That all subscriptions which are now authorized by law and have not been made by the board of public works, or which may hereafter be authorized, shall be subject to the following conditions and provisions, to wit:
>
> "In every case the board of public works shall be furnished with a certificate under the seal of the company signed by the treasurer and countersigned by their president, stating that at least one-fourth of the private subscriptions of not less than three-fifths of the capital stock has been actually paid up into the hands of such treasurer, and the remainder of such subscription is either so made or is made by solvent persons fully able to pay, and these facts be shown to the satisfaction of the board of public works. They shall also be furnished with a list of the stockholders, showing a list of the shares standing in each name."

(The provision with reference to the proportion of capital stock subscribed by individuals was afterwards changed to "two-fifths," so that the state took three-fifths and private stockholders were permitted to take only two-fifths.)

If any private improvement shall have been commenced previously, and the subscriptions thereto have been authorized or made, the

board of public works shall be furnished with a statement showing the amount of money received up to the date of such statement, and of the amount expended in the work, together with the balance of money on hand, the contracts entered into for the construction of the improvements, the exact progress made therein, as near as may be, its dimensions and a correct map of its location.

The section provided:

> "Installments of future subscription of the board of public works shall be applied in the manner and on the conditions hereinbefore mentioned when not otherwise specifically provided by law; that is, one-fourth of such subscription shall be paid on the production of the draft of the treasurer or other authorized agent of the company, in the manner and in such form as the board of public works may prescribe, and the remaining three-fourths on similar drafts, in six equal semi-annual installments or in installments *of the same proportions with future payments or private subscriptions at the discretion of the board of public works.*"

It also provided that:

> "Before payments of the installments aforesaid, the board of public works shall be furnished in every case with a certificate in the form and manner required by the first section of this act, showing the amount actually paid up by the private stockholders, which amount must be at least equal to the amount payable by the board of public works."

It was the evident purpose of the commonwealth from the beginning to render susceptible of easy ascertainment the identification of each loan with the particular improvement for which it was authorized by special act of the legislature to be made. Thus, by chapter 117 of the laws of 1834, which authorized the borrowing of money on the credit of the state at a rate of interest not exceeding five per centum for sums of money not less than $30,000, and not exceeding $60,000, it is provided:

> "That the money so to be borrowed shall be paid into the treasury upon the warrant of the second auditor, and upon the receipt in the treasury of the sum

or sums so borrowed, the treasurer shall issue his certificate of loan for the amount thereof, purporting that the Commonwealth of Virginia owes to the lender, his heirs, executors, administrators or assigns, the principal sum so borrowed, together with the interest at the rate of interest agreed upon, and that the interest so agreed upon is payable semi-annually at the treasury of the commonwealth. *Such certificate shall show on the face thereof that the loan was made under authority of this* act."

And this principle was embodied, as the Court will see, in chapter 12, laws of 1838, providing for the negotiation of loans for internal improvements, a general act, the pertinent portions of which are as follows:

"First, that all loans hereafter authorized by law for the payment of subscriptions on behalf of the commonwealth to the capital of joint stock companies *incorporated* for purposes of internal improvement or for defraying the expense of any work or internal improvement in which the state is or may be interested, as well as all loans heretofore authorized, shall be negotiated according to the provisions of this act, except so far as may be otherwise specially provided by the acts authorizing the loans.

"Second, the board of public works in effecting such loans shall borrow upon the credit of the commonwealth at the lowest rate of interest at which the necessary amount can be obtained, not exceeding in any case five per centum per annum. Upon the payment of the moneys so borrowed into the treasury, which shall be done upon the warrant of the second auditor, the treasurer shall issue a certificate or certificates of loan for the amount thereof purporting that the Commonwealth of Virginia owes to the lender, his heirs, executors, administrators or assigns, the principal sum so borrowed, together with the interest at the rate agreed on; and that the interest is payable semi-annually at the treasury of the commonwealth, *and that such certificate or certificates were issued under authority of a special act authorizing such loans;* which certificate shall be signed by the treasurer and countersigned by

the second auditor and be registered in a book to be kept for that purpose by the second auditor, and shall be transferable on the books of his office in person or by attorney." * * * "All loans negotiated in conformity with this act shall be irredeemable for twenty years and shall afterwards be redeemed at the pleasure of the general commonwealth.

"Third, for the payment of the interest and the final redemption of the principal of any sum to be borrowed in conformity to this act, the stock of any joint stock company subscribed for or purchased with the moneys so borrowed, together with the dividends and other net incomes which may accrue therefrom to the commonwealth or to the fund for internal improvement, shall be and the same are *hereby appropriated and pledged; and in like manner the net income and other profits which may accrue from works in which the state is interested other than those of joint stock companies, and on which the money borrowed is to be expended*, shall be and the same are likewise hereby *appropriated and pledged for the payment of the interest and redemption of the principal of the moneys so borrowed;* that if the stock aforesaid and the said dividends, net profits and other income shall be inadequate to the payment of the said semi-annual interest and the final redemption of the principal of the respective loans, the general assembly pledges itself to provide other and sufficient funds, and for that purpose to levy any necessary and adequate taxes upon any or all subjects liable to taxation under the Constitution."

The act provides that:

"If the dividends and income arising from the stock or work as aforesaid, together with the fund for internal improvement, shall be insufficient to pay all interest due upon the loan when demanded, the auditor of public accounts shall, upon the application of the board of public works, issue his warrant upon the treasury directing the payment of such interest out of any moneys therein not otherwise appropriated, and in case of the inability of the treasury at any time to discharge such warrants, the board of public works shall be and they are hereby authorized to borrow the necessary amount from

> the banks of this state at a rate of interest not exceeding six per centum per annum, on the credit of the commonwealth, to be repaid in such manner as the general assembly may by law direct."

By section 5 the board is authorized and empowered to procure any or all of the loans authorized by law, either in the United States or in Europe, as they may deem most advantageous to the public interest, and for that purpose to appoint one or more agents with necessary powers, and to allow him or them such compensation as they may deem reasonable; also that as to European loans they may provide for the payment of interest on the same semi-annually in London or elsewhere, and may stipulate for the payment by the lenders of the amount of such loans in England or elsewhere, conforming the certificates to be issued to the terms of the loans.

It appears in the case that during the debt period, between 1823 and 1861, a large number of stock corporations were created to build works of internal improvement, of one kind and another, to whose stocks the board of public works, under this legislation, subscribed on behalf of the commonwealth, for a time, for two-fifths, and for another time, for three fifths, but never until, in the one case three-fifths, and in the other, two-fifths, had been subscribed by *solvent private citizens,* and a required sum paid in *on the private subscriptions.* Moneys were borrowed in sums, great and small, from time to time, to pay these stock subscriptions of the commonwealth. This applied to turnpike companies, bridge companies, navigation companies and railway companies. And the state also subscribed a large amount to the stock of banks incorporated by her legislation and issued bonds in payment of her subscription.

The record shows that Virginia expended about $40,000,000 more than the $33,000,000 debt on works of internal improvement, out of moneys raised by taxation. In some instances she expended through her board of public works directly the proceeds of loans.

In respect of all of the debt, the proceeds of which were expended in West Virginia, the schedule shows that the loans which she effected were numbered as required by law, the certificate of debt or certificates of debt, referring to the act which *authorized the particular expenditure,* so that it is not only true that the debt represents expenditures

for internal improvements, but it is true, so far as the expenditures in West Virginia were concerned, that the moneys which were expended, the proceeds of loans, are traceable to the particular improvements and the stocks and dividends thereon were pledged for the repayment of the loan.

An examination of complainant's exhibit A-2, which shows the form of bonds, will disclose that each loan was numbered; so that while the aggregate amount of the debt is very large, it is composed of a vast number of separate, relatively small loans, each susceptible to identification, and the proceeds of each traceable to the particular improvement for which the loan was authorized to be made, so that each loan was localized.

By chapter 8, laws, passed March 27, 1839, page 9, it was provided:

> "It shall be lawful for the treasurer of the commonwealth, and he is hereby directed upon the requisition of the board of public works, *and without requiring the previous payment of money into the treasury on account thereof, to issue* certificates of stock for the amount of any loan or loans which are now or may hereafter be authorized by law, to procure for private or internal improvements, payable in currency of the United States or that of any European state, and in such form and with such conditions and stipulations, *not inconsistent with law*, as the said board shall direct, which certificate shall be countersigned," etc., etc.

This phrase "not inconsistent with law" preserved the inditification of the loan with the particular improvement as provided by the act of 1838 above quoted.

As it was a general provision of law, the presumption is that the same thing is true of the loans, the proceeds of which were expended within Virginia, or in the purchase of stocks of corporations whose improvements were within her present limits.

The Rule of Public Law Does Not Govern This Case Because the Wheeling Ordinance and the Constitution of West Virginia Constitute a Special Agreement as to the Proportion of the Old Virginia Debt to be Assumed by West Virginia.

Even if the Court should not recognize the distinction between *general* and *local debts,* the present case is within the exception to the rule of international law as stated by Mr. Justice Field in that the matter of the division of the public debt was the subject of a special agreement between the two states evidenced by the 9th section of the Wheeling Ordinance and Section 8 of Article VIII. of the Constitution of West Virginia.

1. SECTION 9 OF THE ORDINANCE.

The pertinent portion of the ordinance is as follows:

> "9. The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period. All private rights and interests, in lands within the proposed state, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the State of Virginia.
>
> "The lands within the proposed state of non-resident proprietors shall not, in any case, be taxed higher than the lands of residents therein. No grants of lands, or land warrants issued by the proposed state shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed state now liable thereto."

2. SECTION 8 OF ARTICLE VIII. OF WEST VIRGINIA CONSTITUTION.

Section 8 of Article VIII. of the Constitution, "Taxation and Finance," is as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one shall be assumed by this state; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

3. TWO VIEWS OF OPPOSING COUNSEL IN RELATION TO THE ORDINANCE.

Two views are taken in relation to the ordinance and the quoted provision of the constitution by opposing counsel. The learned counsel who represents the "bondholding creditors of Virginia" contends in his brief (p. 38):

> "That ordinance, as shown by its title, was to provide for the formation of the new state. All of its sections, except the ninth, were directed toward that end. The state was formed when its constitution was framed and adopted by the people. The ordinance then became *functus officio*, and ceased to have any operation."

It is hardly to be expected that a lawyer, in the changing fortunes of a great litigation, can always be entirely consistent. The learned counsel has stated that he drew the bill, by the filing of which this suit was inaugurated. In that bill, page 4 (May's Comp.), is set forth the ordinance, followed on page 6 by several quotations from the first Constitution of West Virginia, including section 8 of Article VIII.

Paragraph 18 of the bill is as follows (p. 10):

> "Your oratrix charges that the liability of the State of West Virginia for a just and equitable proportion of the public debt of Virginia as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:
>
> "*First.* The area of the territory now known as the

State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this *public debt* was created, and its population included about one-third of that of the original state at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the *public debt* created prior to the partition of such territory.

"*Second.* The *liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virgina as it existed prior to the creation and erection of the State of West Virginia forms part of her very political existence, and is an essential constituent of her fundamental law*, as *shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861 in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a state into the Federal Union*, and *was one of the conditions under which she was created a state and admitted into the Union.*"

The learned counsel for the bond-holding creditors says, in his brief (page 37):

> "The tenth section of the ordinance to provide for the erection of a new state," etc. provided that—"When the general assembly shill give its consent to the formation of the new state, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the new state may be admitted into the union of states."

He adds:

> "It did not provide that a copy of the 'ordinance' should be forwarded to congress, and there is nothing in this entire record to sustain the assertion that congress ever saw or knew of that ordinance or of its provisions."

It may be true that there is nothing in the record, technically speaking, to evidence the fact that the ordinance was before the congress, and accessible to its members, at the time the bill for the

admission of West Virginia was being considered and passed. That depends upon what the record in this case is; but some things the Court will take judicial notice of. In many instances, it has taken judicial notice of the archives of the government and the legislative history of measures before it, the construction and effect of which have been here involved. It has taken judicial notice of records of the treasury department, of the records of the congress in respect of the history of measures, or amendments offered and adopted or rejected, and of reports of committees.

It is said in our brief, filed on the argument of complainant's motion to refer cause to Master (page 42) as follows:

> "It ought here to be stated that the constitutional convention of West Virginia appointed three commissioners to that end, also that the commissioners presented on May 31, 1862, to the United States Senate a memorial praying for the admission of that state into the Union, addressed to the Honorable B. F. Wade, chairman of the committee on territories, in which they gave a history of the proceedings which led to the organization of the restored government of Virginia, *and which included at length the ordinance adopted on the 20th of August, 1861, by the convention at Wheeling, entitled, 'an ordinance to provide for the formation of a new state out of a portion of the territory of this state,' which, on the 31st day of May, 1862, was referred by the senate to the committee on territories and ordered to be printed* (Congressional Globe, p. 2451; 37 Cong. 2d. session, Misc. Senate Doc., No. 99)."

The Congressional Globe, being a public document, giving the proceedings of co-ordinate branches of the government, this Court will, undoubtedly, under the authorities, take judicial notice of the fact that it was presented to the senate, that it was ordered by the senate and referred to the committee on Territories. That the order to print the usual number, which supplies both houses, was obeyed, the Court will presume.

The Paquette Habana, 175 U. S., 712.
United States v. *Whittridge*, 197 U. S. 135.

4. VIRGINIA IS NOT IN A POSITION TO INSIST UPON THE ELIMINATION OF THE ORDINANCE FROM THE CASE.

Neither the learned counsel, nor the Commonwealth of Virginia, is in position to insist upon the elimination of the Wheeling Ordinance from this case. In 1871, *years after the adoption of the Wheeling Ordinance* and the *Constitution of West Virginia*, the Commonwealth of Virginia passed a funding act, the preamble of which (May's Comp. 14, Exhibit No. 1) of the bill, reads as follows:

> "WHEREAS, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and
>
> "WHEREAS, in the *ordinance authorizing the organization of said state it was provided* that the *said state shall take upon itself a just proportion* of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, *which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this state*, and *will continue to be made as long as may be necessary;* and
>
> "WHEREAS, the people of this commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and
>
> "WHEREAS, it has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof, and *not to this state, as the constitution of this state provides:*
>
> "NOW, THEREFORE, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt, as the same shall become due;
>
> "THEREFORE BE IT ENACTED:"

And the act proceeds to fund *two-thirds* of the debt, and to provide for the issue of certificates of Virginia for the remaining *one-third* —the payment of which

> "will be provided for in accordance with such settlement as shall hereafter be had between the states of Virginia and West Virginia in regard to the public debt of the State of Virginia in existence at the time of its dismemberment."

We find here a legislative recognition of the ordinance as the sole evidence of the assumption by West Virginia of a proportion of the public debt of the commonwealth prior to January 1, 1861. The legislature of Virginia evidently regarded it as not *functus officio*, although the constitution had been adopted for some years; and this legislative declaration was despite the fact that Virginia, in her constitution adopted in 1864, was the only organic law of the state until 1870, had attempted in express terms to repudiate the ordinance, so far as it related to the debt.

Section 27 of article IV. of the constitution of 1864 is as follows:

> "SECTION 27. The *general assembly shall provide by law for adjusting* with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the states of Virginia and of West Virginia respectively * * * and no *ordinance passed by the convention which assembled at Wheeling on the 11th day of June 1861, adjusting the public debt between Virginia and West Virginia shall be binding upon this state.*"

5. VIRGINIA DOES NOT CONTEND THAT THE ORDINANCE HAS CEASED TO BE BINDING.

The legislation of Virginia, upon which was based her funding act, honorably ignored this attempted repudiation of the ordinance, and in the argument on the submission of a draft of a proposed decree the distinguished lawyer who represented the state as its attorney-general, now of counsel, in a brief filed here, said:

> "While the basis of settlement prescribed by the Wheeling Ordinance is, as we have always considered it arbitrary and inequitable, we *have never taken the position that that ordinance, reasonably and fairly construed, and taken and applied together with the act of the restored government of Virginia of February 3, 1863*, and section 8 of article VIII. of the constitution under which West Virginia became a state, *was not binding on both states.*"

The learned counsel who argue for Virginia here, in their notes of argument, do not quite contend that the ordinance became *functus officio* by the adoption of the constitution.

On page 13 of their "notes of argument," they say:

> "Now the insistence of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to *be ascertained under the Wheeling Ordinance construed so as not to defeat the express controlling purpose of its enactment* and qualified and ruled by the provisions of article VIII. of the West Virginia Constitution, upon which the consent of the legislature and of the Congress of the United States to the formation of the new state, was predicated.
>
> "Agreeably to the decision of this Court in its opinion, delivered by the late Chief Justice (R., 136), the view of Virginia is, and has been, that the ordinance and the provisions of the West Virginia Constitution, should be read as being *in pari materia; but that the* constitutional provision being the latest, must prevail whenever there is conflict between them."

And it is then said,

> "as logical and inevitable consequence from this, the claim of Virginia was, and is, that if the language of the Wheeling Ordinance is fairly and reasonably susceptible of such a construction as will, when fairly applied to the facts of the case, lead to an equitable result, and place upon West Virginia an equitable proportion of the debt, such construction should be given to that ordinance; and that, if the language of the ordinace is not reasonably and fairly susceptible of such a construction, *then the ordinance must be discarded*, and the *mandate* of the *West Virginia Constitution followed*. And that in any event, the provisions of the constitution will govern in placing a contractual obligation upon West Virginia to pay an equitable portion of the debt of the undivided state, and to pay interest upon the same from the date when that express contractual obligation accrued, until it shall have been discharged.
>
> But the claim of Virginia was, and is further, that the provisions of the Wheeling Ordinance—fairly, sensible and justly construed, and applied, according to its manifest purpose—places upon West Virginia a just and equitable proportion of the debt; and that West Virginia

cannot be heard to repudiate this result of her own express covenant and promise."

In other words, the attitude of counsel for Virginia is, that if the ordinance, fairly, sensibly and justly construed, brings about a result which, in the opinion of the Court, is an equitable proportion of the public debt of Virginia, prior to 1861, to be assumed by West Virginia, the ordinance is binding; but if the Court shall be of opinion that the ordinance, construed in accordance with the settled rule of construction, does not produce a result which the Court regards as an equitable proportion of the public debt of Virginia, prior to 1861, to be borne by West Virginia, it was repealed by the Constitution and is no longer to be considered.

6. THERE IS NO CONFLICT BETWEEN THE ORDINANCE AND THE CONSTITUTION.

We contend that the ordinance is to be construed as any other contract would be construed; that its language is plain, and that the general words of assumption with which it begins cannot control the clear and special provisions which follow. We insist that there is no conflict between the ordinance and Section 8 of Article VIII. of the constitution. The ordinance contains substantially two provisions concerning the only matters with which the ordinance would naturally deal:

(1) That the proposed new state shall take upon itself a just proportion of the *public debt* of the Commonwealth of Virginia prior to the first day of January, 1861.

(2) The method by which it shall be ascertained which is clearly prescribed.

Two things the ordinance naturally and properly omitted:

(1) It made no provision as to the agency or tribunal whose duty it should be to ascertain the proportion by pursuit of the method prescribed by it.

(2) It made no provision for the payment of the just proportion when ascertained. These matters were left to the constitutional convention. In other words, the constitution supplies the provisions omitted from the ordinance which would obviously be necessary to carry it into execution. The one is a supplement of the other, and

there is no conflict between them, nor can any be claimed, but it is contended that if the method prescribed by the ordinance does not bring about a result which Virginia thinks is equitable, the ordinance then becomes *functus officio,* and Section 8 of Article VIII. of the constitution constitutes the entire compact between the two states. This is based upon the fact that the ordinance uses the word "just" as qualifying the word "proportion," and the constitutional provision uses the word "equitable." It is not to be doubted, we think, that the two mean, as here used, the same thing. The constitutional convention was provided for by the ordinance. It met and adopted the constitution within ninety days of the adoption of the Wheeling Ordinance.

It is stated in the brief of the learned counsel for the "bond-holding creditors" that the same territory was represented in both bodies, and to a large extent by the same men. Probably no constitutional convention ever assembled in this country under such circumstances. It was in the midst of war, at a time of excitement and passion. There is no reason to suppose that the men in this convention who had thought out carefully the method by which the proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, to be assumed by the new state should be ascertained had either forgotten or abandoned, ninety days later, the method prescribed in the ordinance, as to the manner in which it should be ascertained. The constitutional provision was silent as to method. There was no occasion for repeating in it the language of the ordinance so recently adopted.

Virginia vs. *West Virginia,* (11 Wall. 39), decided in 1870, was a suit brought here by Virginia to have determined the true boundaries of the latter state with reference to whether three counties which, according to the contention of Virginia, were within her jurisdiction. This ordinance was treated in that case by this Court as a compact between two states, not binding, of course, until it had been ratified.

The Court said at page 59:

> "But did congress consent to this agreement?
>
> "Unless it can be shown that the consent of congress under that clause of the constitution which forbids agreements between states without it, can only be

given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement."

Virginia vs. *Tennessee*, 148 U. S. 503.
Wedding vs. *Meyler*, 192 U. S. 582.

The Court was referring there to the agreement so fas as it related to the three counties.

It certainly was a compact, and wherever it was not carried into the constitution, it remains binding as such. There can be no doubt that if the constitution had been silent on the subject of the assumption of a proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, our friends on the other side would have been here claiming that the ordinance was both as to assumption and method a compact, and we do not perceive how West Virginia could have answered that claim. It might not be a binding compact until acted upon in some way by congress, but if acted upon by congress in the admission of the state, it would be binding *ex relatione* as a compact from the beginning. Its validity as a compact could not be attacked, because in our view its validity does not depend upon that provision of clause 3, Section 10 of Article I. of the United States Constitution which provides:

> "No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

The predicate of this provision is that there shall be "another state." When this ordinance was enacted there was but one state, and that was the Commonwealth of Virginia. The validity of this compact is traceable to, and well supported by, that provision of the constitution, clause I, Section 3 of Article IV.:

> "New states may be admitted by the congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states, without the consent of the

> legislatures of the states concerned, as well as of the congress."

When the congress admitted West Virginia into the Union, there were two states, and the ordinance so far as it was not merged into the constitution, was a compact binding from the beginning.

If the method prescribed by section 9 of the ordinance for the ascertainment of the proportion of the debt which the new state should assume, had produced a result satisfactory to Virginia, and the constitution had contented itself with enjoining upon the legislature to provide for the ascertainment and payment of the debt to be assumed by the new state, our friends would have been here contending that the method prescribed by the ordinance, not being in conflict with the constitution, was a compact binding upon West Virginia, and how could that contention have been successfully answered?

The circumstances under which the framers of this ordinance drew it and adopted it, the purposes to be accomplished by it, the fact so often referred to by the learned counsel of the bond-holding creditors, that the men who drafted and adopted it were West Virginians, whose homes would be in the new state, whose association has always been with the people and with the territory which were to constitute the new state, and who resented, and had long resented what they had long deemed unjust and oppressive treatment by the government of the Commonwealth of Virginia, all this is to be kept in mind.

7. THE VICE IN THE ARGUMENT FOR VIRGINIA.

The vice in the argument for Virginia is in the assumption that the ordinance is to be read as if it consisted only of these words:

> "The new state shall take upon itself a just proportion of the public debt of Virginia prior to the first of January, 1861."

If the word "equitable" had been used instead of the word "just" in the first clause of the ordinance, then, applying the method prescribed, the result must have been the same.

Section 9 of the ordinance is to be construed as a whole; and it can mean but one thing, and that is an agreement that whatever sum shall result from an accounting, in accordance with the method

specifically prescribed by the ordinance, shall constitute the just proportion of the debt which the State of West Virginia should take upon herself.

It is perfectly apparent that the ordinance was not confined to the debt. Even the first item is not limited to expenditures in the creation of internal improvements within the limits of the new state, although it is well known that it was an internal improvement debt. It says:

> "The new state shall take upon itself a just proportion of the 'public debt,' etc., 'to be ascertained by charging to it all state expenditures within the limits thereof.'"

This is not limited in scope to internal improvement expenditures within her limits. First, whatever money the commonwealth has expended in the territory in the construction of public buildings, or the improvement of public buildings, it was clearly intended should be included. Every expenditure made by Virginia within the territory of the proposed new state, which could be localized there, was to be included. Second, there was to be charged to her a just proportion of the ordinary expenses of the state government since any part of said debt was contracted.

It will be borne in mind, as has before been shown, that the Trans-Alleghany people had, for a great many years, complained publicly, in constitutional conventions, in the legislature and elsewhere, that a larger burden of taxation had been imposed upon the people living in the territory of the proposed new state than was just, from any standpoint. That Virginia had denied proper representation in the legislature to the people of the western portion of the state. That she had, while taxing them in a searching way, refused proper representation to the people of the western portion of the state, taxing them in the way of taxes on personal property, even including the interest on her own obligations, taxes on watches and plate, on carriages, and a long list of personal property; taxes on occupations and excises and taxes of every imaginable description; that she had exempted from taxation slaves under twelve years of age, unless hired to work under certain circumstances, and had taxed all slaves of greater age than twelve years, at the rate of one dollar and twenty

cents per slave, regardless, utterly, of the value of both classes—those under twelve years of age and those over twelve years of age—thus practically exempting, for the benefit of a class of property owners in the eastern portion of the state not less than $300,000,000 of marketable property; thereby casting an additional and oppressive burden upon the mountainous portion of the state, where there were, relatively, few slaves, and where the people were opposed to the institution of slavery. Those men, rightly or wrongly, considered that was the "parting of the ways" with the eastern portion of the state and her people, and that would 'even up" on a just basis. They remembered that during the years from 1823 to 1861, the debt period, not a single public building had been constructed within the limits of the proposed new state; and that of the $33,000,000 of indebtedness incurred for internal improvements, only $2,800,000 at the uttermost, had been expended within her limits. And during all that time, the people felt that they had been over-taxed for the purpose of paying interest on an immense bonded debt, a trifle only of the proceeds of which had been expended within her territory, and that they had borne a larger than a just proportion of the ordinary expenses of the state government. It was, for this reason, manifestly, that there was inserted in that ordinance, as to be charged to West Virginia "a just proportion of the ordinary expenses of the state government," "since any part of said debt was contracted." And it was for this reason that, after charging both of the items to the new state, the ordinance provided for deducting from that total, "the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period."

It is said that this was an artificial and arbitrary method. That depends upon the point of view. We must take the standpoint of the men who drafted and adopted this ordinance. If the ordinance had used the word "equitable" instead of the word "just" before the word "proportion," in the first line, and had left the remainder as it stands, could the result have been any different?

The definitive words, "to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of the said

debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period," would have remained, and the result must have been precisely the same by the pursuit of the same method.

To construe this ordinance by disregarding the method prescribed in it, in order to reach a result which Virginia deems equitable, or which the Court may think ought to have been prescribed, is not to "construe" the ordinance; but is to make a new and different ordinance.

The members of the legislature of 1871, presumably, knew what this ordinance was when they embodied it in their funding act. Is it to be supposed that the men who framed the ordinance, and so carefully outlined the method to be pursued, had, within 90 days, in the constitutional convention, abandoned that method, and had intended to assume a different proportion of the debt from that assumed by the ordinance? Counsel would have the Court take an extraordinary liberty in construing the ordinance.

They say, on page 11 of their notes:

> "That ordinance purported to be an enactment of Virginia alone. It prescribed, *upon its face*, an arbitrary and what would seem to be an inequitable basis of settlement. In so far as it provided for the assumption of the new state of a "just proportion" of the debt of the commonwealth, its language was free from objection. But when it came to indicate the manner in which that proportion should be ascertained, its terms were not only artificial, but *on their face*, inequitable."

That is a matter of opinion, and, although that is the opinion of the learned counsel and of the bond-holding creditors and their counsel, that is not the question before the Court. The question is, "what was intended by the framers of the ordinance?"

8. "JUST" AND "EQUITABLE" ARE SYNONYMOUS.

We say again that there is no conflict between the ordinance and Section 8 of Article VIII. Where the latter covers the same ground as the former, there is but one change, which, in the excitement of

that day, is easily accounted for, if it requires explanation; and that is the substitution of the word "equitable" for the word "just" in the ordinance. What is the difference in common parlance between the word "equitable" and the word "just"? Webster defines "equitable" as follows:

> "Possessing or exhibiting equity; according to natural right or natural justice; marked by a due consideration for what is fair; unbiased; impartial; just; as an *equitable* decision, an *equitable* distribution," etc.

The first word he gives as a synonym is "just," followed by:

> "Fair, reasonable, right, honest, impartial candid, upright."

He defines 'just."

> "That which was fitting; conforming or conformable to rectitude or justice; not doing wrong to any one; violating no right or obligation; upright; righteous; honest; true;—said both of persons and things.
> "3. Rendering or disposed to render to each one his due; equitable; fair; impartial, as a just duty."

He gives as synonyms of "just":

> "Equitable, honest, upright, true, fair, impartial, proper," etc.

Soule gives as the synonyms of "just":

> "1. Equitable, right, rightful, lawful, reasonable.
> "2. Fair, fair-minded, candid, even-handed.
> "3. Honest, upright, righteous, blameless, pure, conscientious, uncorrupted, virtuous, good, straight-forward."

As the synonyms of "equity" he gives:

> "1. Justice, right.
> "2. Justice, rectitude, uprightness, righteousness, impartiality, fairness reasonableness, fair play."

But it seems impossible, for a moment, to consider that the use of the word "equitable" in the constitution operated to obliterate the method prescribed by the ordinance, when, if the word "equitable" had been in the ordinance instead of the word "just," the result would have been precisely the same.

9. IF THE ORDINANCE IS IN CONFLICT WITH THE CONSTITUTION THE ORDINANCE MUST BE WHOLLY ELIMINATED.

We take it to be clear that if the ordinance is to be ignored as the method prescribed for ascertaining the proportion of the debt of the commonwealth, it must be because it conflicts with Section 8 of Article VIII. of the Constitution. And if it does so conflict, it is eliminated as an entirety from this case, and is neither to be treated as a compact, nor, so far as the method it prescribes is concerned, to be considered at all. It cannot be partly in and partly out of the case; in so far as it meets Virginia's notion of what it ought to be, and out, so far as it comes within her condemnation. It must either be the basis upon which the amount is to be ascertained, or entirely discarded for that purpose.

10. WITH THE ORDINANCE ELIMINATED THE ASCERTAINMENT OF WEST VIRGINIA'S PROPORTION OF THE DEBT MUST BE LEFT TO THE LEGISLATURE OF VIRGINIA.

If the ordinance is discarded, the case rests, so far as the liability is concerned, entirely upon Section 8 of Article VIII. of the West Virginia Constitution. As we have said, this article is entirely without provision as to the rule which shall govern in ascertaining the equitable proportion. One thing only is explicit in Section 8 of Article VIII., and that is the command of the legislature found in the words:

> "And the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a Sinking Fund sufficient to pay the accruing interest and redeem the principal, within thirty-four years."

Here we have the action of the Virginia legislature consenting to and requesting, by legislative act, the admission of the state into the union under the provisions of its constitution. On the theory of the ordinance being eliminated, this is clearly a compact to the effect that the proportion of the public debt which the new state shall bear is to be ascertained by her legislature. This commits entirely to the legislature the ascertainment of the equitable proportion of the debt which the new state shall bear, and enjoins upon it the

necessity of using in the discharge of that duty all practicable speed. *Ex necessitate rei*, this not only gives to the legislature the power, but imposes upon it the duty, of choosing the method by which the equitable proportion shall be ascertained, and its action in that respect would not be subject to judicial review. This made of it a legislative question. It left it to the sense of justice of the tribunal which the constitution selected for its ascertainment. The legislature might ascertain it through a joint committee of the two houses, or it might provide for the appointment of a commisssion, instructing it as to the basis upon and a method by which it should be ascertained and reported to that body. It is urged against this view that it never could have been intended that the debtor state (if it should turn out on the accounting to be a debtor state), should be left to determine the proportion which it should assume. It is a sufficient answer to this to say that it was plainly and unmistakably done. The legislature was placed in the position sustained by the legislature of a state as to the selection of the method of ascertaining and prescribing the proportion of the debt of a county or town which is divided. And in such cases the courts have held, including this Court, that the question, "what proportion of the debt of a county or a city or a town which is divided by legislative authority, shall be borne by the portion set off to make a new town, or included within the boundaries of another county, city or town" is a legislative question and not a judicial one. *Commissioners of Laramie Co.* v. *Commissioners of Albany Co.*, 92 U. S. 307; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514. If the Legislature of West Virginia has failed, with or without justification, to discharge its duty imposed upon it by the constitution, what is the remedy? It has not yet been decided that any Court can mandamus a legislature to pass a law, or can restrain it in the exercise of its functions. It cannot enjoin it from passing an unconstitutional measure, albeit it may overturn the measure after it shall have been passed. Whether the Legislature of West Virginia is to be justly reproached for not having acted, is a question that will be considered later. And if the legislature had proceeded to the ascertainment of the amount of the debt—the just proportion which should be assumed by West Virginia—either by its own committees or by a commission, could the court overturn its ascertainment upon the ground that it had

not adopted the proper basis or method as between population, area or assessed valuation? When the power is unqualifiedly committed by a constitutional provision to the legislature, can any court control the exercise of that discretion as to the selection of the method by which the proportion of the public debt which the new state shall assume is to be determined? When the legislature in the exercise of its power and discretion shall have ascertained what it regards as an equitable proportion of the debt, can any court overturn that determination because in its opinion the proper method was not pursued, and the result does not in *its* opinion constitute an equitable proportion? The plain truth seems to be that the matter—the ordinance being out of the case—was left by the legislature of Virginia and by the congress to the honor of the Legislature of West Virginia. This is nothing new in our system. Since the adoption of Article XI. of the Constitution:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

No state can be sued, even in this court or in other Federal courts, by citizens of another state or by citizens or subjects of any foreign state. Whether suit may be brought in a state court by an individual against the state in one of her own courts depends upon her own consent, as evidenced by her own laws. So that every citizen of the United States and every subject of a foreign state who buys a bond of a state, takes it with full notice and knowledge that the payment thereof and of the interest thereon rests, in the last analysis, upon the honor of the state whose obligation it is.

11. WITH THE ORDINANCE ELIMINATED IS THE MATTER JUSTIFIABLE?

The case of *County of Tulare* v. *County of Kings*, 117 Cal. 195, throws light upon this question.

Section 3 of Article II. of the Constitution of California is as follows:

> "Every county which shall be enlarged or created from territory taken from another county or counties

> shall be liable for a just proportion of the existing debts and liabilties of the county or counties from which such territory shall be taken."

The County of Kings, in the state of California, was created wholly out of Tulare County, and was fully established May 23, 1893. It was contended that on that date there were outstanding $22,000 of court house and $5,000 of road bonds, and that the plaintiff county, Tulare, between May 29, 1893, and September 18, 1895, had paid, on account of said bonds, $14,472.46; that on the assessment rolls of the two counties, as the basis of apportionment, the amount due from defendant was $4,615.22, which, with interest due, would make $5,049.61, due October 11, 1895; that this claim had been presented, etc., to the supervisors of Kings County and rejected, when action was brought against Kings County to recover the sum. A demurrer being sustained, the case was taken to the supreme court.

The contention in the supreme court was that the defendant was liable under the constitution.

The Court said:

> "The contention of plaintiff is that by the supreme law of the state it has been declared that the new county shall pay a *just proportion* of the debts of the old county and it is left with the courts to determine what that *just proportion* may be in a case presented. In other words, it is denied that the legislature has any power to apportion the indebtedness, but that this question as to how much this just proportion will amount to is purely judicial.
>
> "On the other hand, defendant contends that the sole question is whether the action will lie against defendant, the legislature having failed to provide in the act creating Kings County for the apportionment of the public property and debts of the County of Tulare."

The court held on the strength of a prior decision, that the constitutional provision was a restriction upon the power of the legislature to divide a county, and that the power still remained with the legislature to divide counties and that where a county was divided by the legislature without any provision as to apportionment of the debt the presumption was that the legislature thought no apportionment was required.

The Court added:

> "It would seem to me, if the courts should undertake to determine this question upon the authority of the constitution alone, they would have neither compass nor rudder by which to be guided."

The case was ruled largely by the opinion of the supreme court in *Los Angeles County* v. *Orange County*, 97 Cal. 329, of which decision the opinion says:

> "The learned justice, in delivering the opinion of the court, called attention to the established rule that where no provision is made by the legislature as to the debts of the old county they remain with the old county. He then takes up the constitutional provision in question, and says: 'The mode of determining the 'just proportion' of the debts and liabilities for which the new county shall be liable, is not prescribed in the constitution, *but is left to the determination of the legislature in each particular case'*; he points out that the legislature did provide a mode of ascertaining the 'just proporation' of the debts by the appointment of commissioners, and limited the liabilities to those existing at the time the act took effect, and he says: 'As the legislature could divide the public property and assets of the county in such mode as it might choose, it was competent for it to fix upon a date, which it might select, as the time for ascertaining their amount and value, *as well as determining in connection therewith the 'just proportion' of the debts and liabilities to be assumed by the new county. In the present instance the legislature fixed the time when the act took effect as the proper period for ascertaining the amount of these assets and liabilities, and it cannot be held that the constitutional provision was violated in selecting that as the point of time at which to properly determine what would be a 'just proportion' of the debts and liabilities to be assumed by the new county.'* The expenditures for which the claim was made were incurred in the new county prior to its organization, but after the date of the act, and the commissioners had reported these separately, with the remark, "that as a matter of equity the amount should be funded by Orange county to Los Angeles county.'

The opinion upon this point continues: 'The legislature may have considered that it would be necessary for the County of Los Angeles to expend the money for municipal purposes within this territory; *and as it was within its discretion to determine that it should bear the burden of any of the expenditures which it might thus make, the fact that it has made no provision for its reimbursement is indicative that it was not its intention that it should be reimbursed therefor.*'

"Now, this was just such a claim as counsel for plaintiff insists must be heard and determined by the judicial arm of the government, and that over it the legislature has no jurisdiction or power whatever. It seems to me the decision necessarily settles the very question here—that it is a legislative and not a judicial function. Upon plaintiff's theory it was the duty of the court to overrule the demurrer and proceed to hear and determine what the "just proportion' of the debt of Los Angeles county was that should be borne by Orange county; but the court found no cause of action stated, because the legislature had disposed of it, and because it was a legislative function and not a judicial one. (See, also, *County of Orange* vs. *Los Angeles County*, 114 Cal. 390.)"

County of Tulare vs. *County of Kings*, 117 Cal. 195.

If the liability of West Virginia is to be determined under Section 8 of Article VIII. of her Constitution, without reference to the ordinance, then the grounds for holding that the legislature of West Virginia is the only tribunal which can ascertain the amount of her liability are much stronger than those upon which the California court, in the case just cited, decided that it had no jurisdiction; since the Constitution of West Virginia expressly provides that the legislature shall ascertain the equitable proportion of the debt to be assumed. The California constitution contained no provision of this character.

We recognize, of course, the fact that the power of the legislature to apportion the indebtedness of counties exists in case of division, as an incident to their power to divide such municipalities. These are public corporations, created for political purposes, and they have no contract rights to continued existence. They are subject, at all times, to legislative change. But the power which the legislature has to

create them, and divide them, and, therefore, the incidental power to apportion their liabilities, while it proceeds from the power to create them, is no more direct and unlimited than the power with which the Constitution of West Virginia clothed the legislature of that state, in respect to the method of ascertainment, and otherwise, of the proportion of the public debt which would constitute an equitable share for West Virginia to pay.

The question is not whether it was wise for the Legislature of Virginia to consent to the admission of the State of West Virginia, under Section 8 of Article VIII. of her Constitution, vesting such a power in her legislature. The question is, did they do it? The ascertainment is, certainly, in its nature, a legislative function. In the exercise of its legislative powers, the legislature may provide for examination. It must, ultimately, pass upon the result. It may have done it on several bases or theories; but it must, in the end, select the basis, for it must provide for the payment.

The constitutional provision, without the ordinance as a guide as to method, seems to submit to the Court a question which is not judicial in its nature. The case in that respect, as well as others, is unique. It does not differ much, in the aspect of it which we are now considering from the case of *Taylor* vs. *Brewer, et als.*, 1 Maule & Selwin, 290, and *Cummer* vs. *Butts*, 40 Mich. 322.

In the former case plaintiff founded an action of assumpsit on an agreement by defendant that any service by plaintiff should be taken into consideration, and such remuneration be made as should be deemed right.

The court refused to set aside a non-suit.

Lord Ellenburough, C. J., said: "Here, I own, it struck me, was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labor deserved anything he should be recompensed for it by the defendants."

Graves, J., said: "I consider the resolution to import that the committee were to judge whether any or what recompense was right."

Le Blanc, J., said: "It seems to me to be merely an engagement of honor."

Bagley, J., said: "The fair meaning of the resolution is this, that

it was to be in the breast of the committee whether he was to have anything, then how much."

Cummer vs. *Butts* arose on a contract for the sale of lumber which stipulated that either party might cancel the contract "for good cause."

One of the parties terminated the contract, whereupon the other party, who insisted that no good cause for cancellation existed, brought suit.

Judge Graves said: "The difficulty is inherent. It exists in the terms adopted by the parties. The requirement of good cause as something on which the right to revoke by one or the other should depend, is, as here introduced, too vague to be fairly intelligible. It is manifestly applied to each party, but the phrase 'good cause' in such connection, as to parties and subject matter, has no distinct sense as to furnish a common and intelligible criterion for the parties, or any determinate sense whatever. It is impossible to say that the wills of the parties concurred and that each meant exactly what the other did, or even to say what either meant. The room for difference of opinion is immense, and the case is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainty by judicial effort."

12. THIS COURT HAS DECLARED THAT THE ORDINANCE AND THE CONSTITUTION DO NOT CONFLICT AND ARE TO BE READ IN PARI MATERIA.

When this case was argued here on demurrer, counsel for defendant contended that the Court did not have jurisdiction to determine the principle upon which West Virginia should be made liable for any portion of the old debt of Virginia because this was a matter which the Constitution of West Virginia had referred to her legislature. Hence, it was argued, the consent of Virginia to the admission of West Virginia into the union, under the provision of that constitution, and the action by congress admitting the new state, constituted a compact between Virginia and West Virginia, which operated to commit to the legislature of the latter state the ascertainment of what would be a just and equitable proportion of the debt to be assumed, including the basis and method upon and by which it should be ascertained.

The Court in reply to this argument resorted to the ordinance which prescribes the method of ascertainment and thereby defines the proportion which should be assumed. The Court said, through the Chief Justice (206 U. S. 290, 319):

> "It is, however, further insisted that this Court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of congress, by which the question of the liability of West Virginia to Virginia was submitted to the abitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the Constitution of West Virginia, when admitted into the union contained the provision: 'An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years.' And it is said that, on May 13, 1862, the Legislature of Virginia passed an act entitled 'An act giving the consent of the Legislature of Virginia to the formation and erection of a new state within the jurisdiction of this state,' by which consent was given to the creation of the proposed new state, 'according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861;' and that by the act of congress, the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two states. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecesary to go into that, for when Virginia, on August 20, 1861, by ordinance provided 'for the formation of a new state out of the territory of this state,' and declared therein that 'the new state shall take upon itself a just proporation of the public debt of the Commonwealth of Virginia prior to the first day of January,

> 1861,' to be ascertained as provided, it is to be supposed that the new state had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should 'ascertain the same as soon as practicable,' it *referred to the method of ascertainment* (italics not the Court's) prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the 'legislature shall ascertain' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained."

While nothing has been settled in this case except the question of jurisdiction, it is quite difficult to conceive upon what principle Section 8 of Article VIII. of the Constitution can be read without reference to Section 9 of the ordinance; and there is no point in reading it in connection with Section 9 of the ordinance except that the ordinance furnishes, and nowhere else is it to be found, the intention of its framers as to the method which should be pursued in ascertaining the result which would constitute the just or equitable proportion intended to be assumed. Reading the ordinance *in pari materia*, with Section 8 of Article VIII. of the Constitution, incorporates into that provision of the constitution all of Section 9 of the ordinance relating to the method prescribed for the ascertainment of the proportion of the debt which the new state was to assume.

Exceptions to the Master's Report

Pursuant to the interlocutory decree, there has been an accounting before the Master on the basis of the ordinance, and, alternatively, on the other *bases* indicated by the decree. A large number of exceptions have been filed, by both parties, to the finding of the Master. Most of these exceptions have been fully argued in Part II. of this brief. It is admitted that the amount of the public debt, on January 1, 1861, was $32,919,863.93; nor is there any dispute that this debt was incurred for works of internal improvement, as alleged in the bill, and admitted in the answer.

1. THE MASTER WAS RIGHT IN HOLDING THAT BONDS HELD BY THE SINKING FUND AND BY THE LITERARY FUND WERE NOT A PART OF THE PUBLIC DEBT OF VIRGINIA.

The only difference that arose under Paragraph II. of the decree between the complainant and defendant is whether the bonds of the commonwealth held by the Sinking Fund of $1,369,243.92, and by the Literary Fund, $1,116,843.35, with accrued interest amounitng to $15,895, are part of the debt.

As to the latter, after investigation by counsel for the complainant, it was conceded that the bonds were in possession of the board of public works for sale; but have never been disposed of, and were, therefore, not a part of the public debt. As to the other two items, the master held that the bonds were the property of Virginia, and were no part of the public debt on January 1, 1861. This question is elaborately discussed by the Master in his report.

We are content to rest the question whether the bonds in the Literary Fund and the Sinking Fund were part of the public debt of the Commonwealth of Virginia, on January 1, 1861, upon the reasoning and citations of the Master, calling attention only to one or two authorities which are not cited by him.

In *Board of Public Works, etc.*, v. *Gannt*, 76 Va. 465, the court said:

> "The bills are against the board of public works and the board of education. Although the persons composing those boards are made parties, in their individual character, no relief is asked against them as such, and it is obvious that as individuals they have no sort of concern or interest in the question. The acts complained of are acts of the legislature, and the relief sought is against corporations composed exclusively of officers of the state. The bill is precisely such as it would have been if the appellees were proceeding against the state.
>
> "*Conceding that the fund in controversy is subject to a pledge on behalf of the public creditors, it is still the property of the state as absolutely as any of the money in her treasury, or the capitol square and public buildings.*
>
> "It is none the less in her possession because it is

> under the control of the board of education, for that board is a mere agency of the state, having no existence or power independently of the state. As was said by Judge Anderson in *Clarke* v. *Tylor,* 30 Gratt. 159: 'After money is set apart as a literary fund, the commonwealth is still the sole owner of it, as she is of all the funds and property of the board of education and the other corporations, which are composed of officers of the government, the funds and property of which are the sole property of the commonwealth.' "

It would seem to be clear that the property of Virginia could not very well be a part of the public debt of Virginia. Such bonds are not outstanding obligations of the state. When the bonds were purchased by the state, the debt was *pro tanto* discharged, and the bonds were then no more the obligations of the state than if they had never been negotiated.

At the foot of the opinion is the following:

> "NOTE BY JUDGE STAPLES.—'Since the foregoing opinion was delivered, the decision of the Supreme Court of the United States in the case of *John Elliott and als.* v. *The Governor, Lieutenant-Governor, Auditor, and other State Officers of Louisiana,* has been rendered. The reasoning in that case sustains fully the views presented in my opinion.' "

(The case to which Judge Staples refers is reported under the title of *"Louisiana* v. *Jumel"* and *"Elliott* v. *Wiltz,"* 107 U. S. 711.

2. THE MASTER WAS RIGHT IN EXCLUDING UNDER PARAGRAPH III. OF THE DECREE EXPENDITURES BY CORPORATIONS IN WHICH VIRGINIA WAS A STOCKHOLDER.

Paragraph III. of the Decree required the master to ascertain and report:

> "All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted."

We agree with the Master that the paragraph was based upon that portion of the Wheeling Ordinance which reads:

> "The new state shall take upon itself a just pro-

> portion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it *all state expenditures within the limits thereof.*"

We do not agree that the discussion by the Master of the question which arose under this paragraph, as to the doctrine of "equitable construction," was at all warranted by any question which arose, or could arise, under the third paragraph, and insist that the question is one of law, which the Court did not commit to the Master. The sole question under that paragraph, committed to the Master, was to ascertain and report:

> "All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

(*a*) THE MASTER'S FINDING.

The complainant claimed that $5,639,302.66 had been expended by the state within the designated territory (Record, p. 371, c. 1, p. 1).

The amount conceded by the defendant was $1,251,288.92.

The question as to the items 2, 3, 10, 11, 12, 13, 14, 25, 28, 35, 55, 150, have been fully argued in another portion of the brief.

The Master allowed, to which the defendant excepted, in addition to the conceded sum, $1,560,271.06, making $2,811,559.68, rejecting claims insisted upon under this paragraph by the complainant, amounting to $2,827,742.68.

(*b*) THE REJECTED CLAIMS REPRESENTED EXPENDITURES BY PRIVATE CORPORATIONS.

The claims rejected represented the expenditures within the State of West Virginia, except as hereinafter stated, by private corporations created by Virginia by special act, which possessed under her general laws all the faculities of a corporation, including perpetuity, the right to have a common seal, to be managed by a board of directors, to issue stock, to the stock of which corporations Virginia had subscribed through her board of public works duly thereunto authorized by law in conjunction with solvent citizens, either two-fifths or three-fifths, as the special act provided. The Master was clearly right in

excluding these as state expenditures within the Territory of West Virginia. The money paid in by the state and other stockholders to the treasurer of the corporation on their respective subscriptions became the property of the corporation. For such payments the stockholders each received stock representing his interest in the company's property. The distinction between the stockholder and the corporation is too well settled to require argument. The improvements made through the expenditure of the moneys thus paid into the treasury of the corporation was its property. This property did not belong to the state, nor did it belong to the stockholders. The state in subscribing to the stock carried none of its soverignty into that relation. It stood before the law in respect of ownership and control precisely as individuals or private stockholders stood. This has been long settled by the decisions of this Court.

(c) VIRGINIA LEGISLATURE AND COURTS RECOGNIZE THE DISTINCTION BETWEEN PRIVATE CORPORATIONS WITH STOCK AND PUBLIC CORPORATIONS WITHOUT STOCK.

The Virginia legislature recognizes the distinction between private corporations and public corporations. In several instances the legislature created public corporations composed of the governor, the attorney general, and some other official of the state, through which to construct work of public improvement. These corporations had no stock. The corporations were simply the agents of the state, each without stock; their property was the property of the state. The Supreme Court of Appeals of Virginia held that such a corporation was not liable for damages caused in the construction of an improvement, or in its management.

Sayre v. *The Northwestern Turnpike Road*, 10 Leigh 454.

These private corporations, on the other hand, in which the state had taken stock in conjunction with others, were, in respect of suits, subject to the same laws as other private corporations throuhout the state, to which the state sustained no relation whatever except as a sovereign. In the case of *James River, &c.*, v. *Early*, 13 Grattan 541 cited by the Master and in Part II. of this brief, which was an action

to recover for the negligence of the corporation and in which the right to sue the corporation was raised, the Supreme Court of Appeals distinguished that corporation from the public corporation involved in the Sayre case.

We do not suggest that the primary motive of the state in subscribing to the stocks of such companies to secure the construction of highways, bridges and railways, and the improvement of rivers, and works of public convenience and benefit, was to make money. She borrowed the money to pay her stock subscriptions in almost every one of these cases. In each case, the loan was authorized by the act of the legislature which created the corporation. And in each case the evidences of debt, which were certificates of stock issued by the state, contained a reference to the particular act under the authority of which the loan was made, and the Court will see in the schedule annexed to the Master's report opposite the name of each of these corporations the purpose for which the loan was created, giving the act by date, and also the number of the loan, its maturity and amount. On principles of international law, upon the division of Virginia by the separation of the territory now constituting West Virginia, and her admission into the union as a state, the public improvements, public buildings and other governmental property within West Virginia, would pass by the fact of separation to the new state; and the latter would be obliged on principles of international law, as she took the property, to bear not a part, but the whole debt which had been incurred in its creation. It would be a debt running with the land, an obligation not secured by a mortgage upon the territory of the new state and localized in that way, but a debt *contracted with reference to, and for the benefit of, the territory embraced* in the new state. It would be manifestly impossible for the State of Virginia by any act of her own, or any agreement between her and the proposed new state, to convey to the latter the property of the corporations in which she was a mere stockholder, for she would not have any property to convey except her stock; manifestly she could not transfer the private property of the corporation; nor could the interest of the private stockholders in the corporation be displaced by any agreement made by the commonwealth in respect to it.

(*d*) VIRGINIA ACT OF 1863 TRANSFERRING TO WEST VIRGINIA PROPERTY WITHIN HER BOUNDARIES.

No change of the government of the old state, or its territory, could change in the slightest the corporation ownership, or release it from its duties under its charter. It would be subject, perhaps, to a new master; and this was evidently Virginia's notion of it in '63. The act of February 3, 1863, passed by the restored government, Chapter 15, Appendix to the Record, page 128, provides:

> "That all property, real, personal and mixed, owned by or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof, situated within the said boundaries, and now vested in this state, or in the president and directors of the board of the literary fund, or the board of public works therefor, or in any person or persons, for the use of this state to the extent of the interests and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any *parent bank or branch* doing business *within the said boundaries;* and all *stocks of any other company or corporation*, the principal office or place of business whereof is located within the said boundaries standing in the name of this state or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state."

It was admitted on the record by the defendant that the principal office or place of business of any corporation whose works were wholly within the State of West Virginia, was within the State of West Virginia, and came within the provisions of the act. Section 2, transferred unpaid and uncollected, arrearages of taxes on lands, lots, of all descriptions, fines imposed by courts, forfeitures and penalties, &c., &c., dividends on stock owned by the state or by the board of public works

or the literary fund, in any bank, bridge or other corporation, and various other items which need not be mentioned. Section 5 provided that:

> "If the appropriations and transfers of property, stocks and credits provided for by this act take effect, the State of West Virginia *shall duly account for the same* in the settlement hereafter to be made with this state; provided that no such property, stocks and credits shall have been obtained since the re-organization of the state government."

(*e*) THE TRANSFERS OF PROPERTY TOOK PLACE.

That the tranefers did take effect, is apparent from the legislation of West Virginia, put in the record by the complainant, and will be found in the appendix. If by that act Virginia had transferred to West Virginia her interest in the property, and had provided simply for the transfer of the stocks or property of corporations in which her stock represented her interest, it might be thought that it was intended as a mere muniment of title; but the provision that she shall *account for it hereafter in the settlement to be had between the two states gives to it conclusively a different aspect.* This act is set out in Paragraph VIII. of the bill. And it is alleged in this paragraph that:

> "The property which was by the operation of this act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate to several million of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury from the sale thereof about $600,000; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861."

(*f*) WEST VIRGINIA CANNOT EQUITABLY BE CHARGED BOTH WITH THE VALUE OF THE STOCKS AND WITH THE EXPENDITURES MADE BY THE CORPORATIONS.

And the Master finds that the amount due Virginia on account of the stock of the Northwestern Bank of Virginia and of the Fairmont Bank, is $477,250; and he also adds $7,578, stock of Sweet & Salt Sulphur Spring Company; $4,000, stock of the White & Salt & Salt Sulphur Spring Company; $12,000 for stock of the Fairmont & Palatine Bridge Company, making in all $500,828. No evidence was offered, upon which he could find, nor does he find, the value of the other stocks at the time of the transfer under the act of 1863 to the defendant. It is admitted that they were of no value. Before that date the property of such corporations had to a considerable extent been destroyed by the troops of Virginia acting in co-operation with the Confederate States, stocks of the bridge companies and the turnpike companies. If there had been evidence upon the part of the plaintiff that the stock other than bank stock; in other words the stocks of the private corporations created to build bridges, turnpikes, and other works of internal improvement, whose principle place of business was in 1863 in the territory of West Virginia were worth par when thansfered, he would have been obliged to find in favor of West Virginia for all the stocks at par. That it is confessed on the record that they were worthless at the time they were transferred does not change in the slightest the status or the principle. Upon this basis, it is perfectly apparent that it was the understanding of the legislature that the expenditures by these companies of their money within West Virginia could not be considered state indebtedness; otherwise, if West Virginia were obliged to pay for them as *state expenditures* and also to pay for the *stock*, the defendant would be subject to double payments for the same thing, which, of course, never could have been intended. It is thus apparent that not only was the Master right, as a matter of law, in rejecting under Paragraph 2 expenditures by these corporations as state expenditures, but that this could not have been the understanding of Virginia, as shown by the act of 1863. And it will not escape attention that the act of 1863 in respect of all the items embraced in it, stocks and improvements, localized them, just as the ordinance localizes expenditures. The

act of 1863 was based upon territorial limits. It can hardly be possible that West Virginia *could equitably be held responsible* for these stocks under the act of 1863 at par if they *were worth par*, and also be responsible for all, or a part, of the moneys which Virginia had *borrowed with which to purchase them*. That would be unique for want of equity.

(*g*) COUNSEL FOR VIRGINIA BEG THE QUESTION.

Counsel for Virginia on page 21 of their Notes of Argument say:

> "In considering the questions which are presented by the controverted items in the schedules filed under this paragraph it is important always to bear in mind the precise language of the decree which, following the terms of the Wheeling Ordinance, directs the ascertainment of:
>
> 'ALL *expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.'
>
> "It is manifest that that language in explicit and comprehensive terms embraces without exception or qualification, all expenditures of whatever character or description, and on whatever account, or for whatever purpose, or in whatever manner made, which were made by the Commonwealth of Virginia in any part of the territory now constituting West Virginia, after March 19, 1823, the agreed time at which any part of the debt in question was contracted."

This is *petitio principii*. The question is whether an expenditure by Virginia in the purchase of stock of a corporation, which corporation is authorized to construct a work of internal improvement within the territory of what is now West Virginia, is an expenditure *"made* within West Virginia could not be considered state expenditures: *made in West Virginia by a corporation in which Virginia is a stockholder*. The learned counsel have emphasized the capital letters and italics in the wrong place. The point is not there: the capitals and the italics, both, should be transferred from the words *"all expenditures"* to the words *"made by the Commonwealth of Virginia."*

3. THE MASTER WAS WRONG IN FINDING THAT INTEREST ON THE PUBLIC DEBT OF VIRGINIA WAS PART OF THE ORDINARY EXPENSE OF THE STATE GOVERNMENT.

If the state chooses to create corporations, and invest in their capital stocks, for the making of internal improvements, and borrows the money for the purpose of paying her stock-subscriptions, while she does it upon her credit as a sovereign, the use to which she devotes the money is not a *governmental use;* but is a commercial use.

While the debt as between the bond-holders and the state, is the debt of a sovereign state, the property acquired is an investment. It is, in no sense, governmental. It is commercial. And to say that the interest annually accruing upon such debt is an ordinary expense of state government, seems to be absurd. To say that it is even an ordinary expense of a state, as a sovereignty, is not maintainable.

Is it conceivable that the framers of this ordinance could ever have been induced to agree to the proposition, or have contemplated, that by its provisions they were binding the new state to pay, under the guise of ordinary expenses, nearly $4,000,000 of interest on the moneys borrowed by Virginia to invest in capital stocks of corporations, which, on the separation, she was to keep, and did keep, as well as of all the internal improvements which that stock represented?

The Master finds the ordinary expenses of the state government of Virginia, during the debt period; that is to say, from March 19, 1823, to January 1, 1861, to have been $40,274,896.70, including interest on the public debt during that period, amounting to $18,574,747.84, leaving as the sum for ordinary expenses of the state government, excluding interest, $21,700,148.86, of which he assigns to West Virginia $4,161,352.99. This ascertainment and apportionment was excepted to by the defendant. He also assigns to the defendant, $3,986,102.93, as its proportion of the interest paid on the public debt during the debt period, which he includes as a part of the ordinary expenses of the state government. To this, the defendant excepts.

(*a*) THE LANGUAGE OF THE ORDINANCE.

SECTION 9 of the Wheeling ordinance, in which the words to be construed occur, is as follows:

> "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the *ordinary expenses of the state government*, since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period."

(*b*) DEFENDANT'S CONTENTION.

The defendant contends that upon every principle of construction, by the plain meaning of the words "ordinary expenses of the state government," by the interpretation which results from reading section 9 of the ordinance as a whole, by the meaning which the words in question have acquired from common use in the constitutions and statutes of the different states as well as by the great preponderance of judicial interpretation in cases where these words have been construed interest on a public debt, especially where such a debt was incurred for extraordinary purposes, cannot properly be included among the ordinary expenses of a state government.

(*c*) INTEREST ON A STATE DEBT IS NOT AN ORDINARY EXPENSE OF GOVERNMENT BECAUSE IT IS PAYABLE ONLY DURING A LIMITED PERIOD.

The adjective "ordinary" fixes the character of the expenses of the government with which the ordinance charges West Virginia. An ordinary expense of government is one which ordinarily recurs so long as government exists. It is obvious that interest on a state debt does not belong to this category. A state debt is a temporary obligation to be discharged at an agreed time by payment. The ordinary expenses of a state government, however, never cease. So long as the government exists, expenses for its support, for the maintenance of the legislative, judiciary and executive departments, for the performance

of the various duties which they owe to the people will annually recur and must be met. Even if it were proper, as we do not think it is, to describe payments upon a bonded state debt as an expense of government, is it not too clear for argument, when we find that payments upon such a bonded debt are by the terms of the contract creating the debt only to continue during a specified limited time, while ordinary expenses of the government must continue indefinitely, that the term *ordinary* expenses must be applied exclusively to the latter class of expenses, and cannot be deemed to include the payments on the debt which are to cease after the expiration of the time fixed by the contract?

(*d*) INTEREST ON THE OLD VIRGINIA DEBT WAS NOT AN ORDINARY EXPENSE OF GOVERNMENT BECAUSE THE DEBT WAS INCURRED FOR EXTRAORDINARY PURPOSES.

In considering whether interest on a state debt is one of the ordinary expenses of a state government, it is important to bear in mind the purposes for which the debt was incurred. The debt of Virginia to which the Wheeling Ordinance refers, was incurred for internal improvements. The proceeds of the Virginia bonds were either directly applied in the construction of highways, railways, bridges and similar improvements, or to the purchase of stock in corporations which applied the money in the construction of such internal improvements. These improvements were of a permanent character, and in constructing them the state was making a permanent investment. We do not understand that there is any dispute that expenditures for works of internal improvements are extraordinary and not ordinary expenditures. The Master's report (page 112) states that "the question as to what is an extraordinary expense seems to be well settled," and the cases which he cites in illustration decide that expenditures for permanent improvements are extraordinary expenditures. All the authorities on this question are in agreement. A number of state constitutions prohibit the state from expending money on works of internal improvement. This shows the impossibility of regarding such an expense as an ordinary expense of government. If the principal of some of the Virginia bonds issued for internal

improvements had fallen due within the period covered by the ordinance and had been paid to the bondholders, is it not manifest that this payment for an extraordinary purpose, a payment which could be made only once, could not be deemed an ordinary expense? And if payment of the principal debt would not be an ordinary expense, on what theory can payment of the interest, which is merely incidental to the principal debt, be so regarded?

(*e*) THE FACT THAT THE INTEREST WAS PAYABLE AT REGULAR INTERVALS DID NOT MAKE IT AN ORDINARY EXPENSE.

The only circumstance which gives any semblance of plausibility to the claim that interest on the Virginia debt was an ordinary expense of the state government is the fact that the interest was payable at regular intervals until the principal fell due and was paid. We have already pointed out that the annual recurrence of an interest charge during a *limited* period does not make the interest an *ordinary* expense. Suppose the state had made a contract for the construction of works of internal improvement, under which payment therefor was to be made in equal semi-annual installments during a period of years. Would it be possible to claim that the payment of such installments was an ordinary expense of government?

(*f*) INTEREST IS NOT PROPERLY DESCRIBED AS AN EXPENSE.

Leaving out of consideration the force of the adjective "ordinary," it would still be not in accordance with the common use of language to describe the payment of interest on a funded public debt as an *expense of government*. The difference between expense and debt in the common use of language is well expressed by Judge Spencer in a Louisiana case as follows: "In common parlance there is, no doubt, a distinction in the meaning of the words debts and expenses. The latter is usually applied to those current temporary obligations which are met by payment as they arise, while the former designates obligations of a more enduring kind" (*State ex. rel.* vs. *State Auditor*, 32 La. Ann. 89, 90).

A striking illustration of this distinction is found in the provisions of state constitutions relating to taxation and revenue. In most of the

states the constitutional provisions concerning taxation and the appropriation of revenue expressly provide for the payment of the expenses of government, and *also* for the payment of the public debt and interest thereon. Clearly the men who framed these constitutions would not have provided separately for the payment of the principal and interest of the public debt, if they had supposed that such payment fell among the expenses of government for which they had already provided. We shall subsequently call the attention of the Court to the specific constitutional provisions to which we refer.

(*g*) THE DISTINCTION BETWEEN THE STATE AND THE GOVERNMENT OF THE STATE.

The Wheeling Ordinance expressly discriminates between the state and the government of the state. According to the ordinance, "the new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia." The public debt to be assumed is the debt of the Commonwealth of Virginia and not of its government; and the new *state*, not the *government* of the new state, is to take upon itself a just proportion thereof, which is to be ascertained "by charging to it all the *state* expenditures within the limits thereof and a just proportion of the ordinary expenses of the state *government*." All *state* expenditures within the defined area are to be charged and in addition a part of all the ordinary expenses of the state *government*. It is a cardinal principle of construction that effect must be given to every word in a written instrument. In the ordinance no effect can be given to the word "government" unless it is construed as meaning something different from the word "state." If this is granted, then the conclusion follows that under the ordinance payment of the public debt of Virginia, if it is to be regarded as an "expense," is an expense of the *state*, and not of the *government* of the state, because the ordinance describes the public debt as the "debt of the Commonwealth of Virginia," that is to say, of the *state*. The state may have expenses which are not the expenses of the state government. If a state fails to pay interest on its bonds, its credit is affected, and it is an event to be deplored; but the government of the state must go on just the same. The distinction drawn by the ordinance between the state and the government of the state is a real and not an artificial

distinction which this Court has recognized in *Texas* v. *White*, 7 Wall. 700, and in *Poindexter* v. *Greenhow*, 114 U. S. 290. In the former case Chief Justice Chase delivered the opinion of the Court, and in enumerating the various senses in which the word state is used said: "And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government. In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every state in the union a republican form of government, and shall protect each of them against invasion. In this clause a plain distinction is made between a state and a government of a state." We think the language of the ordinance plainly shows that the words commonwealth and state are therein used in the primary sense of a people or a political community as distinguished from the government. Such an interpretation is in accordance with the actual fact. Under American institutions the government of a state has no validity except as representing the people who compose the state. When a public debt is contracted it is not the government, but the people of the state who become liable for its payment. The government merely acts as the agent of the people in the transaction. In the case of this debt of Virginia this is peculiarly true. The whole debt which is the subject of this suit was incurred for internal improvements, matters in which the people were interested, from which the people might anticipate benefits in the conduct of their trade and commerce, but which have no relation to the work of government. How can the payment of such a debt or of the interest thereon be regarded as an expense of government? Suppose a private individual entrusts the conduct of his affairs to an agent, who, in the course of his employment, executes a note on behalf of his principal. Would it not be doing violence to the ordinary sense in which language is understood to include payment of the note or of interest thereon among the expenses of the agent? In the case of business corporations, the word government is not used to describe the agents who conduct the business, but the work performed by them is commonly described by the word management, and the expenses of the management of a private corporation, in the largest sense, are called operating expenses. We submit that no instance can be found in the

records of private corporations where the payment of interest on bonds of such a corporation is treated as an operating expense.

(*h*) FINANCE PROVISIONS OF STATE CONSTITUTIONS SHOW THAT INTEREST ON A STATE DEBT IS NOT REGARDED AS AN EXPENSE OF GOVERNMENT.

The provisions of the state constitutions relating to taxation and revenue are helpful in considering the phrase "ordinary expenses of the state government." The constitutions show two things, (1) that the creation of a public debt is not an ordinary, but an extraordinary matter, and (2) that the phrases "expenses of the state" and "expenses of the state government" do not apply to the payment of interest on state bonds. Examination of the constitutions makes it plain that the founders of state government intended that ordinary expenses should be defrayed out of funds raised by taxation, that the power of creating funded debts by the issue of bonds, if granted at all, should be exercised only for the purpose of meeting extraordinary emergencies, and that such debts when created should be paid and extinguished at maturity, thus restoring the normal and ordinary condition of paying expenses as they arise by the imposition and collection of taxes. Nearly all the state constitutions carefully limit the power of the legislature to issue bonds and define the purposes for which this power may be exercised. In some states, as in Wisconsin, the constitution prohibits the state from contracting public debts except for the purpose of defraying extraordinary expenditures. Many of the constitutions also direct that the law authorizing the creation of a public debt shall provide for levying a special annual tax sufficient to pay the interest on the debt and to provide a sinking fund for the payment of the principal at maturity within a specified number of years. Furthermore, in many of the states the constitutions direct the legislatures to raise revenues sufficient to defray the estimated expenses of the state or of the state government, and also sufficient sum to pay the interest on the state debt. There could not be a clearer indication that interest on the state debt was not regarded as an *expense* of the state government. Had it been deemed such an expense there would have been no need of requiring the legislature to raise revenue to pay

interest on the state debt in addition to revenue for the purpose of defraying the expenses of the state government.

We shall now quote the specific provisions from the state constitutions to which we have made general reference. In many of these provisions the phrase used is substantially the same as that in the Wheeling Ordinance; namely, the ordinary, or the current, or the necessary, expenses of the state government, and these expenses are expressly distinguished from interest on the state debt. When we find that so many constitutions, drawn up by men who were under a peculiar obligation to use language accurately, agree in separating the ordinary expenses of the state government from interest on the state debt, the inference is compelling that this distinction is generally accepted, and that the men who framed the Wheeling Ordinance, in charging the new state with a just proportion of the ordinary expenses of the state government, did not intend to include interest on the public debt of Virginia among these expenses.

(*i*) EXTRACTS FROM STATE CONSTITUTIONS.

Alabama, Constitution of 1875, Article X., Section 7, provides that the City of Mobile "may, until the 1st day of January, 1879, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed three-fourths of one per centum to pay the *expense of the city government*, and may *also* until the 1st day of January, 1879, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed three-fourths of one per centum to pay the *existing indebtedness* of said city and *the interest thereon*."

Alabama, Constitution of 1901, Article XI., Paragraph 216, provides that the City of Mobile "may from and after the ratification of this constitution levy a tax not to exceed the rate of three-fourths of one per centum to pay *the expenses of the city government*, and may also levy a tax not to exceed three-fourths of one per centum to pay *the* debt existing on the 6th day of December, 1875, *with interest thereon*, or any renewal of such debt."

Florida, Constitution of 1885 (in force at present), Article IX., Section 2: "The legislature shall provide for raising revenue sufficient to defray *the expenses of the state* for each fiscal year, and *also* a sufficient sum to pay *the principal and interest of the existing indebtedness of the state*."

Georgia, Constitution of 1877 (in force), Article VII., Section 1: "The powers of taxation over the whole state shall be exercised by the general assembly for the following purposes only: For the support of the state government and the public institutions. * * * * To pay the interest on the public debt. To pay the principal of the public debt."

Section 14, Paragraph 1: "The general assembly shall raise by taxation each year, in addition to the sum required to pay the public expenses *and* interest on the public debt, the sum of $10,000 which shall be held as a sinking fund to pay off and retire the bonds of the state which have not yet matured."

Indiana, Constitution of 1851 (in force), Article X., Section 2: "All the revenues derived from the sale of any of the public works belonging to the state, and from the net annual income thereof, and any surplus that may, at any time, remain in the treasury derived from taxation for general state purposes, *after* the payment of *the ordinary expenses of the government, and* of the *interest* on bonds of the state, other than bank bonds, shall be annually applied, under the direction of the general assembly, to the payment of the principal of the public debt."

The ordinance relating to the state debt which was adopted as part of the Louisiana Constitution of 1879, reduced the interest payable on certain state bonds, fixing the rate from January 1st, 1880, at 2 per cent. for five years thereafter, and provided in article 3: "Be it further ordained, that the coupons of said consolidated bonds falling due the first day of January, 1880, be and the same is hereby remitted, and any *interest* taxes collected to meet said coupons are hereby *transferred* to defray *the expenses of the state government.*"

Michigan, Constitution of 1850 (in force), Article XIV., Section 1, provides that, "The legislature shall provide for an annual tax, sufficient with other resources, to pay the estimated *expenses of the state government, the interest of the state debt,* and such deficiency as may occur in the resources."

North Dakota Constitution, Article II., Section 174, provides that: "The legislative assembly shall provide for raising revenue sufficient to defray the *expenses of the state* for each year, not to exceed in any one year four mills on the dollar of the assessed valuation of all tax-

able property in the state, to be ascertained by the last assessment made for state and county purposes, and *also* a sufficient sum to pay *the interest on the state debt.*"

Ohio Constitution, Article XII., Section 4, provides that: "The general assembly shall provide for raising revenues sufficient to defray the *expenses of the state* for each year, and *also* a sufficient sum to pay the *interest on the state debt.*"

Oklahoma Constitution, Article X., Section 2, provides that: "The legislature shall provide by law for an annual tax sufficient, with other resources, to defray the estimated *ordinary expenses of the state*, for each fiscal year."

Section 4 provides that: "For the purpose of paying *the state debt*, if any, the legislature shall provide for levying a tax, annually, sufficient to pay the annual *interest and principal of such debt* within 25 years from the final passage of the law creating such debt."

Oregon, Constitution of 1857 (in force), Article IX., Section 2: "The legislative assembly shall provide for raising revenue sufficient to defray the *expenses of the state* for each fiscal year, and *also* a sufficient sum to pay the *interest on the state debt*, if there be any."

Pennsylvania, Constitution of 1838, Article XI. added 1864), Sections 1, 2 and 3 provide for the creation of state debts. Section 4 provides for the creation of a sinking fund to pay the accruing interest and annually to reduce the principal of the state debt and then provides: "The said sinking fund may be increased from time to time by assigning to it any part of the taxes or other revenues of the state not required for the *ordinary and current expenses of government.*"

Pennsylvania, Constitution of 1873, Article IX., Section 11, is in substance the same as Section 4 of Article XI. of the preceding Constitution referred to above, and provides that "Said sinking fund * * * shall be increased from time to time by assigning to it any part of the taxes or other revenues of the state not required for the ordinary and current expenses of government."

South Dakota Constitution, Article XI., Section 1, provides that: "The legislature shall provide for an annual tax sufficient to defray the estimated *ordinary expenses of the state* for each year, not to exceed in any one year two mills on each dollar of the assessed valua-

tion of all taxable property in the state, to be ascertained by the last assessment made for state and county purposes.

"And whenever it shall appear that such ordinary expenses shall exceed the income of the state for such year, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of such ensuing year. And for the purpose of paying *the public debt*, the legislature shall provide for levying a tax annually, sufficient to pay the *annual interest and the principal of such debt* within ten years from the final passage of the law creating the debt, provided that the annual tax for the payment of the interest and principal of the public debt shall not exceed in any one year two mills on each dollar of the assessed valuation of all taxable property in the state as ascertained by the last assessment made for the state and county purposes."

In the case of *In re Limitation of Taxation*, 3 S. D., 456, the court construed Section 1 of Article XI. of the Constitution as follows: "This section relates to three different and distinct items of taxation: First, the annual tax for defraying *the ordinary expenses* of the state; second, taxes to pay deficiencies from preceding year; third, taxation for the purpose of paying *the public debt*. * * * When the purpose is to pay the public debt, the legislature shall provide for levying an annual tax sufficient to pay the annual interest and the debt within ten years. The tax, *like the one* for the estimated ordinary expenses, is limited to two mills on the assessed valuation of property."

Texas Constitution, Article XI., Section 6, provides that: "Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed, and collected *separately* from that levied, assessed and collected for current expenses of municipal government, and shall when levied specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds or other indebtedness for the payment of which such tax may have been levied."

Virginia Constitution, Article XIII., Section 188, provides that:

"No other or greater amount of tax or revenue shall at any time be levied than may be required for the *necessary expenses* of the government, *or* to pay the *existing indebtedness* of the state."

Section 189 fixes the rates of state taxation on property, and provides that the proceeds "shall be applied to the expenses of the government *and* the indebtedness of the state."

Washington Constitution, Article VII., Section 1, provides that: "The legislature shall provide by law far an annual tax sufficient, with other sources of revenue, to defray the estimated *ordinary expenses* of the state for each fiscal year. And for the purpose of paying the *state debt*, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the *annual interest and principal of such debt* within twenty years from the final passage of the law creating the debt."

West Virginia Constitution, Article X., Section 4, provides that: "The payment of any liability other than that for the *ordinary expenses* of the state, shall be distributed over a period of at least twenty years."

Section 5 provides that: "The power of taxation of the legislature shall extend to provisions for the payment of the *state debt* and *interest* thereon, the support of free schools, *and* the payment of the annual estimated *expenses of the state.*"

(*j*) THE DISTINCTION BETWEEN ORDINARY EXPENSES OF GOVERNMENT AND INTEREST ON A PUBLIC DEBT IS APPARENT IN THE CASE OF MUNICIPAL CORPORATIONS.

The line of division between ordinary expenses of government and interest on a public debt is plainly marked in the case of municipal corporations. It is familiar law that a municipal corporation has no power to issue bonds without express authority from the legislature, and statutes giving such authority are strictly construed. It necessarily follows that a municipal corporation has no power to impose taxes for the purpose of paying bonds or interest thereon unless authority to issue the bonds was duly conferred. On the other hand, a municipal corporation, by virtue of its creation, has implied power to incur debts for the purpose of its existence and to raise money

by taxation to pay these living expenses. In *U. S.* v. *New Orleans*, 98 U. S. 381, 393, Mr. Justice Field, speaking for this Court, said: "When such (municipal) a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of side-walks, sewers and drains, the introduction of water, and the establishment of a fire and police department."

Is it not clear that the expenses, which municipal corporations have power to incur by necessary implication, are ordinary expenses of municipal governments as distinguished from those payments which are not necessary to their existence and grow out of obligations which depend for their validity on the express authorization of the legislature?

(*k*) THE ADJECTIVES "ORDINARY," "CURRENT" AND "NECESSARY" WHEN APPLIED TO GOVERNMENTAL EXPENSES ARE SYNONYMOUS.

The Master has pointed out that the expression considered by the courts in some cases is "ordinary expenses," while in others it is "current expenses," and in still others it is "necessary expenses." These different phrases also appear in the constitutional provisions which we have quoted. The Master rightly concludes that the courts treat the adjectives "ordinary" and "current" when applied to expenditures of a state or a municipality as synonymous (Master's Report, pages 91, 92). This Court, in considering the terms of a private trust, said: "We think the correct interpretation to the phrase 'current expenses' was given it by the Circuit Court, namely, ordinary expenses" (*Taylor* v. *Mayo*, 110 U. S. 330). The cases, furthermore, show that the expression "necessary expenses," when the context shows that regularly recurrent expenses of government are referred to, has

the same meaning as "ordinary expenses" and "current expenses." We submit that all these phrases describe the expenses which are incurred in carrying on the regular work of government. Judge Lurton, in the case of *City of Cleveland* v. *U. S.*, 111 Fed. Rep. 341, 350, defined current expenses as follows: "Those current expenses proper for the maintenance of the city government and chargeable against current revenue." In *Burch* v. *Earhart*, 7 Ore. 58, 66, Chief Justice Kellogg gave the following definition: "Current expenses of the state mean the ordinary running liabilities incurred by the state in the administration of its offices from year to year." In *Dunbar* v. *Board, etc.*, 5 Ida. 407, 412, 413, the court, referring to the ordinary expenses of a county, defined them as "Ordinary expenses such as are usual to the maintenance of a county government, the conduct of its necessary business, and the protection of its property."

(*l*) THE MASTER'S ARGUMENT.

The regular work of government to which the foregoing definitions refer differs according to the needs, the means and the demands of different communities. The Master's Report (page 87) states: "The defendant contends that the language should receive a construction which would make 'ordinary' synonymous with 'necessary' or 'essential' used in the sense of indispensable expenses—expenses which if not paid the wheels of government will cease to revolve, without the payment of which the state government cannot be administered." In one sense this is a correct statement of defendant's position, but not in the sense in which the Master apparently understands this statement. On page 92 of his report the Master says: "The defendant relies upon the line of cases where judgment creditors seeking to recover payments from the revenues of the municipality have been postponed to ordinary current or necessary expenses, which are made a primary charge upon revenues. The cases clearly establish the general doctrine. From some of them it might perhaps be inferred that interest was not a primary charge or an ordinary, current or necessary expense. I find none of them, however, where the specific question as to whether interest is or is not an 'ordinary expense' is concerned. It is very clear that all essential expenses are also 'ordinary expenses,' but it does not by any

means follow that all 'ordinary expenses' are essential expenses, that there may not be 'ordinary expenses' which are not essential expenses. It if were true that judgment creditors were postponed only to essential or indispensable expenses, the cases might be entitled to considerable significance. On the contrary, however, the postponing of judgment creditors is not confined to essential or indispensable expenses, as expenses which do not come within that class, are often held to be primary in their character and to precede judgment creditors as a charge upon the current revenues. The following cases show that such current or ordinary expenses as light, water and fire protection, none of which are essential to the revolution of the wheels of government, have been held to be ordinary or current expenses that will be made a charge upon the revenues prior to the claims of judgment creditors, thus demonstrating that the essential character of the expenditure is not the test of an ordinary expense.' "

(*m*) FALLACY OF THE MASTER'S ARGUMENT.

The Master's argument in substance appears to be this: He concedes that the payment of interest on a public debt is not an "essential expense," indispensable to carrying on the government, but he argues that because judgment creditors are postponed not only to essential expenses, but also to "ordinary expenses" which are not "essential," therefore the cases relating to judgment creditors do not decide that payment of interest on a public debt is not an ordinary expense. It would be a sufficient answer to point out that in some cases the judgments which were postponed to ordinary expenses were judgments for interest on a public debt. The fallacy of the Master's argument, however, lies in his assumption that he or a court can determine what is an indispensable or essential expense of a particular government. The true rule is that this is a matter to be determined by the government, and that the determination of the government cannot be reviewed by a court in the absence of clear abuse of discretion. The requirements of a highly developed state are different from those of a newly settled state. The essential expenses of a city like New York are in number and kind very unlike those of a town in a sparsely settled western state. There is no conflict in the cases if one bears in

mind this rule, that the judge of the necessity of expenses is the government itself. When this rule is borne in mind it is evident that the Master is wrong, and that there can be no ordinary expenses of government in the sense in which this phrase is used by the courts, which are not essential expenses. The rule as we have stated it has been established by the highest authorities. In *City of East St. Louis* v. *U. S.*, 110 U. S. 321, Mr. Justice Matthews, in delivering the opinion of the Court, said: "The question, what expenditures are proper and necessary for the municipal administration is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it." The same rule is also recognized and approved in the following cases:

White v. *Mayor*, 109 Ala. 476.
Mayor v. *State*, 32 La. Ann. 748, 749.
State ex. rel. Lorenz v. *New Orleans*, 116 La. 851.
Sherman v. *Langham*, 92 Tex. 13.
Young v. *Lamb*, 43 Neb. 813.
State v. *Sheldon*, 52 Neb. 364.
Ward v. *Piper*, 69 Kan. 773.

(*n*) BY THE GREAT PREPONDERANCE OF JUDICIAL CONSTRUCTION INTEREST ON A PUBLIC DEBT IS NOT AN ORDINARY EXPENSE OF GOVERNMENT. THE AUTHORITIES.

The cases in which the question has arisen whether ordinary or current expenses of government include interest on a public debt are few. This we are persuaded is due to the general understanding as indicated by the constitutional provisions cited above, that interest on a public debt is not one of such ordinary expenses. The cases to which we shall now call the attention of the court, however, seem to us sufficient in number and weight to be decisive on this question.

In the case of *Quincy* v. *Jackson*, 113 U. S. 332, a creditor who had recovered a judgment upon coupons for interest on bonds which the City of Quincy had issued in payment of a subscription for stock of a railroad company, had petitioned for a writ of mandamus to compel the city to levy taxes for the payment of his judgment. The city was empowered by a law passed in 1863 to levy taxes not exceed-

ing fifty cents on each one hundred dollars ($100) of the assessed value of property "to pay the debts and meet the general expenses of said city." In 1869 the legislature passed the act authorizing the subscription for railroad stock in payment of which the city had issued the judgment creditor's bonds. The city contended that its power to tax was defined by the act of 1863, and that this power had been exhausted. The court, however, decided that the act of 1863 applied only to taxation for raising money to pay ordinary expenses, that the indebtedness arising on the bonds given for railroad subscriptions was not of this character, and the power to tax for the purpose of raising money to pay the bonds was implied in the grant of authority to issue the bonds in payment of the stock subscription. Mr. Justice Harlan, speaking for the Court, (page 336) said: "The act of 1863 related to debts and expenses incurred for ordinary municipal purposes and not to indebtedness arising from railroad subscriptions, the authority to make which is not implied from any general grant of municipal power, but must be expressly conferred by statute." Referring to the act of 1869, which authorized the city to subscribe for the railroad stock, Mr. Justice Harlan further said (page 337): "It could not have been contemplated that indebtedness thus created would be met by such taxation as was permitted for ordinary municipal purposes. In giving authority for such extraordinary indebtedness the legislature did not restrict its corporate authorities to the limit of the taxation provided for ordinary debts and expenses. The limitation imposed by the city's charter upon its power of taxation had reference to its ordinary municipal debts and expenses." This decision is in point. The judgment sought to be enforced was for interest on a public debt. The limited power of the city to tax for the purpose of meeting its ordinary expenses had been exhausted, and if the court had deemed interest on a public debt an ordinary expense the writ of mandamus must have been refused, but the Court held that the interest on this public debt was not an ordinary expense, and therefore, the limitation upon the city's power to tax for ordinary expenses did not apply.

In *Clay County* v. *McAleer*, 115 U. S. 616, the case arose on a petition for a writ of mandamus to compel Clay County to levy a sufficient tax to pay the petitioner's judgment. It appeared that the power of the county to levy for ordinary county revenue was limited to six

mills, and by demurrer to the answer it was admitted that the maximum levy would not be sufficient to pay the ordinary current expenses of the county, and that no part thereof could be applied for the payment of the petitioner's judgment without seriously impairing the efficiency of the county government. The Court held that no levy could be ordered to pay the relator's judgment, saying (page 618): "Here the answer shows affirmatively that the whole of the six mill levy of 1882 will not be sufficient to pay the ordinary expenses of the county."

East St. Louis v. *U. S.* 110 U. S. 331, is to the same effect.

In *Sibley* v. *Mobile*, 3 Woods, 535, 541, Judge Woods, referring to the bondholders who had recovered judgment against the city, said that they "are entitled to have all the taxing power of the city within the constitutional limit exercised, if necessary, to secure the performance of the contract made by the city with them. When that power is exercised the current expenses of the city must be paid out of the fund so raised, and out of the residue the relators are entitled to share *pro rata* with the other creditors of the city who have no specific lien or claim to any portion of the taxes."

Accord *Mayor, etc., of New Orleans* v. *U. S.*, 49 Fed. Rep. 40.

In the case of *Ward* v. *Piper*, 69 Kan. 773, a creditor who had obtained a judgment for interest on township bonds applied for a writ of mandamus to compel the officers of Isabel Township to pay his judgment. The plaintiff asked to have the fund which had been levied and collected to meet the general current expenses of the township applied to the payment of his judgment. This was denied by the court. Johnston, C. J., delivering the opinion, said, (page 775): "It is not alleged nor shown that the funds raised for current expenses are more than sufficient for that purpose. It does not even appear that the indebtedness on which the judgment was founded was for an ordinary expense of the township to which funds derived from a levy for legal expenses could be legally applied. The taxes levied for one purpose cannot be diverted and applied to another. Presumably the township officers are acting in good faith, and have levied and raised a fund which is necessary as well as sufficient to meet the ordinary current expenses of the economical administration of the township. The township organization must be maintained, and its current ex-

penses met, although creditors of the township must wait for the payment of their bonds and judgments."

In *State ex. rel. Watkins* v. *Macon County Court*, 68 Mo. 29, a creditor who had recovered judgment on bonds which the county had issued in payment of its subscription for stock in a railroad company, applied for a writ of mandamus to compel the county to pay his judgment out of its general fund. It appeared that the statute which authorized the county to issue bonds in payment of the subscription provided for a tax not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property in the county for the purpose of paying the interest on the bonds, but this special tax was insufficient to pay relator's judgment. The case arose on demurrer to the return which alleged that all of the general fund was needed to pay the current and necessary expenses of conducting the county government. The court refused to grant the writ of mandamus. Judge Norton, in the opinion of the court, which he delivered, said (page 42): "What, then, are the purposes for which the general expenditure or common fund of a county is raised? A proper answer to this question can only be returned by the law which authorizes a levy of taxes to produce it. That law is to be found in Wagner's Statutes, section 165, page 1193, and is as follows: 'The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for state purposes, * * * but the county tax shall in no case exceed one-half of one per cent.' The revenue derived from the tax thus authorized to be annually imposed, is in the very terms of the law declared to be to defray the expenses of the county, which we understand to mean the ordinary current expenses incurred in conducting the county government, such as the payment of grand and petit jurors, witnesses summoned before the grand jury, costs of criminal prosecutions, expenses in supporting the poor and insane of the county, salaries of officers, assessing and collecting the revenue, &c.

"That an extraordinary indebtedness incurred by a county in subscribing stock to a railroad corporation and in issuing bonds in payment was never intended by the general assembly to be embraced in the words 'expenses of the county,' or that they contemplated the creation

of any debt for county purposes is manifest from section 166, which makes it the duty of the county court, after the assessor's book has been adjusted and returned, 'to ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes so as to raise the required sum. If section 165, *supra,* was intended to authorize the creation of debts or provide for their payment, the general assembly would, doubtless, have so expressed themselves as they did in sections 1 and 7, page 1158, of the same law in providing for the levy of state taxes. Section 1 provides that 'for the support of the government of the state, the payment of the state debt, * * * taxes shall be levied on all property, real and personal,' * * * and section 7 provides that there shall annually be levied, assessed and collected on the assessed value of all the real and personal property subject to taxation in the state, one-fifth of one per cent, for state revenue, and one-fourth of one per cent, for the payment of all state indebtedness. The state revenue thus provided is in express terms for the support of the state government, and the county revenue provided for in section 165 is for the payment of the expenses of the county government.

> "That such an extraordinary indebtedness as is incurred by a county in issuing bonds in payment of a railroad subscription was not intended to be embraced in the terms 'expenses of the county,' is apparent when it is considered that the very same words used by the general assembly in section 165 are to be found in section 20, Revised Statutes 1825, page 671, except in the latter act, the tax authorized was limited to 50 per cent. of the amount of state tax. The same section was continued in the Revised Code of 1835, except that the amount of tax was in no case to exceed the amount of the state tax. It is also to be found in the Code of 1845, and that of 1855, the only difference being that in the former the rate of taxation was not to exceed 34 cents, and in the latter not to exceed 40 cents on a valuation of $100. It is clear that the general assembly in 1825 and in 1835, when they authorized the county courts to levy such tax from time to time as should be necessary for defraying county expenses, could have had no reference to such indebtedness as arises from a county bond issued in discharge of a subscription to

the stock of a railroad corporation, because, at that time, there was no law to be found on our statute books authorizing such subscriptions or the issuance of any such obligations."

Accord *State ex rel. Hudson* v. *Trammel*, 11 S. W. Rep. 747, Missouri.

City of Denison v. *Foster*, 37 S. W. Rep. 167, Texas.

Cromarty v. *Commissioners*, 85 N. C. 211, 87 N. C. 134.

In the foregoing cases creditors who had recovered judgments on claims for interest on municipal bonds were not allowed to take funds raised for the payment of the ordinary expenses of the municipalities when the funds were needed for this purpose. The decisions conclusively establish that interest on a public debt is not an ordinary expense of government; if it had been, the courts would have been bound to hold that funds devoted to the payment of ordinary expenses should be applied to the payment of such interest, but they held instead that the claims for interest must wait for payment until the ordinary expenses had been paid. The Master's report (page 108) protests that the cases of the judgment creditors are not directly in point, because the present case is not a controversy between a judgment creditor and a municipality; but surely the principle which governed the decisions by which the payment of judgments for interest on a public debt were postponed to the payment of ordinary expenses, is the same principle which must govern in the controversy between Virginia and West Virginia. The question here is the same as the question in these cases, namely, whether interest on a public debt is an ordinary expense of government. The cases cited above decided that it was not.

In *White* v. *Mayor*, 119 Ala. 476, the case arose on an application by the holder of a judgment based on coupons for interest on bonds of the town of Decatur for a writ of mandamus to compel the town to pay this judgment out of its general revenue. The court held that the petitioner was entitled to mandamus, applicable, however, only to the surplus of the town's revenues over its current expenses. McClellan, J., in delivering the opinion of the court, said, page 480: "It is thoroughly well settled law that where the interest and principal of a municipal bonded debt is payable out of the general revenue of the town, no part of such revenue that is necessary to meet current

legitimate municipal expenses can be subjected to the payment thereof, but only to the surplus of income after the governmental expenditures have been met or provided for can by any process of law be applied to such debt. *Dill* v. *Mun. Corp.*, Secs. 100, 101; *Underhill* v. *Calhoun*, 63 Ala. 216; *Williamsport* v. *Com.*, 190 Pa. St. 498; *East St. Louis* v. *U. S.*, 110 U. S. 321; *Com.* v. *Commission*, 1 Wharton 1. Nor can it make any difference that the bonded debt is specially charged upon the general revenues or that the corporate authorities are specially required to set apart a sufficiency of such revenues to meet such debt. * * * * with or in the absence of such provisions, it is within the power of and is the duty of municipal corporations * * * * to apply the whole revenues to current municipal expenses, leaving nothing to go in payment of bonded debts, nor can the courts determine what municipal expenditures are necessary. If a given expenditure is within charter authorization, and therefore abstractly considered a legitimate municipal charge, the courts cannot pass upon the advisability or wisdom of its being made or incurred."

In the case of *Anniston* v. *Hunt*, 140 Ala. 394, the charter of the City of Anniston required the city council before July 1st in each year to agree upon a budget of expenses for governmental purposes for the year ending on the 30th of the following June. In making up the budget for the year ending June 30th, 1903, the council had included among the expenses for government purposes an item of $7,600 for interest on bonds of the city. A judgment creditor of the city applied for a writ of mandamus commanding the mayor and councilmen to pay his judgment out of the surplus revenue of the city for the year ending June 30th, 1903, and restraining them from paying the interest on the bonds which had been included in the budget among the government expenses. If the revenues were not applied to the payment of this interest there would be a surplus to pay the petitioner's judgment. The writ of mandamus was granted and the Supreme Court affirmed the judgment of the court below. In delivering the opinion of the court, Haralson, J., said (p. 400): "We have found neither in the charter nor in any other statute any legislative authority to make the interest income on municipal bonds and accounts an item of expenditure for the administration of government purposes. The council, therefore, had no right to estimate this interest as a

government expense and by way of anticipation in their budget of expenses to appropriate the amount to the payment of interest on municipal bonds and accounts so as to defeat the plaintiff or other creditors in their efforts to subject this excess over necessary current expenditures to the satisfaction of their demands."

In *Leavitt* v. *Town of Somerville*, 75 Atlantic Rep. 54 (Maine, 1909), the question was whether certain bonds of the town were valid under the constitutional provision limiting the debt which the town could incur. The bonds in question, which exceeded in amount the limit of indebtedness, purported to refund a debt existing at the time when the constitutional limitation took effect. The amount of the bonds was larger than the original debt, but if the excess represented accumulated interest the bonds would be valid. The court, however, declared this fact had not been proved, saying (page 57): "There is no legitimate inference that the town officers paid current expenses any more than that they paid the interest on the town debt."

In *Dexter* v. *County Commissioners*, 20 Weekly Law Bulletin 364 (Hamilton County, Ohio, Common Pleas), it was held that the estimated levy which the statutes required the auditor to present to the county commissioners on or before the first Monday in April of each year, was intended to cover current expenses as distinguished from the payment of the bond liabilities of the county, and that the acts creating sinking funds for future payments of outstanding bonds did not contemplate the payment of debts and the accumulation of moneys for that purpose as among the current monthly or annual expenses of the county.

In the case of *University R. R. Co.* v. *Holden*, 63 N. C. 410, the Supreme Court of North Carolina had occasion to construe a provision of the recently adopted Constitution of 1868. This provision contained in Article 5, section 1 of the Constitution, is as follows:

> "The general assembly shall levy a capitation tax on every male inhabitant—which shall be equal, on each, to the tax on property valued at $300 in cash. * * * And the state and county capitation tax combined shall never exceed $2.00 on the head."

The question was whether this provision, requiring what the court called an equation of taxation between the property tax and the capi-

tation tax, applied to all taxes, or whether it was limited. The court gave the question most careful consideration, deeming it so important that each of the judges delivered a separate opinion. The conclusion of the judges was that the equation of taxation established by the provision which we have quoted did not apply to all taxes, but only to taxes imposed for the ordinary expenses of government, and the judges expressly declared that the equation of taxation did not apply to taxes imposed for the purpose of raising money to pay interest on a public debt.

Pearson, C. J., said (page 414):

> "I agree that if under this equation, carried to its limits, the amount is not enough to meet current expenses, and also to pay the interest on the public debt, then for the excess needed it is not only within the power, but it is the duty of the general assembly to disregard the equation."

Reade, J., said (page 418):

> "My construction of the tax power of the legislature under the constitution is as follows: (1) The first object of the convention in the fifth article of the constitution was to provide for the ordinary and current expenses of the government; that is done in sections 1, 2 and 3. And for that purpose the tax is limited to $2 on the poll, and the same amount on $300 worth of property, and the equation must be observed. This was thought to be sufficient for the ordinary and economical administration of the government. (2) We had a considerable public debt, and after providing for current expenses, the next consideration was, how is the public debt to be met? And the fourth section provides, that a special tax shall be laid for that."

Dick, J., said (page 432):

> "The object of the convention in article 5, section 1, was to provide a system of general taxation for the ordinary expenses of the government. * * * Sections 1, 2 and 3 establish a general revenue system for the state; and sections 4 and 5 provide special taxes for the state indebtedness, unexpected exigencies and for the completion of unfinished railroads."

Speaking in reference to Section 5, Article 5, of the Constitution, which authorizes the state to issue bonds for extraordinary purposes, Judge Dick said (page 433 :

> "The convention evidently contemplated the necessity of incurring new debts outside of the ordinary expenses of the government."

Settle, J., said (page 436) :

> "I conclude that the equation of taxation applies only to the ordinary expenses of the state government. It does not apply to the public debt."

The opinion of the judges in *University R. R. Co.* v. *Holden*, that the equation of taxation prescribed in Section 1, Article 5, of the North Carolina Constitution, applies only to taxes imposed for the payment of the ordinary expenses of government and does not apply to taxes imposed for payment of interest on a public debt, was affirmed after very careful consideration of the whole subject and a review of all the authorities in the recent case of *Southern Ry. Co.* v. *Board of Commissioners of Mecklenberg County*, 148 N. C. 220.

The case of *Union Pacific R. R. Co.* v. *U. S.*, 99 U. S. 402, though it relates to a private corporation, is, we submit, in point, because it decides that interest on a funded debt is not an ordinary expense. The question in the case was whether the Union Pacific Company was liable to account to the government for five per cent. of its net earnings under the sixth section of its charter and the Court had to determine what was meant by the expression, "the net earnings of the road." Mr. Justice Bradley, who delivered the opinion of the Court, said :

> "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping

> up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. * * * All payments of interest on the bonded indebtedness of the company should be charged to capital interest account, and not to current expenditures. Though payable out of earnings before any dividend can be made to stockholders, they cannot be deducted for the purpose of ascertaining the 'net earnings' of the road, as that term is to be understood in the sixth section of the act. The bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock; and the interest accruing thereon is in the natrue of a dividend on such capital. It has nothing to do with and cannot affect the amount of the net earnings of the road."

(*o*) LEGISLATION OF VIRGINIA DURING THE PERIOD COVERED BY THE ORDINANCE DID NOT DEAL WITH INTEREST ON THE PUBLIC DEBT AS AN ORDINARY EXPENSE OF GOVERNMENT.

The legislature of Virginia, in its appropriations, from 1823, did not deal with the interest on the internal improvement debt as one of the items constituting the ordinary expenses of the state government. The fiscal year of the state began on the first day of October of each year. The annual appropriation bill constituted a general fund of the taxes and arrears of taxes due on the first day of October, last preceding, not otherwise appropriated, and all other branches of revenue not appropriated by law, which shall come into the public treasury prior to the succeeding October and the surplus of all appropriations theretofore made, shall constitute a general fund, and be appropriated in specific sums, as follows, to-wit:

To the expense of the general assembly; to the salaries and allowances of the officers of the civil government; to the commissioners of the revenue, for examining commissioners' books; to defray criminal charges, including the expense of guarding jails; for pensions, civil contingent fund, militia establishment, including the services of clerks

of courts-martial, of adjutants, provost marshals, and expenses, and for the purchase of drums, fifes, and to pay for instruments where the fines of the regiments are insufficient, pay of the adjutants and inspectors; internal charges of the penitentiary, house and officers' salaries and the transportation of criminals to the penitentiary, such balance of former appropriations to complete penitentiaries; public guard in the city of Richmond, slaves executed or transported; expense of representation to congress and state senate; public warehouses, including the pay of superintendents, civil prosecutions, including clerks and sheriffs' fees; services of guard at Lexington arsenal; for the collection and transportation of arms; to constitute the balance of military contingent fund, including claims for services during the last war; transportation of public arms; defray expense of publishing the map of Virginia; complete erection of Western Lunatic Hospital; support of lunatic hospital at Williamsburg; transportation and expenses of lunatics confined in jail, etc.—all ordinary expenses of the state government.

In addition, the legislature made specific appropriation to pay the interest on $319,000 of the seven per cent. debt, and on two certificates of six per cent. debt held by the literary fund, $23,773. This appeared to be the *general debt* outstanding. These bonds, held by the literary fund, were owned by the state; and this was simply the measure of annual appropriation to that fund, for purposes of convenience, such as has been frequently resorted to by other states.

The second section provides that so much of the public revenues, and of other public moneys *not otherwise appropriated by law* as may be received into the treasury after the thirtieth day of September, next, and the surplus of all other appropriations heretofore made, shall constitute a general fund to defray such expenses authorized by law as are not therein specifically provided for; and to defray the current and other expenses of the commonwealth in the fiscal year commencing on the first day of October, next, and terminating on the 30th day of September, 1828 (this was the act of 1827); and the auditor of public accounts is authorized and required to issue his warrants in the same manner as if the funds had been specifically mentioned, with such exceptions, etc. This was the act passed March 8, 1827; and those which had preceded it, from 1822, did not differ.

As early as 1840, in none of these appropriation bills was interest appropriated for the payment of bonds issued for internal improvements.

As early as 1840 the annual appropriation bill changed in respect of the provision as to interest. It created, as did its predecessors, a general fund constituted of the taxes and arrears of taxes due to the preceding October, and not otherwise appropriated, and all other branches of revenue not appropriated by law which should come into the treasury prior to the succeeding October, and the surplus of all other appropriations.

Out of this fund were appropriated expenses of the general assembly, officers of the civil government, commissioners and clerks, criminal charges, and items similar to those mentioned in the act of 1827.

And it provided expressly and specifically for interest on the public debt as follows:

To pay the interest on certain certificates of public debt, to-wit.

For one year on seven per cent. debt, due literary fund, $22,330;

Half year's interest on same, unpaid on October 1st last and chargeable on present fiscal year, $11,165.

(This did not default the state, for she had the bonds on which she had omitted to pay interest to the literary fund.)

One year's interest on 6 per cent. debt, held by literary fund, $1,442.35.

One year's interest on $250,000 of 5 per cent. stock subscribed to the Chesapeake and Ohio Canal Company guaranteed by the act of February 18, 1833, $12,500;

One year's interest on $298,700, certificates issued for money borrowed to pay commonwealth's subscription to the stock of the Exchange Bank, $19,922;

Ten months' interest on $62,825, additional sum borrowed to pay commonwealth's subscription to stock of Exchange Bank, $3,143.23;

One year's interest on $80,592, certificates issued for money borrowed to pay commonwealth's subscription to stock of the Northwestern Bank, $5,315.52;

and then, after appropriating for contingent expenses of courts, pensions, civil contingent fund, militia, public guards, slaves transported,

representation to congress and the state senate, warehouses, civil prosecutions, arms, military contingent fund, removal of lunatics in jails, vaccine agents, roads, military school, electors, clerks of committees, sweepers of the capitol, principal engineer, etc., etc.

Section 3 provides that so much of the public revenue and all other moneys not otherwise appropriated by law as may be received into the public treasury, after the 30th day of September, next, and the surplus of all other appropriations heretofore made, shall constitute a general fund to defray expenses authorized by law which are not herein particularly provided for, and to defray the current and other expenses of the commonwealth in the fiscal year which will commence on the first day of October, next, and terminate on the 30th day of September, 1842; and the auditor of public accounts is hereby authorized and required to issue his warrants in the same manner as if the sums had been specifically mentioned, subject to such conditions, exceptions, and limitations, as the general assembly may prescribe by law.

Then comes an additional section, which was continued in each appropriation act until after the establishment of the sinking fund for the payment of interest and principal on the public debt, provided for by the constitution of 1850. It will be remembered that the stock for which the commonwealth subscribed, and the dividends thereon, were, in each instance, pledged, primarily, together with the improvement fund, not otherwise appropriated. It enacted, further, that if the revenue of the fund for internal improvement shall, at any time, be insufficient to meet the payments of the interest charge on such fund as it shall become due upon loans obtained for purposes of internal improvement, under existing or future acts, of the general assembly, such interest *shall be paid out of any money in the Treasury not otherwise appropriated;* and the auditor of public accounts is hereby authorized and required, upon the receipt of the order or orders of the board of public works, certifying the fact of such insufficiency in the funds of said board, to issue his warrant or warrants in their favor for the necessary sum or sums which shall be deposited in the treasury to the credit of the fund for internal improvement, to be applied by the said board on the warrants of the second auditor towards the payment of such interest.

Here, it will be noticed, interest on the internal improvement loans,

perhaps as a reason why specific appropriations were not made in any year to pay the interest on internal improvement loans, is that by law the primary security for such loans was the stocks and dividends derived from the stocks, and the internal improvement fund, which, if taken together, were inadequate, were supplemented by the pledge of the commonwealth to raise the money otherwise necessary to pay the interest and the principal as it matured. By this provision, it is seen that the interest on the internal improvement fund, where the special security proved inadequate, was to be paid out of money deposited to the credit of the internal improvement fund; not, by the act, otherwise appropriated. In other words, the payment of interest on internal improvement loans was deferred to all appropriations for the ordinary expenses of the government, whether specifically made, or generally appropriated, by Section 3 above quoted. And that provision was the last section of every appropriation act from 1840 to the time the sinking fund was established. Twenty million dollars of this debt was incurred between 1850 and 1861, after the sinking fund for the payment of interest and principal had been created.

(*p*) THE CREATION OF A SINKING FUND FOR THE PAYMENT OF INTEREST ON THE VIRGINIA DEBT SHOWS IT WAS NOT AN ORDINARY EXPENSE OF THE STATE GOVERNMENT.

The very fact of the creation of a sinking fund for the payment of interest on the public debt differentiates it from ordinary expenses of the state government.

Whoever heard of the payment of the ordinary expenses of a state government out of a sinking fund?

Section 29 of Article IV. of the Constitution of 1850, sets apart annually, from the accruing revenues, a sum equal to seven per centum of the state debt, as existing on the first day of January, 1862, to be called "The Sinking Fund," and applied to the payment of the interest on the state debt and the principal or such part as may be redeemable. If no part be redeemable, then the sum so remaining shall be invested in the bonds or certificates of debt of this commonwealth, or of the United States, or of some of the states of this Union, and applied to the payment of the state debt as it shall become redeemable. And

it made subject to this provision all debts contracted by the commonwealth thereafter.

It added this provision:

> "The general assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

If there were a deficiency in the treasury, because of an underestimate of the revenue, or of the expenses of the government, resort could not be had, for its payment, to the sinking fund. That one fund could be resorted to only for a purpose other than that for which it was created and set apart, in case of war, insurrection or invasion.

The creation of a sinking fund, which is so common in all the constitutions, and has been for a great many years in most constitutions, marks, in an illuminating way, the distinction between the ordinary expenses of a state government and the interest to accrue upon the public debt.

The ordinary annual expenses of the state government are estimated for. They change. Some times they exceed the estimate; and there is a deficit, although, by the Federal govrenment, that has been prohibited by law, as has been done by the constitutions of some of the states. It is true that ordinary expenses are estimated for by county governments and other municipalities, even towns and villages. Speaking in respect of governments, sometimes additional offices are created; some times departments or bureaus, which have long existed, have, in legislative judgment, become unnecessary, and they are disposed of, and their duties transferred to some other department, or altogether pretermitted. But who ever heard of estimating the interest on the public debt? That does not fluctuate. It may be enlarged by the increase of debt, or diminished by payment of debt; but it is always susceptible of accurate ascertainment. It is fixed. In corporate management, it is charaterized as a "fixed charge," as contradistinguished from ordinary expenses.

The ordinary expenses of the government, changing from time to time, must continue as long as the government lasts. The interest on the public debt continues as long as the debt lasts.

The philological distinction as to the difference between the expenses

of the government—ordinary, essential and necessary—confuses; but does not enlighten. They come to the same thing in the end.

(q) THE WORDS OF THE ORDINANCE SHOULD BE CONSTRUED IN THE LIGHT OF THE SURROUNDING CIRCUMSTANCES.

This Court, said, in *Sand Filtration Corporation* v. *Cowardin*, 213 U. S., page 364:

> "The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made."

This is a succinct and clear definition. It must be remembered, in reading the ordinance, that, at the time it was drafted and adopted, the debt of the Commonwealth of Virginia was about $33,000,000, the proceeds of which she had either expended directly for internal improvements or had invested in bank stocks, the stocks of railway companies, navigation companies, turnpike companies and bridge companies. The improvements constructed by the use of this borrowed money were almost all within the present limits of Virginia, and this was well known to the men who drafted and adopted this ordinance. These stocks were thought by Virginia to be of value, for, in her constitution of 1850, section 30, article IV., it was provided:

> "The general assembly may, from time to time, direct a sale of the stocks held by the commonwealth in internal improvement and other companies, and the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund, and be applied in like manner."

Can it be supposed that the men who framed and adopted this ordinance would have been willing to stipulate that the proposed new state should take upon herself the payment not only of a just proportion of the ordinary expenses of the state government, but a proportion of the $18,000,000 of interest upon the moneys borrowed by the Commonwealth of Virginia from 1823 to 1861, and invested in $30,000,000 of stocks, bank and otherwise, incorporations whose

improvements lay almost entirely within her limits, would remain within her limits, and which investments she was to keep? It is inconceivable.

To say that when she incurred this indebtedness, which is the sum of a great number of special loans, each with a special security, and invested the same in stocks, she did not expect them to be valuable and revenue producing, not simply during the duration of the debt, but long after the debt should have been paid, would be to impeach her honor in the earlier, if not better days, of her existence, for she held out these stocks and dividends as the primary security of the money she borrowed, with which to repay it.

She became a great battlefield and the camping ground of contending armies; and if the ravages of war destroyed, in large measure, these improvements, and disappointed the expectation with which she had invested her money, it cannot be said that that unfortunate result is, in any wise, imputable to West Virginia, or her people.

It is not a complicated question. The words "ordinary expenses of the state government" are words of common use, and they are without technical signification. It seems to us impossible to misunderstand them.

The ruling of the Master seems to have been unconsciously, and with perfectly good faith, based somewhat upon what seemed to him to be the equitable construction which he advocates in his report. If the words "ordinary expenses of the state government," as a matter of law, include interest on the public debt, he is right. If they do not, whatever may be the result of their exclusion from the computation, he is wrong, for it is a question of law. Whatever it means, as here used, it means wherever it is used.

(*r*) THE PROPORTION OF ORDINARY EXPENSES WITH WHICH WEST VIRGINIA IS TO BE CHARGED SHOULD BE ASCERTAINED UPON THE BASIS OF TAXABLE VALUES.

Whichever view this Court may adopt as to the meaning of the phrase, "A just proportion of the ordinary expenses of the state government," the question confronts it, upon what basis or standard are these expenses to be apportioned?

First: On the basis of area; or

Second: Upon the basis of population, and if so, shall slaves be included or excluded? or

Third: Shall it be upon the basis of population of 1823 of Virginia, as shown by the census of the United States, the average population to be taken as required by the decree; or shall it consist of five averages of ten-year periods combined, as taken by the Master; or

Fourth: Shall it be upon the basis of the assessed valuation of the real and personal property of Virginia and West Virginia?

Fifth: If so, shall it be based upon the valuation of January 1st, 1861, or June 23rd, 1863?

The joint schedules returned by the Master furnish a basis in accordance with several alternatives.

We feel constrained to the opinion that the true basis is taxable values, or the average revenues for a period prior to the 1st of January, 1861. We formerly inclined to the opinion that population was the best basis. We see no reason, however, for the adoption of a basis upon which the ordinary expenses are to be apportioned which differs from the international law basis of general indebtedness, which we have somewhat discussed. A peculiar complication arises here with reference to the ascertainment upon the basis of population; and that is, the large number of slaves within the limits of Virginia and the relatively small number within that portion of Virginia which now constitutes West Virginia. Those slaves were property, albeit, as we have shown, they constituted a property upon which was levied a tax entirely disproportionate to their market value. They were the subjects of barter and sale the same as any other private property in the commonwealth was subject to it. They were taken care of by their masters. They were, of course, not given the privileges of white children in respect of common education. They did not enter into the basis of representation; and, therefore, neither paid taxes, nor contributed to the school fund, nor derived benefit from it. Even in the emancipation of slaves by the constitution, and free negroes, section 19 of article "IV." of the Constitution of 1859 provided that:

> "Slaves hereafter emancipated shall forfeit their freedom by remaining in the commonwealth more than twelve months after they become actually free, and

shall be reduced to slavery under such regulations as may be prescribed by law."

Section 20:

"The general assembly may impose such restrictions and conditions as they shall deem proper on the power of slave owners to emancipate their slaves; and may pass laws for the relief of the commonwealth from the free negro population, by removal or otherwise."

Section 21:

"The general assembly shall not emancipate any slave, or the descendant of any slave, either before or after the birth of such descendant."

Section 22:

"Taxation shall be equal and uniform throughout the commonwealth, and all property other than slaves shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law."

Section 23:

"Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars. Slaves under that age shall not be subject to taxation; and *other* taxable property may be exempted from taxation by vote of a majority of the whole number of members elected to each house of the general assembly."

Section 24:

"A capitation tax, equal to the tax assessed on land of the value of two hundred dollars, shall be levied on every white male inhabitant who has attained the age of twenty-one years; and one equal moiety of the capitation tax upon white persons shall be applied to the purposes of education in primary and free schools; but nothing herein contained shall prevent exemptions of taxable polls in cases of bodily infirmity."

It seems quite impossible that slaves should be included in the population. The taxes upon them were assessed to their owners. It seems impossible that in such a situation slaves should be considered

as part of the population for any purpose. Their value, as property, would, of course, enter into any calculation based upon the taxable values, or assed value, of the seperate portions of the state. And as we have already shown to the Court, the population as a basis of apportionment of debt between nations, is rejected. It has also appeared that area, or territory, is rejected as a basis for the apportionment of state debts. Capitation taxes were levied by Virginia under the constitution of 1850. During the whole period from 1823, the revenues of the state, aside from those which went into the internal improvement fund, were derived from the taxation of lands, inheritance, taxes on incomes, salaries and licenses, and almost every imaginable excise tax, including the taxation of land and personal property, as well as watches, clocks, plate, carriages and the like, and interest on the state's own securities, and excises of every imaginable description. The basis upon which the moneys were collected for the payment of ordinary expenses during these years would seem to be the basis upon which they should be apportioned between the two states.

West Virginia is not Bound to Pay Interest from January 1, 1861, on the Proportion of the Old Virginia Debt Assumed by Her.

1. NEITHER BY THE ORDINANCE NOR BY HER CONSTITUTION DID WEST VIRGINIA IN PRAESENTI ASSUME ANY PORTION OF THE PUBLIC DEBT OF VIRGINIA.

By the ordinance West Virginia *was* to take upon herself a "just proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, to be *ascertained*," etc. We may here inquire what is meant by the words "to *be ascertained*"? There can be but one answer to this question, and that is, the just proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, which West Virginia was to take upon herself. How was this just proportion to be ascertained? First, by charging to it all state expenditures within the limits thereof; second, a just proportion of the ordinary expenses of the state government since any part of the said debt was contracted; and, third, deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period.

The ordinance did not become a compact between the two States of Virginia and West Virginia, nor did section 8 of Article VIII. of the Constitution become a compact between the two states at the time of their adoption, for there was then but one state and that was the Commonwealth of Virginia. When she consented and the congress of the United States admitted West Virginia into the union, there was an agreement between two states, and for the first time efficacy was given to section 9 of the ordinance and section 8 of Article VIII. of the Constitution. Before that they rested entirely in proposition.

When they became effective, they became effective as a compact between two states, one older than the other, but of no greater dignity or sovereignty; for West Virginia was admitted into the union, as all states must be admitted, on terms of equality with the original states. It is not conceivable that any state shall be dissimilar or unequal in dignity and sovereignty to the other states. If section 8 of article VIII. is to be read in connection with the ordinance, then the compact created the assumption, which was *in futuro*, and left yet to be ascertained, as we have argued, what was the just proportion of the debt which West Virginia agreed to assume or, what is precisely legally equivalent, to take upon herself? It was an unliquidated account. She did not assume the payment of any of the bonds or obligations of Virginia outstanding prior to January 1, 1861. The amount that she was to assume was, if the ordinance was in effect for any purpose, the amount ascertained by the methods prescribed by the ordinance. If it is not in effect, then the method is left to the legislature to choose and to execute.

The word "thereof" in section 8 of Article VIII. of the Constitution of West Virginia does not bear the construction for which counsel for Virginia contend, nor does the rule of law established in Virginia prior to 1863, that in private contracts "interest follows the principal as the shadow does the substance" apply to this case. The decisions which laid down that rule were all with reference to interest between individuals on private obligations.

2. THE VIRGINIA RULE AS TO PRIVATE CONTRACTS THAT INTEREST FOLLOWS THE PRINCIPAL DOES NOT APPLY TO CONTRACTS BETWEEN STATES.

But for the dignity and character of the eminent gentlemen who urge it, it is difficult to regard as serious the proposition that because among private parties in Virginia prior to the admission of West Virginia as a state "the interest follows the principal as the shadow does the substance" or, differently stated, because interest is an incident to the debt, or is favored both by the legislative and judicial bodies of the state, and because the laws of the old state, until changed, were adopted in the new as to private parties, that, therefore, by the contract between the sovereign State of Virginia and the sovereign State of West Virginia, a case for which the law of neither state made provision, West Virginia would be liable to pay all the unpaid interest on her proportion, when ascertained, of the debt existing January 1, 1861. No such intention can be imputed to the framers of the ordinance, nor the convention which adopted the Constitution of West Virginia.

The learned counsel appear to be conscious of the inapplicability of the rule which they assert as to interest on private contracts; and to show that it is the rule that the commonwealth pays interest on claims against her, they cite the case of *Higginbotham's Executrix* v. *Commonwealth*, 25 Grattan 627. That case was decided in 1875, and if it is authority for the statement that in 1875 interest, by the law of Virginia, was allowed against the commonwealth without any promise to pay interest, but as a mere incident to a debt, it cannot apply in this case. The question would be, what was the law of Virginia in respect of the liability for interest upon claims against her in the absence of contract in 1861, when the ordinance was adopted and when the constitution of West Virginia was adopted.

3. ANALYSIS OF HIGGINBOTHAM'S EXECUTRIX V. COMMONWEALTH.

It is notable that in the *Higginbotham case* the question of interest was not discussed, although many other questions were discussed. The syllabus of the case is as follows:

> "1. The present State of Virginia is bound to the creditors of the state for the debts due before the divis-

> ion for the whole of their debts. And West Virginia is equally bound for them."

That is a decision which hardly binds West Virginia, for she was not a party.

> "2. Under the statute, the State of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated."

The plaintiff in error, and petitioner below, was the executrix of David Higginbotham, deceased, who was the owner of twelve shares of stock in the old James River Company. By an amendment to the charter of that company, passed on the 17th day of February, 1820, and accepted by the company, the company became the agent of the state to carry on the work for the state, and under the direction and the control of the general assembly; and it was agreed between the state and the company that, in lieu of the annual dividends which might have been thereafter declared on the stock, the company should be allowed twelve per centum per annum on its stock for twelve years from the commencement of the amendatory act, and fifteen per centum per annum thereafter forever. The act was declared on its face to be "a compact" between "this commonwealth and the said company, subject, however, at all times, to such change and modification as the legislature may think proper to make; provided that no such change or modification shall be made as will take from the James River Company their right to the dividends, or any part of the dividends, upon their stock allowed to them by this act." It was a solemn compact between the state and the company that "the dividend or annuity, as it is in effect, should be forever paid without abatement or diminution." Such was the solemn obligation assumed by the state as the price of the stockholders' property.

By an act of February 17, 1820, and other acts, the powers and duties of the James River Company, acting for the state, were from time to time extended and enlarged; but the company up to the last mentioned date, continued to exist under its own organization. On that day, however, a new company, with greatly extended powers, was chartered, called the James River and Kanawha Company, to which all the interest of the state in the old James River Company was transferred; but this transfer was made expressly "subject to the

payment of fifteen per centum per annum forever to the *stockholders of the old company.*" By this act the James River and Kanawha Company became the successor of the old James River Company, and the duty of providing forever for the dividend, as it is called, of fifteen per centum per annum to the stockholders of the old company devolved, as we have seen, directly on the James River and Kanawha Company, under its agreement with the state; and by the act of March 22, 1836, the state required the latter company to pay these dividends into the public treasury, to be disbursed among the stockholders of the old James River Company by the second auditor; thus again solemnly acknowledging the right of the stockholders to these "dividends," and the duty of the state to see that they were punctually paid, by requiring her assignee to pay them into the public treasury to be disbursed to the stockholders by a state officer.

Now, this was treated by the court as a solemn compact, the obligation of which on the state should be "eternal." The court says:

> "Accordingly we find that under all the changes of legislation on the subject down to the first of January, 1865, the appellant's annuity was regularly paid; but since that date there has been but a single payment of $120, leaving arrearages to the amount of $2,220, as of the first of July, 1871. For that amount *with its accruing interest*, after applying for payment at the offices of the auditor of public accounts, and the second auditor, and being refused at both, this suit was brought."

The petition was dismissed below.

It was claimed by the attorney general of Virginia that the dismemberment of the State of Virginia and the formation of a new state, called West Virginia, out of a portion of her territory, had discharged the State of Virginia from this debt as now claimed; that the old debt of Virginia contracted prior to her dismemberment, if not wholly extinguished by the events leading to, attending and following her dismemberment, was not then due from her, but only ratably from the two states. The court says:

> "Were this a question between the two states alone, I should not question the concluding part of the proposition;"

and quote from Puffendorf:

> "When a kingdom divides by common consent into two or more distinct commonwealths, the public patrimony, with all the debts and encumbrances upon them, ought to be equally shared among them."

The court decided that, in its opinion, Virginia was liable to pay the petitioner the amount of her demand, with interest, but the court said, in so deciding:

> "No power is claimed for this court to control or in manner to interfere with the discretion of the legislature in making provision for the payment of this debt. * * * The judgment being for more than three hundred dollars, the court has no authority to require the auditor of public accounts to issue his warrant for the amount. In such cases, the provision to be made for the judgment is expressly reserved to legislative discretion, and to that discretion we must leave it."

It must be noted, in respect to this claim, and it is rather exceptional, that when the state took the property, it was agreed between the state and the old James River Company that, in lieu of the annual dividends which might have been thereafter declared, the company should be allowed twelve per centum per annum on the stock for twelve years from the commencement of the amendatory act, and fifteen per centum per annum thereafter forever. That was a liability from the state to the company in exchange for its property. By subsequent arrangement, all the interest of the state in the old James River Company was transferred to the James River and Kanawha Company, subject to the payment of fifteen per centum per annum forever to the *stockholders* of the old company. By this act the James River and Kanawha Company became the successors of the old James River Company, and the duty of providing forever for the dividend, as it is called, or fifteen per centum per annum to the *stockholders* of the old company devolved directly on the James River and Kanawha Company under its agreement with the state.

This created the relation of debtor and creditor between the James River stockholders and the James River and Kanawha Company. When the commonwealth compelled the company to pay the dividend

monies into her treasury for distribution by her among the stockholders, she made herself a trustee of the latter, had no right to withhold or use the trust fund, and having failed to pay it over was bound in equity for interest upon it, just as the company would have been liable for interest, if the commonwealth had not interfered and the company had failed to pay the dividend.

This case cited by counsel is a long way from establishing the proposition, that even in 1875, thirteen years after the transactions involved here, it was the rule in Virginia for the state to allow interest upon claims against her.

When a state takes upon herself a trust she should stand like any other trustee, and the principle that a trustee can take no profit out of the trust estate applies universally.

4. THE CASE OF UNITED STATES V. NORTH CAROLINA.

The learned counsel refer to the case of the *United States* v. *North Carolina*, 136 U. S. 211. This was an action of debt brought in this Court, November 5, 1889, by the United States against North Carolina upon 147 bonds, duly executed, for $1,000 each, payable in thirty years from date, with interest at the yearly rate of six per cent., alleged in the declaration to be payable half yearly until payment of the principal. They were executed at different dates, set forth in the statement of the case. They were interest bearing debts. The declaration alleged that, at the dates when the bonds became payable payment of the principal was demanded by the United States and refused by the State of North Carolina. The defendant pleaded payment of the principal sums of the bonds after they became payable, together with all interest accrued thereon to the days when they became payable. The Court say:

> "The only question presented for our decision is whether, as a matter of law, the principal of the bonds bore interest after maturity."

And they add:

> "Interest, when not stipulated for by contract, or authority by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and,

> as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers;"

citing:

> *United States* v. *Sherman*, 98 U. S. 565.
> *Angarica* v. *Bayard*, 127 U. S. 251, 260.

The Court looked into the laws of North Carolina, and after stating the law as to the payment of interest in an action, against a private person and citing authorities, said:

> "But it is equally well settled, by judgments of the Supreme Court of North Carolina, that the state, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid."

5. THERE IS NO BASIS FOR VIRGINIA'S CLAIM FOR INTEREST.

No statute of Virginia has been cited by the learned counsel, who would have cited it, we think, if there had been such, by which the state subjects itself to the payment of interest as an incident to a debt, or by way of compensation for its use, or damages for non-payment of the principal when due. Whether the legislature in the *Higginbotham case* appropriated the interest, the counsel do not state. The opinion of the Supreme Court of the state that it ought to do so does not make it the rule of the state, nor do legislative acts in special and sporadic cases which allow interest on claims constitute a rule which binds the state to pay interest upon claims against it.

Moreover, Virginia is the state *demanding interest*. If one sovereign makes it a rule to pay interest on claims against it without having contracted so to do; in other words, puts itself upon the same plane as private creditors may be placed by its laws, does it follow that, because it pays interest itself without having agreed to do it, that it may collect interest from another sovereign which does not pay interest except where it has contracted to do so? The United States does not pay interest except where it contracts to pay it.

We have found no indication in the decisions of the Supreme Court

of Virginia that any such rule has been adopted by the legislature of that state, or by the courts of that state, if indeed the courts can make such a rule for a state. It is a matter of contract, and contracts are not made by the courts for states or their citizens.

Virginia has given very liberal right to her citizens to sue; but it is a suit for liquidation. The court has no power, except in petty claims, amounting to not over $300, to direct the auditor to issue a warrant, and the whole matter of payment, including the principal sum awarded, with or without interest, is left entirely to the discretion of the legislature. Probably, sometimes, they pay interest, and oftener they do not, as the case may or may not appeal to the legislative judgment. But there is no statutory rule for the payment of interest by the state on claims against her where she has not contracted to pay it.

In 1837, the question arose in the Court of Appeals of Virginia in the case of *Commonwealth* v. *Marston's Administrator*, 9 Leigh, page 36. To that case, there is appended a note, as follows:

> "There was an error committed by the reporter, in the report of *Lilly's* case, 1 Leigh 525, 6. It is there stated, that the circuit court of *Henrico* reversed the auditor's decision, and ordered him to issue a warrant in favor of *Lilly's* administrator, *for the amount of five years full pay, with interest from the 22d April, 1873:* and that that judgment was affirmed. But, in fact, the circuit court gave judgment, ***not*** for the ***commutation,*** but for the *half pay* that accrued to *Lilly* during his life, without interest; and that was the judgment which this court affirmed. This court expressly decided, that no *interest* should be paid; see Judge *Green's* opinion, in the same case, *Id.* 538, and in *Markham's* case, *Id.* 523, 4."

6. WEST VIRGINIA AGREED TO ASSUME A JUST PROPORTION, NOT OF THE OUTSTANDING OBLIGATIONS OF VIRGINIA, BUT OF HER DEBT.

It is clear that the constitution can bear no such construction as is sought to be placed upon it. It must be borne in mind that neither by the ordinance nor by the constitution was there any agreement to assume, or an assumption of, any proportion of the obligations of the

Commonwealth of Virginia outstanding prior to 1862. If she had agreed to assume a just proportion of the obligations of the commonwealth, it might be argued that, as they were interest-bearing obligations, she assumed to pay the principal and accruing interest, until paid; but the bonds or state stock, as evidences of debt, are one thing. The debt is another, and different thing. Moreover, it seems impossible to impute an intention, upon the part of the framers of the two instruments, that the new state should assume a proportion of the outstanding interest-bearing securities of the old state, January 1, 1861. For that day, it was an enormous debt. The framers of those instruments were well aware, as were the people in the Trans-Alleghany territory, that the moneys borrowed by the state had been expended in payment of stock subscriptions in corporations created to construct various internal improvements. It is conceivable that it could have been intended by the convention which framed either the ordinance or the constitution that the new state should assume, considering the character of the debt, the purposes for which it was contracted, the territory within which it had been expended, from 1823 to 1861, a proportion of the obligations representing the debt, and especially in view of the fact that the people of what now constitutes West Virginia had been, during a large portion of the period, deeply resentful that they were taxed to pay interest upon such indebtedness, so little of the proceeds of which was expended within their territory, and enured to their benefit?

7. THERE IS NO EVIDENCE THAT THE IMPROVEMENTS CONSTRUCTED BY VIRGINIA WITHIN HER PRESENT LIMITS WERE FOR THE BENEFIT OF THE REGION NOW WEST VIRGINIA.

It is alleged in the bill that these expenditures were largely with a view to the ultimate benefit of West Virginia, and to secure the development of her resources and the prosperity of her people. This is alleged in general terms. If this allegation is susceptible of proof, no proof has been offered. If, by the participation of her government and people in the war she was, and as a consequence of the impoverishment and destruction wrought by war within her limits, unable to continue to completion such works as would, if completed, have benefited West Virginia and her people, it is safe to say that the people

of that portion of the state did not contribute to that result (*Davis* v. *Gray*, 16 Wallace 203).

The answer denies that the purpose of the improvements or the effect of the improvements, in the main constructed within the present limits of Virginia, were with reference to the well-being, or would, if completed, have essentially affected the well-being of what is now West Virginia and her people. Answer under oath is not waived by the bill and the answer is verified by the oath of the governor of West Virginia. No evidence has been offered upon the subject.

8. FACTS SHOWING INJUSTICE OF VIRGINIA'S CLAIMS.

The injustice of charging to West Virginia a proportion of the internal improvement debt of Virginia, prior to January 1, 1861, *as such*, is further intensified by the facts in relation to the population of the other during the years from 1823 to 1861. While the territory was separated, as we have said, from Eastern Virginia, and what is known as "The Valley" by the Alleghany Mountains, and while the markets of its people were to the westward, rather than to the eastward, it was no sparsely settled region.

There was laid before the constitutional convention of 1829-30 by Mr. Doddridge, one of its ablest members, who represented West Virginia, a statement showing the distribution of the white population in 1810, 1820 and 1829, as follows:

"In 1810 the white population was distributed thus, viz.:

East of the Blue Ridge		338,837
In the Valley	108,355	
West of the Alleghany	104,377	212,726
Whole population		551,553

"In 1820 the population was distributed thus, viz.:

East of the Blue Ridge		348,875
In the Valley	121,196	
West of the Alleghany	133,112	254,308
Whole population		603,081

"And in 1829 the white population, as estimated by the auditor, stood thus:

East of the Blue Ridge		362,745
In the Valley	138,134	
West of the Allegheny	181,384	319,516
Whole population		682,261"

It will be noticed that from 1810 to 1820 the population east of the Blue Ridge increased 10,038. The Valley increased 12,841, The increase west of the Alleghany was 28,735. From 1820 to 1829 the increase in the white population east of the Blue Ridge was 13,870. The increase in the Valley was 16,938. The increase in the Trans-Alleghany territory was 48,272.

(These figures from the book entitled "Proceeding and Debates of the Virginia State Convention of 1829-30," page 686. There are some errors in addition; but they are, relatively, trifling. The book was printed after the convention had been dissolved, and, undoubtedly, the figures used by Mr. Doddridge, were correct.)

It will be observed that the increase in population in the territory "east of the Blue Ridge" combined with the increase in population "in the Valley" was 30,808, a total increase for the two regions of 17,464 less than the total increase in population in the territory "west of the Alleghany."

Mr. Doddridge said (page 682):

> "It thus appears that in 19 years, white population east of the Blue Ridge, beginning with 338,837, has increased to 362,745, or to the amount of 29,908. The increase in the Valley having in 1810, 108,345 has been 29,779. Making in 1829, 138,134. These data show that the increase in the valley and in the whole east are nearly equal. That in the Valley being the smallest only by a difference of 129. As the Valley has kept pace with the whole east for nineteen years past, so it probably will hereafter, and therefore, a permanent apportionment which would do justice to the present Valley and eastern population with reference to each other, might probably suit them in all future time: yet, the same apportionment might operate to the

> utmost excess of cruelty and injustice to the Trans-Alleghany country. To concur in such a one would be a treachery to the Valley, of which we have not the least apprehension. The extent of this injustice will be manifest by comparing the increase of that population during the same period of 19 years. In 1810 we commenced with a population of 104,377, which, in 1829, is 181,384, having increased 77,007, or four times as much as either the Valley or all the country east of the Blue Ridge mountains."

The Territory of West Virginia was, by location, climate, proximity to Pennsylvania, Ohio and Kentucky, and in the sentiment of her people upon the question of slavery and the trifling number of slaves within her territory, inviting an immigration, which never sought, in even measurably the same numbers, the real slave states of the union. Notwithstanding this population, constantly increasing, of the $33,000,000 expended out of borrowed money, less than one-tenth was expended within what now are the limits of West Virginia; and it may very well be said that it was largely due to the fact of disproportionable representation.

It is truthfully said in "Part II." of this brief, page 173:

> "It should be remembered that there was not in the entire territory of Virginia, which is now West Virginia, on the 1st day of January, 1861, a single mile of state built or state-aided railroad, nor a mile of canal, nor a state building; not even a school, not a public institution of any kind."

9. UNDER THE ORDINANCE AND HER CONSTITUTION WEST VIRGINIA CANNOT BE CHARGED WITH INTEREST UNTIL AFTER THE ASCERTAINMENT IN THE MANNER PRESCRIBED OF HER EQUITABLE PROPORTION OF THE OLD VIRGINIA DEBT.

The ordinance prescribes a method of accounting by which a definite sum shall be ascertained. This sum the ordinance, in effect, declares to be West Virginia's just proportion of the old Virginia debt. Section 8 of Article VIII. of West Virginia's Constitution, when read in connection with the ordinance, as this Court has said it should be, produces precisely the same result. West Virginia did not agree to

pay interest on the sum to be ascertained by the prescribed method before this sum was ascertained.

We refer again to section 8 of Article VIII. of the Constitution of West Virginia.

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the 1st of January, 1861, shall be assumed by this state, and the legislature shall *ascertain the same* as soon as may be practicable and provide for the liquidation *thereof* by a sinking fund sufficient to pay the *accruing* interest and redeem the *principal* within thirty-four years."

That the word "thereof" refers to the result of an accounting in accordance with the terms of the ordinance, or, if the latter be eliminated, in accordance with such method as the legislature shall adopt, is not susceptible of doubt. That the command to the legislature to "provide for the liquidation thereof," means the sum which the legislature shall ascertain by pursuit of the methods prescribed by the ordinance, or if that be eliminated, by such method as the legislature shall adopt, is equally clear. The words "accruing interest" obviously refer to the word "principal."

We maintain most earnestly that, all things considered, it is clear that it was the manifest purpose that West Virginia was not to assume any portion of the public debt of Virginia as such, but was only to contribute to that end such sum, be it much or little, as would result from the accounting prescribed by the ordinance, unless the general words in the first clause of section 9 of the ordinance control and destroy the special provisions which follow, all being expressed in a single sentence. Moreover, this produces an equitable result, for the debt being an internal improvement debt, and nine-tenths of it having been expended by Virginia within her present limits, in public improvements, it would have been, in the highest degree, inequitable for the new state to take upon herself an obligation to contribute one-third of that debt, when Virginia retained the bank and other stocks.

"Accruing" is a word operative in the future, and has no reference to the past. When we speak of past due interest we refer to it as "accrued interest."

Six months' interest, the record shows, was due and defaulted on

this debt on January 1, 1861. Where is there any indication here, upon the part of West Virginia, of an intention to pay accrued interest? The interest up to the time of the ascertainment would be "accrued." She did not in her constitution assume:

> "a just proportion of the debt, with interest to accrue thereon, to the date of the ascertainment, until the just prorportion shall have been ascertained and paid."

The constitution speaks of "accruing interest" and that means the interest to accrue on the principal thereafter to be ascertained, and not yet ascertained. This is not technical. It is substantial. It is in harmony with the ordinary use of the word "accrue" and with its technical, legal signification.

At an earlier hearing in this case, we called the attention of the Court to the case of *Gross* v. *Partenheimer*, 159 Pa. 556. The case may be briefly stated:

Plaintiff agreed to purchase from defendant, in April, 1883, a lot of land, for $8,000, payable $5,000 in cash, on delivery of deed, and the residue by plaintiff's assumption of a mortgage for $3,000, then on the lot, plaintiff to pay also the accruing interest on said mortgage, not exceeding six months. The six months' interest from the date of mortgage to February 26, 1893, was past due and unpaid, and, to avoid foreclosure proceedings, plaintiff was compelled to pay the same: He then brought suit to recover the sum thus paid, the vendor claiming that the purchaser was obliged to pay it under the agreement.

The court, at page 558, said:

> "This contention hinges entirely on the proper construction of the clause in the contract of sale above referred to, wherein the plaintiff agrees to pay 'the accruing interest in said mortgage not exceeding six months.' There is nothing in the affidavit of defense that can in any wise aid or control the construction of this clause. If, accruing interest' means interest which, according to the terms of the security was due and payable on February 26, 1893, and remained overdue and unpaid at the date of the contract, the defendant's construction should prevail: but we cannot agree that these words mean any such thing. Such a con-

struction would be strained and wholly unwarranted by the language employed. As generally understood, 'accruing' interest means running or accumulating interest, as distinguished from accrued or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it accruing interest. When we refer to interest heretofore payable but still remaining unpaid, we speak of it as overdue interest, arrears of interest, or interest in arrear, just as we speak of rent in arrear. We are therefore of opinion that the words 'accruing interest' do not refer to, or in any manner embrace any part of the six months' interest which was then overdue and unpaid. That interest was an encumbrance on the lot, which the defendant was bound to remove. He refused to do so, and the plaintiff, who was compelled to pay it, in order to prevent foreclosure of the mortgage, etc., is entitled to recover the amount thus paid with interest from date of payment. The learned court was clearly right in adjudging the affidavit of defence insufficient and entering judgment against defendant for the amount claimed by plaintiff."

If there had been any intent to assume, or pay, the accrued interest on the bonds of Virginia, outstanding, the constitution would have so expressed it; and, as expressed, we earnestly contend that it can be construed to mean no such thing.

For the convenience of the Court, we venture to insert the memorandum of authorities submitted by the late John G. Carlisle, who died during the last summer, upon this question of the liability of the state to pay interest.

10. MEMORANDUM OF JOHN G. CARLISLE.

"It will be observed that in Paragraph II. of this draft of a decree the Master is not only directed to ascertain the amount and proportion of said indebtedness, but 'of the interest accrued thereon.'

"Counsel for the defendant object further to this paragraph because there is no legal ground for directing the ascertainment of interest. The State of West Virginia has not obligated herself in any manner for the

payment of interest. The principle is well settled that a state is not liable to pay interest unless it has expressly contracted to do so.

"In support of this proposition this Court, in *United States* v. *North Carolina*, 136 U. S. 211, said:

"'A state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by lawful contract of its executive officers.'

"Following the principle thus announced by this Court, many of the state courts have laid down in distinct terms the same proposition. Among the decisions of those courts are the following:

Sawyer v. *Colgan*, 102 Cal. 293; 36 Pac. 583.

Hawkins v. *Mitchell*, 34 Fla. 421, 422; 16 So. 316.

Molineaux v. *State*, 109 Cal. 380; Am. St. Rep. 50; 42 Pac. 34.

Flint, etc., R. R. v. *Board of State Auditors*, 102 Mich. 502; 60 N. W. 971.

Carr v. *State*, 127 Ind., 204; 22 Am. St. Rep. 624.

"In *Carr* v. *State*, 127 Ind. 204, 22 Am. St. Rep. 624, this principle is announced as one of the points decided:

"'A sovereign state is not bound to pay interest unless it has contracted to do so.'"

"The court, in the course of its opinion in this case, says:

"'In the case of *State ex rel.* v. *Board*, etc., 36 Ohio St. 409, it was held that in the absence of a promise to pay interest none can be recovered against a state, and that a state is not within the provisions of a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute unless it is expressly named, and in support of its conclusion cited these cases: *Trustee, etc v. Campbell*, 16 Ohio St. 11; *Jaselyn* v. *Stone*, 28 Miss. 753; *State* v. *Kinne*, 41 N. J. 238; *Attorney General* v. *Cape Fear, etc.*, Co., 2 Ired. Eq. 444; *Auditorial Board* v. *Arles*, 15 Tex. 72; *State* v. *Thompson*, 10 Ark. 61. In *Wightman* v. *United States*, 23 Ct. of Cl. 144, the general rule

> was stated, and it was said: 'Hence there is no law fixing a rate for interest for all classes of the public debt, and a long-established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment.' It was held in the case of *Tillson* v. *United States*, 100 U. S. 43, that a statute referring to a claim did not authorize a recovery of interest, in the absence of words, expressly providing for the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is, there is no right to coerce the payment of a debt due from a sovereign, and, of course, a sovereign may impose limitations upon its liability."

In a note appended to this case as reported in 22 American State Reports, at page 448, we find the following:

> 'With respect to the obligatios of the state to pay interest upon its indebtedness, the principal case is well established by other authorities upon the same subject. In nearly and perhaps all of the states there are statutory provisions providing that moneys, after they become due, shall, in the absence of express contract to the contrary, bear the rate of interest specified in such statutes; but, acting under the old common-law rule that the king or sovereign is not bound by statute unless expressly named therein, it has been uniformly held that these statutory provisions respecting interest did not apply to any obligation either of the state or of the national government, and therefore that interest is never allowed upon such obligations, in the absence of some special statute clearly manifesting the intention of the sovereign to be bound for the payment of interest upon the particular obligation or class of obligations under consideration (*United States* v. *North Carolina*, 136 U. S. 211; *State* v. *Thompson*, 10 Ark. 61; *State* v. *Board of Public Works*, 36 Ohio St. 409; *State* v. *Bank of Washington*, 18 Ark. 554; *United States* v. *Sherman*, 98 U. S. 565; *United States* v. *Bayard*, 127 U. S. 251; *Tillson* v. *United States*, 100 U. S. 43; *In re Gosman*, 17 Ch. Div. 771; *Attorney General* v. *Cape Fear N. Co.*, 2 Ired Eq., 444; *Bledsoe* v. *State*, 64 N. C. 392; *Trustee* v. *Campbell*, 16 Ohio St. 11; *Joselyn*

v. *Stone*, 28 Miss. 753; *Wightman* v. *United States*, 23 Ct. of Cls. 144).'"

11 VIRGINIA'S RESPONSIBILITY FOR THE DELAY IN APPORTIONING THE DEBT.

Reading section 8 of Article VIII. of the Constitution of West Virginia with the ordinance, or regardless of it, the complainant, by her own act, rendered impossible, any ascertainment prior to January 1, 1871, of the just proportion of the public debt of Virginia to be borne by West Virginia. In 1866, she instituted in this Court, the suit of *Virginia* v. *West Virginia*, 11 Wallace 39. This was an original bill to settle the boundary line between the States of Virginia and West Virginia. It involved the question whether the counties of Berkeley and Jefferson were a part of West Virginia. The case was not decided until December, 1870. While Virginia cannot be complained of for instituting and prosecuting the suit, it is manifest that, until the determination thereof, there could be no apportionment of the old Virginia debt, either under the ordinance or under section 8 of Article VIII. of the Constitution of West Virginia.

Pending the decision of the case, the accounting provided for by the ordinance would be impossible, in view of its requirements:

> (*a*) *"Charging to it all state expenditures within the limits thereof."*

Manifestly, so long as those limits were unsettled, this could not be done.

> (*b*) *"A just proportion of the ordinary expenses of the state government since any part of said debt was contracted."*

This could not be fulfilled upon the basis of taxable values, area or population until the boundaries of the state were settled.

> (*c*) *"Deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period."*

This could not be done until the territorial limits of the new state

were settled, and it was known what counties were included within the new state. So that, while entirely within her right, Virginia's own act compelled a delay from the filing of this bill until the entry of the final decree therein of an adjustment under the ordinance or under the constitution.

Section 9 of Article X. of the Constitution of Virginia, which became operative in 1870, contained the following privisions:

> "The general assembly shall provide by law for adjusting with the State of Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia, and shall provide that such sum as shall be received from West Virginia, shall be applied to the payment of the public debt of the state."

We do not deem it necessary here to give a history of the appointment of commissioners by the two states with reference to the adjustmetn of the debt. This history is set out in the pleadings. It is enough to say that as early as 1870, a commission appointed by West Virginia proceeded to Richmond, where the archives all were, and their visit resulted in accomplishing little. But, on March 30th, 1871, the legislature of Virginia, by a law passed in 1871, apportioned the debt between the two states, assuming for itself two-thirds, and issuing certificates for the other one-third as West Virginia's share. Subsequent legislation of Virginia proceeded upon that apportionment, certificates being issued, to be accounted for by West Virginia.

It is difficult to conceive of any theory upon which Virginia could justly assume the function of apportioning the debt and issuing obligations for which West Virginia could be accountable. Virginia's general assembly were, by the constitutional provision above quoted, required to provide by law for adjusting with the State of West Virginia the proportion of the public debt to be born by the two states. They proceeded to apportion it themselves, without consulting West Virginia.

West Virginiia then was a comparatively new state, and her resources were relatively undeveloped.

To issue securities to be accounted for by West Virginia, was not only apparently in defiance of Virginia's own constitutional provision,

but was usurpatory, detrimental to the credit of West Virginia, and well calculated to produce resentment among her people.

From that time, West Virginia was placed in a position which rendered it almost impossible for her, with dignity and self respect, to take further initiative in the matter.

In 1894, the legislature of Virginia, after she had funded and refunded her debt, adopted a joint resolution, providing for the appointment of a

> "commission of seven members, who were authorized and directed to negotiate with the State of West Virginia for a settlement and adjustment of the latter state's part of the public debt proper to be borne by her."

It was provided:

> "But said commission shall, in no event, enter into any negotiation hereunder, except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proporiton thereof."

It is quite manifest that West Virginia was here called upon, as a condition of any negotiation whatever, to accept the action of Virginia taken in 1871, 1879 and 1894 apportioning the debt, two-thirds to herself and one-third to West Virginia. It needs no argument to show that West Virginia could not be expected to negotiate upon such a basis. It was not until 1905, preliminary to the institution of this suit, that a commission went to West Virginia freed from such restraint.

The attention of the Court is especially directed to the Appendices "A," "B," "C," an "D" printed herewith.

We respectfully submit that from the record in this cause and upon the authorities cited by counsel for the defendant, the State of West Virginia ought to prevail.

WILLIAM G. CONLEY,
Attorney General of West Virginia.

JOHN C. SPOONER,
CHARLES E. HOGG,
W. MOLLOHAN,
GEORGE W. MCCLINTIC,
W. G. MATHEWS,
WM. M. O. DAWSON,
Of Counsel for Defendant.

APPENDICES

A, B, C and D.

APPENDIX A.

PLAINTIFF'S EXHIBIT "D-1."

Commonwealth of Virginia v. *State of West Virginia.*

Ordinary Expenses of Government.

ARTICLE [PARAGRAPH] IV.

Statement prepared by
PRICE, WATERHOUSE & COMPANY,
Chartered Accountants.

Division of Ordinary Expenses of Government as per Article IV.:—		$40,023,287.79
I. On basis of Total Population (including Slaves) June 20, 1863:		
Virginia	75.66%	$30,281,619.54
West Virginia	24.34%	9,741,668.25

Note:

This is without regard to color,—Whites and Blacks being taken together in arriving at the population of June 20, 1863, from the census figures of 1860 and 1870.

II. On basis of Population (without Slaves) Estimated June 20, 1863:		
Virginia	66.71%	$26,699,535.28
West Virginia	33.29%	13,323,752.51

Ordinary Expenses of Government—Article IV.

	Schedule.	
General Expenses of Government, as per Commonwealth Disbursements	1	$20,371,768.47
Administrative Expenses of the Board of Public Works	2	221,532.78
Maps, Expenses of Surveys and Inspection of Internal Improvements	3	155,643.39
General Expenses of the Literary Fund	4	891,435.66
Interest on old Military Debt		24,265.31
Interest on Treasury Notes		157,879.02
Specie Premium		11,534.63
Interest on Sundry Claims		52,324.09
Interest on Temporary Loans		112,545.82
Interest on Public Debt	9	18,024,358.62
		$40,023,287.79

SCHEDULE I.

Analysis of General Expenses of Government—Summary.

Description.	*Amount.*
General Assembly	$ 4,130,064.55
Officers of Government	3,595,102.14
General Government	8,495.63
Pensions	88,548.74
Criminal Charges	1,785,632.11
Commissioners of the Revenue	1,697,751.95
Court Charges	1,188,212.34
Contingent Fund	679,120.46
Militia	755,663.41
Expenses of Representation	24,120.17
Public Arsenals	96,709.63
Public Guard (City)	839,528.23
Penitentiary, House Expenses	215,985.76

SCHEDULE I—*Continued.*

Description.	*Amount.*
Penitentiary, Criminal Charges	256,522.93
Penitentiary, Officers	305,367.24
Warrants on Account, and General Appropriation	746,087.72
Slaves Transported and Executed	611,351.23
Gun Carriages	14,317.05
Guards in the Country	105,049.34
Public Improvements	11,803.75
Military Contingent	75,395.41
Lunatic Asylums	1,888,992.06
Revisions of Laws	4,500.00
Seines	71.10
Public Warehouses	35,722.00
Tobacco Sales	454.91
Armory, Manufactory and Repairs of Arms	243,015.60
Sale of Slaves	99.26
Expense of Lunatics	158,112.71
Collection and Transportation of Arms	10,212.83
Revolutionary Claims Agent	3,861.67
Administrators of J. Merryweather and R. Graves	11.067.33
Electors	11,839.26
Civil Prosecutions	47,684.56
Repairs to Governor's House	50,733.60
Penitentiary, Enlarging and Repairs	53,572.60
Clerk Hire, etc., on account of Delinquent Lands	18,374.27
Repairs to Capitol	51,281.47
Public Library	695.23
Military Equipment	9,993.09
Buckingham Furnace Lands	771.72
Transportation of Free Persons of Color to Liberia	26,103.50
Geological Survey	40,980.61
Military School, Appropriation and Repairs	296,296.19
Reassessment of Lands	147,868.10
Deaf, Dumb and Blind Institution	369,919.73

SCHEDULE I—*Continued.*

Description.	*Amount.*
Unexpended Postage returned to Treasury	53.13
Penitentiary—*Hatcher* v. *Commonwealth*	12,897.96
Ferriage of Troops during late War	54.71
Criminal and Civil Code	52,073.88
Rents	52.25
Virginia Volunteers	29,470.05
Tobacco Sales and Burnt Tobacco	1,931.30
Land Taxes	296.59
Assessment of Free Negroes	897.21
Expenses of Sinking Fund	3,904.82
Fugitive Slave Fund	5,201.00
Land Sold in 1855	8.40
Public Printing	23,092.31
Claims under 27th and 45th ch. of Code of Virginia	1,344.05
Weights and Measures	14,854.90
Registration Expenses	14,661.20
Treasury Note Expenses	375.74
Tax on Dividends	128.50
Arms and Munitions of War	4,111,13
Survey of Washington's Birthplace	139.21
Temporary Clerks in Auditor's Office	3,826.64
Marking Virginia and Maryland Boundary	6,094.44
Maps	11,400.90
Public Arms	11,499.97
State Convention	258,677.40
Repairs to Legislative Halls	4,650.07
Medical College	25,000.00
Experimental Railroad	10,000.00
Blair & Bolling Special Service	200.00
Total	$21,209,952.03
Less—Total Credits as per Summary Schedule after P. No. 1	838,183.56
Total as per Recapitulation	$20,371,768.47

SCHEDULE "S."

Analysis of "Sundry Receipts."

Credits to Ordinary Expenses of Government—Auditor of Public Accounts—Summary.

Description.	*Total Amounts.*
Refunds of Advances, and amounts paid in error	$ 36,252.56
Rents	53,160.55
Repayments of Loans and Interest	1,603.35
Sundry Sales	15,631.70
Judgment on Bonds	16,483.69
Sale of Slaves	272,347.57
Sale of Land	9,189.61
Returns—Expenses of Lunatics	3,588.65
Returns—Lunatic Hospital	16,670.48
Returns—Court Charges	1,656.68
Governor's House	1,701.17
Refunds—Criminal Charges	3,754.69
Tax on Salaries	449.16
Refunds—Attorney General's Fees	1,622.74
Records of Court of Appeals and Clerk's Fees	42,154.55
Interest on Loans	3,914.53
Weighmaster of Live Stock	8,493.32
Virginia Volunteers	8,126.43
Tax on Express Companies	252.68
Collections from Banks to pay salary of Treasurer's Clerks	4,500.00
Voluntary Enslavements	5,175.54
Fugitive Slave Fund	2,444.50
Miscellaneous	53,078.06
	$562,242.26
Proceeds of Goods Manufactured at Penitentiary	275,941.30
Total Credits	$838,183.56

SCHEDULE. 2.

Board of Public Works Disbursements—Administrative Expenses—Summary.

Description	*Amount.*
Salary of Engineers	$ 54,353.30
Pay and Mileage—Members of the Board	19,286.71
Literary Fund, Difference in Exchange, etc.	187.50
Maps, Books, Supplies, Stationery, Postage, etc.	9,599.51
Salary of Secretary	4,982.97
Printing	14,098.70
Advertising	1,013.41
Doorkeeper's and Messengers' Compensation, Postage, etc.	4,208.34
Premium in favor of Specie over Bank Notes	45.60
Equivalent for Specie in Paying Auditor's Warrants	24.31
Literary Fund Transfer	48.67
Tax on Salaries—2nd Auditor's Office	143.76
Compensation	84.17
Engineers' Supplies and Repairs	2,200.63
Fee Bills	1,186.29
Expenses of Tour of Examination	488.37
Traveling Expenses—Respecting Loans, etc.	2,304.53
Expenses preparing Coupon Bonds	13,346.78
Damage Account—Experimental Railroad	65.00
Expenses *re* B. & O. Railroad	249.40
Expenses *re* Investigation Selden, Withers & Company	9,351.45
J. T. Soutar—New York Bond Agent	3,686.60
Commissioners' etc., for paying Coupons	4,604.87
Tabulated Railroad Reports, etc.	1,074.50
Sextant	40.00
Express	18.00
Collectors' Salaries	6,720.68
Salary of Second Auditor and Clerks	68.119.83
	$221,532.78

SCHEDULE 3.

Board of Public Works Disbursements.

Analysis of Charges to Both States to be Charged, in the Final Settlement, to Ordinary Expenses of Government.

MAPS.

Year.	*Reference.*	*Amount.*
1820.....	5-20	$12,000.00
1.....	1	9,000.00
2.....	1	9,000.00
5.....	22	4,428.79
1836.....	25	55.00
8.....	35	700.00
1848.....	22	750.00
9.....	21	750.00
1851.....	24	995.62
2.....	11-21-22	2,730.46
4.....	149	292.61
5.....	7	803.00
6.....	7	899.50
8.....	8	125.00
		$42,529.98

SURVEYS—SALARIES AND EXPENSES.

Year.	*Reference.*	*Amount.*
1820.....	6-7-8-10	$5,373.81
1.....	11	1,000.00
2.....	8	1,000.00
3.....	12	1,889.50
4.....	12-13	500.46
5.....	9-10	4,270.38
6.....	8	2,766.66
7.....	8	2,319.35
8.....	7	1,682.22

SCHEDULE 3—*Continued.*

Year.	*Reference.*	*Amount.*
1829.....	8	2,100.00
1830.....	5	3,941.00
1.....	6-7	4,449.99
2.....	13	280.00
4.....	Pt. 16	2,151.32
5.....	Pt. 14-15	7,122.13
7.....	Pt. 22-23	12,464.35
8.....	20-26,	16,699.84
9.....	13-16	13,678.93
1840.....	30-32	10,787.00
1.....	2-3	5,530.00
2.....	2	3,400.00
3.....	3	1,233.33
7.....	18	500.00
		$114,273.35
Credits as per Schedule attached		3,903.88
		$110,369.47

INSPECTION OF INTERNAL IMPROVEMENTS OF STATE.

Year.	*Reference.*	*Amount.*
1849.....	15	$ 665.00
1850.....	12	1,087.22
1.....	15	1,027.13
2.....	8	656.37
		$3,435.72
Credits as per Schedule attached		691.78
		$2,743.94

SUMMARY.

Maps	$ 42,529.98
Surveys, Salaries and Expenses	110,369.47
Inspection of Internal Improvements	2,743.94
	$155,643.39

SCHEDULE 4.

Summary of Analysis—Literary Fund Disbursements—General Expenses and Sundries.

Description.	*Amount.*
Copies of Judgments	$ 433.75
Clerks' Salaries	82.259.73
Expenses and Commissions to H. Eustace, etc., account of Bristoe Estate	1,786.30
Advances Account of Contingent Expenses	350.00
Judgments and Commissions on Escheats, Delinquent and Redeemed Lands	26,029.48
Accrued Interest and Premium on Sundry Securities Purchased	1,667.95
Expenses account of Purchase of stock by J. Bauer	902.23
Commission on U. S. Debt	4,199.92
Cost of Seal	100.00
Stationery, Postage, Printing, Fee Bills and Advertising	8,625.21
Commission on Bonds	94.29
Sale of Slaves and Expenses of Free Negroes	837.73
Expenses on Sale of Stock	14.00
Taxes on Salaries	217.23
State Claims against the United States	2,722.82
Davis' Book on Criminal Law	12,000.00
Medical College	5,000.00
University of Virginia	649.874.00
Virginia Military Institute	28,500.00

SCHEDULE 4—*Continued.*

Description.	*Amount.*
Deaf, Dumb and Blind Institute	40,821.02
Hampden-Sidney College	25,000.00
Total	$891,435.66

SCHEDULE 9.

Interest on Public Debt.

Interest on Public Debt paid by the Board of Public Works	$5,825,538.66	
do do do	1,834,276.61	
Interest on Bank Debt paid by the Treasurer of the Commonwealth	360,883.02	
Interest on Public Debt (C. and O. Canal Loan) paid by Treasurer of Commonwealth	207,479.25	
Interest on Public Debt paid by the Sinking Fund from its establishment in 1853 till December 31st, 1860	11,762,509.04	
Interest on James River and Kanawha Guaranteed Bonds, paid by Treasurer of the Commonwealth	613,542.66	
		$20,606,229.24
Deduct		
Interest received on State Stock held by Board of Public Works and paid to that Board	$312,214.22	
Refund of Interest on Public Debt previously paid Selden, Withers & Co.	29,924.70	

SCHEDULE 9—*Continued.*

Interest received by Sinking Fund of Trustees of Selden Withers & Company and J. T. Soutters	40,133.59	
Interest received on State Stock held by Board of Public Works, paid to that Board, etc.	639,670.71	
Deduct		
Interest received by the Commonwealth on Certificate of State Stock, $100,000, owned by the Commonwealth	30,213.70	
Interest received on State Stock held by the Literary Fund	1,324,051.72	
Interest received on Bonds of J .R. & K. Company paid to the Treasurer of Commonwealth by that Company	142,181.74	
Interest received by Sinking Fund on Stock held by them as Investments	61,807.55	
Refunds received by the Sinking Fund account of over-payments	1,672.69	
		$ 2,581,870.62
		$18,024,353.62

Interest on 7% War Debt of 1813-14, viz: $319,000.00 and Interest on 6% War Debt of 1809, viz 24,039.17, both of which were held throughout the period by the Literary Fund, has been excluded in both the payments and Receipt statement above.

APPENDIX B.

CHAP. 75.—An Act to convert the Branch of the Northwestern Bank of Virginia at Jeffersonville into a Separate and Independent Bank.

Passed March 13, 1862.

Whereas the armed occupation of northwestern Virginia, by lawless enemies of this state, has entirely destroyed all business intercourse and relations between the Northwestern Bank of Virginia at Wheeling and its branch at Jeffersonville, to the great detriment of the state and loyal stockholders, and it seems proper under the circumstances to dissolve the connection heretofore subsisting between said bank and its branch at Jeffersonville, and of authorizing the latter to transact business as a separate and independent corporation:

1. Be it therefore enacted by the general assembly, that the branch of the Northern Bank of Virginia at Jeffersonville be and the same is hereby constituted, created and incorporated a separate, distinct and independent bank, under the corporate name of Graziers Bank of Virginia; and all the power, control, direction, supervision, relation and connection of said Northwestern Bank of Virginia over and with the said branch at Jeffersonville, are hereby dissolved, abrogated and annulled.

2. All the assets held by said branch (embracing all bills and notes discounted, whether the same be in suit, protested, due or maturing, all judgments, balances due on accounts current, all money, either in coin or currency, all evidences of debt or other securities, all real estate, and every right and interest) are absoutely vested in the said Graziers Bank of Virginia; and in every case where suit has been instituted in the name of the Northwestern Bank of Virginia for the recovery of money or other thing, to which said branch is entitled, the suit so brought shall be prosecuted in the name of the Northwestern Bank of Virginia, for the use and benefit of said Graziers Bank

of Virginia; and in every case where suit shall hereafter be instituted for the recovery of money or other thing belonging to said branch, the suit shall be in the name of said Graziers Bank of Virginia.

3. The said Graziers Bank of Virginia is subject to all the liabilities of the said branch, except so far as the said liabilities are modified by the following sections of this act.

4. The said Graziers Bank of Virginia shall in no event be required to account to the said Northwestern Bank of Virginia for any portion of the net profits or contingent fund of the said branch, nor to contribute to the payment of, or pay out of the assets of said branch, or otherwise, to any stockholder, billholder or creditor of the said Northwestern Bank, any sum of money which any such stockholder, billholder or creditor may be entitled to demand and have of said Northwestern Bank of Virginia.

5. At any time within three months from the passage of this act, any loyal holder of stock in the Northwestern Bank of Virginia, whose stock in said bank was purchased through the said branch, or whose dividends have usually heretofore been credited to him at said branch, may return and assign to said Graziers Bank of Virginia such stock, and demand and receive in lieu thereof a certificate for a like number of shares of stock in the said Graziers Bank of Virginia.

6. As soon as may be after the expiration of the said three months from the passage of this act, the governor of the state shall cause certificates of the stock held by the state in the said Northwestern Bank of Virginia, for an amount equal to the balance of the capital stock of said branch, not exchanged under the previous section, to be in like manner returned and assigned to said Graziers Bank of Virginia, for a like number of shares of the stock thereof.

7. The Graziers Bank of Virginia, hereby established, shall be required to redeem, from loyal citizens of the Confederate States of America, in notes of its own issue, all such notes of said branch as may be in their possession at the passage of this act; provided the same be presented in six months after notice of this provision shall have been published for one month in some weekly newspaper published in the city of Richmond: and provided further, the amount

offered for redemption shall not exceed one hundred and eighty thousand dollars.

8. The legislature reserves the power to provide, after the termination of the war with the United States, the extent, mode and time of redemption by said Graziers Bank of Virginia, of any outstanding notes of said branch, with which, according to the principles of equity, justice and right, it is chargeable. But as it is represented to this general assembly that the said branch has a special deposit of twenty-four thousand dollars in gold with the said Northwestern Bank of Virginia, heretofore made by said branch to meet the redemption of its notes; and as notes payable at said branch may have been issued by the said Northwestern Bank of Virginia, which have not been reported to said branch, nor charged to said Northwestern Bank of Virginia, and which it would be evidently unjust to require the said branch to redeem, it is hereby expressly provided and enacted, that the whole amount of circulation of the said branch, which the said Graziers Bank of Virginia shall be required to redeem, under the provisions of this act, and of any subsequent act of the legislature, taken collectively, shall not exceed the balance of the circulation of said branch, after deducting therefrom the sum of twenty-four thousand dollars on account of said special deposit, and also any amount or amounts of circulation payable at said branch (if any such there be), issued by the said Northwestern Bank of Virginia, of which the said branch has not heretofore received notice from said Northwestern Bank of Virginia.

9. The cashier shall forthwith, after the expiration of three months from the passage of this act, out of the surplus or contingent fund of the said branch, pass to the credit of the stockholders of the said Graziers Bank of Virginia and to the state, a dividend of ten per centum upon their stock issued under the provisions of the fifth and sixth sections of this act.

10. The said Graziers Bank of Virginia shall be located and transact its business at the town of Jeffersonville.

11. The said Graziers Bank of Virginia may, by sales of new stock, increase its capital to two hundred thousand dollars.

12. The present board of directors for the said branch shall con-

tinue to act as a board of directors for the said Graziers Bank of Virginia until a new board shall be appointed under the general law.

13. Except so far as the same may be inconsistent with the provisions of this act, the general banking law of the state shall apply to the said Graziers Bank of Virginia; and the general law of joint stock companies shall apply to the said Graziers Bank of Virginia, so far as the same is applicable to it, and not inconsistent with the provisions of this act.

14. This act shall be in force from its passage, but may be repealed, altered or modified, at the pleasure of the general assembly.

(Copied from Acts of the General Assembly of Virginia, session of 1861-2, pp. 90, 91, 92, 93.)

Report of Honorable Chester D. Hubbard.

Wheeling, West Virginia, Feb. 23, 1871.

Hon. W. E. Stevenson, President.

Dear Sir: In accordance with the instructions of the Board of the School Fund in their action of the 15th, I have ascertained and herewith transmit a statement of the stock held by the state in the National Bank of West Virginia at Wheeling, the First National Bank of Wellsburg, and the Parkersburg National Bank, and the different funds to which said stock is credited.

I also proceeded to Wellsburg and exchanged as directed the stock of the Internal Improvement Fund in the First National Bank of Wellsburg, 163 shares, for United States 5-20 coupon bonds (the Bank had no registered bonds), receiving therefor sixteen bonds of $1,000 each and three bonds of $100 each lettered and numbered as follows: $1000 K 134,401, 134,403, 134,404, 134,405, 134,406, 134,407, 134,413, 134,414, 163, 792, G. 142,990, 142,991, 142,981, 142,982, 142,983, 142,984, 142,985. $100 each I, 177,876, C. 102,938, D. 236,517. These bonds carry the coupons of July 1, 1871, and were issued July 1, 1867, under the act of 1865.

I have sealed the bonds in an envelope writing my name across the seal and labelling them as belonging to the School Fund of West Virginia, and have deposited them as a special deposit in the First

National Bank of Wheeling. The bonds can be exchanged for registered bonds by sending them to Washington. I will attend to it if you desire it to make any other disposition of the bonds you may direct.

The Bank declined to exchange for the stock held in the name of the state, believing that they could not safely do so under section 7, article 8, of the Constitution, besides I was not certain that my authority extended to such an exchange. If I am to make any other disposition of the bonds, please advise me at your earliest convenience.

The stock exchanged at Wellsburg will modify the bond statement to that extent. Very respectfully,

C. D. HUBBARD.

Statement of Stock held by the State of West Virginia in "The National Bank of West Virginia at Wheeling," "The First National Bank of Wellsburg," and "The Parkersburg National Bank," and the different funds to which said stock is credited.

1837—(July 18)—The Commonwealth of Virginia subscribed 4,000 shares of stock in the Northwestern Bank of Virginia $400,000.00

1857—March 3.—The Bank purchased of this stock 1,082 shares as follows:

Northwestern	Bank of	Virginia	at Wheeling,	332	shares
"	"	"	Wellsburg,	250	"
"	"	"	Parkersburg	250	"
"	"	"	Jeffersonville'	250	"
				1,082	"
					108,200.00

Leaving 2,918 shares $291,800.00

1865—March 2.—The Bank charged to the Commonwealth of Virginia all the stocks of the Bank of Jeffersonville, on the plea that the State had taken possession of that Bank, 1,642 shares 164,200.00

And transferred the remaining stock to the State of West Virginia, 1,276 shares	127,600.00
1866—July 1.—On the organization of the present Bank this 1,276 shares was transferred at 50 cents on the dollar, as follows, viz.:	
National Bank of West Virginia at Wheeling, 300 shares	30,000.00
First National Bank of Wellsburg, 188 shares	18,800.00
Parkersburg National Bank, 150 shares	15,000.00
The Internal Improvement Fund of Virginia subscribed to the Stock of the Northwestern Bank of Virginia:	
1856—August 30.—326 shares	32,600.00
This stock was transferred at 50 cents on the dollar, 1866, July 1, to the First National Bank of Wellsburg, (163 shares)	16,300.00
The President and Directors of the Literary Fund of Virginia subscribed to the stock of the Northwestern Bank of Virginia—1832—November 24.—500 shares	50,000.00
This stock was transferred at 50 cents on the dollar, 1866, July 1, to the Parkersburg National Bank, 250 shares	25,000.00

SUMMARY.

The State now holds in the—	
National Bank of West Virginia at Wheeling, 300 shares (in name of the State)	$30,000.00
First National Bank of Wellsburg, 188 shares in name of the State	18,800.00
First National Bank of Wellsburg, 163 shares in Internal Improvement Fund	16,300.00
Parkersburg National Bank, 150 shares in Internal Improvement Fund	15,000.00
Parkersburg National Bank, 250 shares in Literary Fund	25,000.00
	$105,100.00

1867—July 9.—The Northwestern Bank of Virginia paid a dividend of 5 per cent on 326 shares Internal Improvement Fund	$1,630.00	
On 1,276 shares Commonwealth of Virginia stock	6,380.00	
On 500 shares Literary Fund	2,500.00	$10,510.00
1868—August 1.—A like dividend of 5 per cent on the same stocks		$10,510.00

February 21, 1871.

I, J. S. Darst, Auditor of the State of West Virginia, and *ex officio* Secretary of the Board of the School Fund of said State, hereby certify that the foregoing is a true and correct copy from the record of the minutes of the proceedings of said Board, pages 37 to 41 of Record Book No. 1 of said Board.

Given under my hand and official seal, this 26th day of February, 1910.

J. S. DARST,
Auditor.

APPENDIX C.

37TH CONGRESS, 2d Session. | SENATE. | MIS. DOC. No. 99

MEMORIAL OF THE COMMISSIONERS

APPOINTED BY THE

Convention of West Virginia

PRAYING

For the admission of that State into the Union.

MAY, 31, 1862.—Referred to the Committee on Territories, and ordered to be printed.

To the Hon. B. F. WADE,

Chairman of the Committee on Territories:

In conformity with the suggestion of your committee, the undersigned, commissioners appointed by the convention to frame a constitution for West Virginia, beg leave to submit the following:

In the month of January, 1861, the Legislature of Virginia, convened in extra session, passed an act providing for the election of delegates on the 4th of February, 1861, to meet in convention at the city of Richmond on the 13th of the same month to take into consideration the then condition of the country.

The act calling the convention provided that it should submit any proposition it might adopt changing the relations of the State to the Federal Government or the organic law of the State to the voters of the State, to be approved or rejected by them at the polls, provided the people should so require by their vote on the 4th day of February 1861; and accordingly the people, at the same time they voted for delegates to the convention, voted upon the question whether the action of the convention should be submitted to them

for their ratification before the said action of the convention should be of binding obligation.

The people, by a majority of more than fifty thousand votes, declared in favor of submitting the action of the convention to them for ratification or rejection.

On the 17th day of April, 1861, the convention passed an ordinance of secession; on the 24th day of April, 1861, commissioners appointed by the convention entered into an agreement with A. H. Stephens, vice-president of the so-called Confederate States, transferring the State to the said Confederacy. On the fourth Thursday in May thereafter the question of ratifying or rejecting the ordinance of secession was submitted to the voters of the State, but prior to that day the authors of secession had organized the military forces of the State in the interest of the so-called Confederate States, and occupied most of the counties of the State on the day of voting upon the ordinance, so that, in fact, a reign of terror was inaugurated to prevent a free and fair expression of the popular will at the polls.

On the 22d of April, 1861, a meeting of the people of Harrison County was held at the courthouse of that county, which adopted the resolutions following:

GRAND UNION MEETING.

1,000 to 1,200 people present.

At a large and enthusiastic meeting of from 1,000 to 1,200 of the citizens of Harrison County, assembled at the courthouse upon a notice of forty-eight hours, on Monday, April 22, 1861, the following preamble and resolutions were adopted without one dissenting voice:

PREAMBLE.

Whereas the convention now in session in this State, called by the legislature, the members of which had been elected twenty months before said call, at a time when no such action as the assemblage of a convention by legislative enactment was contemplated by the people, or expected by the members they elected in May, 1859, at which time no one anticipated the troubles recently brought upon our common country by the extraordinary action of the State authorities of

South Carolina, Georgia, Alabama, Mississippi, Florida, Louisiana, and Texas, has, contrary to the expectation of a large majority of the people of this State, adopted an ordinance withdrawing Virginia from the Federal Union; and whereas by the law calling said convention it is expressly declared that no such ordinance shall have force or effect or be of binding obligation upon the people of this State until the same shall be ratified by the voters at the polls; and whereas we have seen with regret the demonstration of hostility, unauthorized by law, and inconsistent with the duty of law-abiding citizens still owing allegiance to the Federal Government, have been made by a portion of the people of this State against the said government; and whereas the governor of this Commonwealth has, by proclamation, undertaken to decide for the people of Virginia that which they had reserved to themselves, the right to decide by their votes at the polls, and has called upon the volunteer soldiery of this State to report to him and hold themselves in readiness to make war upon the Federal Government, which Government is Virginia's government, and must, in law and of right, continue so to be until the people of Virginia, shall by their votes and through the ballot box, that great conservator of a free people's liberties, decide otherwise; and whereas the peculiar situation of northwestern Virginia, separated as it is by natural barriers from the rest of the State, precludes all hope of timely succor in the hour of danger from other portions of the State, and demands that we should look to and provide for our own safety in the fearful emergency in which we now find ourselves placed by the action of our State authorities, who have disregarded the great fundamental principle upon which our beautiful system of government is based, to wit, "that all governmental power is derived from the consent of the governed," and have, without consulting the people, placed this State in hostility to the federal government by seizing upon its ships and obstructing the channel at the mouth of Elizabeth River, by wresting from the Federal officers at Norfolk and Richmond the customhouses, by tearing from the nation's property the nation's flag, and putting in its place a bunting, the emblem of rebellion, and by marching upon the national armory at Harper's Ferry—thus inaugurating a war without consulting those in whose

name they profess to act; and whereas the exposed condition of northwestern Virginia requires that her people should be united in action and unanimous in purpose—there being a perfect identity of interests in times of war as well as in peace: Therefore, be it

Resolved, That it be, and is hereby, recommended to the people in each and all of the counties composing northwestern Virginia to appoint delegates, not less than five in number, of their wisest, best, and discreetest men, to meet in convention at Wheeling, on the 13th day of May next, to consult and determine upon such action as the people of northwestern Virginia should take in the present fearful emergency.

Resolved, That Hon. John S. Carlisle, W. P. Goff, Hon. Charles S. Lewis, John J. Davis, Thos. L. Moore, S. S. Fleming, Lot Bowen, Dr. Wm. Dunkin, Wm. E. Lyon, Felix Sturm, and James Lynch, be, and are hereby, appointed delegates to represent this county in said convention.

JOHN HURSEY, *President.*

J. W. HARRIS, *Secretary.*

Strange to say, among that large assembly not a single response was heard to the call by the president for the nays on any of the questions before the meeting.—*Guard Office, Clarksburg, Va.*

The proceedings of this meeting were sent to the several counties of northwestern Virginia by special messengers, which responded to the call, and, in accordance with it, a convention of some five hundred delegates from thirty-odd counties of the State met in the city of Wheeling on the 13th day of May, 1861, and adopted the following resolutions:

Convention of the people of Northwestern Virginia, held at Wheeling, May 13, 1861.

The following resolutions were unanimously adopted:

1. *Resolved*, That in our deliberate judgment the ordinance passed by the convention of Virginia on the 17th day of April, 1861, known as the ordinance of secession, by which said convention undertook, in the name of the State of Virginia, to repeal the ratification of the Constitution of the United States by this State, and to resume all the

rights and powers granted under said Constitution, is unconstitutional, null and void.

2. *Resolved,* That the schedule attached to the ordinance of secession, suspending and prohibiting the election of members of Congress for this State, is manifest usurpation of power to which we ought not to submit.

3. *Resolved,* That the agreement of the 24th of April, 1861, between the commissioners of the Confederate States and this State, and the ordinance of the 25th of April, 1861, approving and ratifying said agreement, by which the whole military force and military operations, offensive and defensive, of this Commonwealth, are placed under the chief control and direction of the President of the Confederate States, upon the same principles, basis, and footing, as if the Commonwealth were now a member of said Confederacy, and all the acts of the executive officers of our State in pursuance of said agreement and ordinance, are plain and palpable violations of the Constitution of the United States, and are utterly subversive of the rights and liberties of the people of Virginia.

4. *Resolved,* That we earnestly urge and entreat the citizens of the State everywhere, but more especially in the western section, to be prompt at the polls on the 23rd instant, and to impress upon every voter the duty of voting in condemnation of the ordinance of secession, in the hope that we may not be involved in the ruin to be occasioned by its adoption, and with the view to demonstrate the position of the west on the question of secession.

5. *Resolved,* That we earnestly recommend the citizens of Western Virginia to vote for members of the Congress of the United States in their several districts, in the exercise of the rights secured to us by the Constitutions of the United States and the State of Virginia.

6. *Resolved,* That we also recommend to the citizens of the several counties to vote at said election for such persons as entertain the opinions expressed in the foregoing resolutions for members of the senate and house of delegates of our State.

7. *Resolved,* That in view of the geographical, social, commercial, and industrial interests of northwestern Virginia, this convention are constrained, in giving expression to the opinion of their constituents,

to declare that the Virginia convention, in assuming to change the relation of the State of Virginia to the federal government, have not only acted unwisely and unconstitutionally, but have adopted a policy utterly ruinous to all the material interests of our section, severing all our social ties, and drying up all the channels of our trade and prosperity.

8. *Resolved,* That in the event of the ordinance of secession being ratified by a vote, we recommend to the people of the counties here represented, and all others disposed to cooperate with us, to appoint on the 4th day of June, 1861, delegates to a general convention, to meet on the 11th of that month, at such place as may be designated by the committee hereinafter provided, to devise such measures and take such action as the safety and welfare of the people they represent may demand—each county to appoint a number of representatives to said convention equal to double the number to which it will be entitled in the next house of delegates; and the senators and delegates to be elected on the 23d instant, by the counties referred to, to the next general assembly of Virginia, and who concur in the views of this convention, to be entitled to seats in the said convention as members thereof.

9. *Resolved,* That inasmuch as it is a conceded political axiom that government is founded on the consent of the governed and is instituted for their good, and it cannot be denied that the course pursued by the ruling power in the State is utterly subversive and destructive of our interests, we believe we may rightfully and successfully appeal to the proper authorities of Virginia to permit us peacefully and lawfully to separate from the residue of the State, and form ourselves into a government to give effect to the wishes, views, and interests of our constituents.

10. *Resolved,* That the public authorities be assured that the people of the northwest will exert their utmost power to preserve the peace, which they feel satisfied they can do, until an opportunity is afforded to see if our present difficulties cannot receive a peaceful solution; and we express the earnest hope that no troops of the Confederate States be introduced among us, as we believe it would be eminently calculated to produce civil war.

11. *Resolved*, That in the language of Washington, in his letter of the 17th of September, 1787, to the President of Congress: "In all our deliberations on this subject we have kept steadily in view that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, and perhaps our national existence." And therefore we will maintain and defend the Constitution of the United States and the laws made in pursuance thereof, and all officers acting thereunder in the lawful discharge of their respective duties.

12. *Resolved, That* John S. Carlile, James S. Wheat, C. D. Hubbard, F. H. Pierpoint, Campbell Tarr, G. R. Latham, Andrew Wilson, S. H. Woodward, and James W. Paxton, be a central committee to attend to all the matters connected with the objects of this convention; and that they have power to assemble this convention at any time they may think necessary.

13. *Resolved*, That each county, represented in this convention, and any others that may be disposed to co-operate with us, be requested to appoint a committee of five, whose duty it shall be to correspond with the central committee, and to see that all things necessary be done to carry out the objects of this convention.

14. *Resolved*, That the central committee be instructed to prepare an address to the people of Virginia, in conformity with the foregoing resolutions, and cause the same to be published and circulated as extensively as possible.

By order of the convention.

JOHN W. MOSS, *President*.

G. L. CRANMER,
M. M. DENT,
C. B. WAGGENER,
Secretaries.

Under the eighth of which resolutions delegates to a convention were chosen on the 4th of June, 1861, and met in the city of Wheeling on the 11th of that month, and adopted the following declaration on the 13th, two days after they met.

A declaration of the people of Virginia, represented in convention, at the city of Wheeling, Thursday, June 13, 1861.

The true purpose of all government is to promote the welfare and provide for the protection and security of the governed; and when any form or organization of government proves inadequate for, or subversive of this purpose, it is the right, it is the duty of the latter, to alter or abolish it. The bill of rights of Virginia, framed in 1776, reaffirmed in 1830, and again in 1851, expressly reserves this right to a majority of her people. The act of the general assembly, calling the convention which assembled at Richmond in February last, without the previously expressed consent of such majority, was therefore a usurpation; and the convention thus called has not only abused the powers nominally intrusted to it, but with the connivance and active aid of the executive, has usurped and exercised other powers, to the manifest injury of the people, which, if permitted, will inevitably subject them to a military despotism.

The convention, by its pretended ordinances, has required the people of Virginia to separate from and wage war against the government of the United States, and against the citizens of neighboring States, with whom they have heretofore maintained friendly, social, and business relations.

It has attempted to subvert the Union founded by Washington and his co-patriots in the former days of the republic, which has conferred unexampled prosperity upon every class of citizens, and upon every section of the country.

It has attempted to transfer the allegiance of the people to an illegal confereracy of rebellious States, and required their submission to its pretended edicts and decrees.

It has attempted to place the whole military force and military operations of the Commonwealth under the control and direction of such confederacy, for offensive as well as defensive purposes.

It has, in conjunction with the State executive, instituted, wherever their usurped power extends, a reign of terror, intended to suppress the free expression of the will of the people, making elections a mockery and a fraud.

The same combination, even before the passage of the pretended ordinance of secession, instituted war by the seizure and appropriation of the property of the Federal Government, and by organizing and mobilizing armies, with the avowed purpose of capturing or destroying the capitol of the Union.

They have attempted to bring the allegiance of the people of the United States into direct conflict with their subordinate allegiance to the State, thereby making obedience to their pretended ordinances treason against the former.

"We, therefore, the delegates here assembled in convention to divise such measures and take such action as the safety and welfare of the loyal citizens of Virginia may demand, having maturely considered the premises, and viewing with great concern the deplorable condition to which this once happy Commonwealth must be reduced unless some regular adequate remedy is speedily adopted, and appealing to the Supreme Ruler of the universe for the rectitude of our intentions, do hereby, in the name and on behalf of the good people of Virginia, solemnly declare that the preservation of their dearest rights and liberties, and their security in person and property, imperatively demand the reorganization of the government of the Commonwealth, and that all acts of said convention and executive, tending to separate this Commonwealth from the United States, or to levy and carry on war against them, are without authority and void; and that the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated."

This convention continued in session several weeks, and on the 19th of June, the following ordinance was adopted:

An ordinance for the reorganization of the State government, passed June 19, 1861.

The people of the State of Virginia, by their delegates assembled in Convention at Wheeling, do ordain as follows:

1. A governor, lieutenant governor, and attorney general for the State of Virginia shall be appointed by this convention to discharge offices by the existing laws of the State, and to continue in office for

six months, or until their successors be elected and qualified; and the general assembly is required to provide by law for an election of governor and lieutenant governor by the people as soon as in their judgment such an election can be properly held.

2. A council, to consist of five members, shall be appointed by this convention to consult with and advise the governor respecting such matters pertaining to his official duties as he shall submit for consideration, and to aid in the execution of his official orders. Their term of office shall expire at the same time as that of the governor.

3. The delegates elected to the general assembly on the 23rd day of May last, and the senators entitled under existing laws to seats in the next general assembly together with such delegates and senators as may be duly elected under the ordinances of this convention, or existing laws, to fill vacancies, who shall qualify themselves by taking the oath or affirmation hereinafter set forth, shall constitute the legislature of the State, to discharge the duties and exercise the powers pertaining to the general assembly. They shall hold their offices from the passage of this ordinance until the end of the terms for which they were respectively elected. They shall assemble in the city of Wheeling on the 1st day of July next, and proceed to organize themselves as prescribed by existing laws in their respective branches. A majority in each branch of the members qualified as aforesaid shall constitute a quorum to do business. A majority of the members in each branch thus qualified, voting affirmatively, shall be competent to pass any act specified in the twenty-fourth section of the fourth article of the constitution of the State.

4. The governor, lieutenant governor, attorney general, members of the legislature, and all officers now in the service of the State, or of any county, city or town thereof, or hereafter be elected or appointed for such service, including the judges and clerks of the several courts, sheriffs, commissioners of the revenue, justices of the peace, officers of the city and municipal corporations, and officers of militia, and officers and privates of volunteer companies of the State, not mustered into the service of the United States, shall each take the following oath or affirmation before proceeding in the discharge of their several duties:

"I solemnly swear (or affirm) that I will support the Constitution of the United States, and the laws made in pursuance thereof, as the supreme law of the land, anything in the constitution and laws of the State of Virginia, or in the ordinances of the convention which assembled at Richmond on the 13th of February, 1861, to the contrary notwithstanding; and that I will uphold and defend the government of Virginia as vindicated and restored by the convention which assembled at Wheeling on the 11th of June, 1861."

If any elective officer, who is required by the preceding section to take such oath or affirmation, fail or refuse so to do, it shall be the duty of the governor, upon satisfactory evidence of the fact, to issue his writ declaring the office to be vacant, and providing for a special election to fill such vacancy, at some convenient and early day, to be designated in said writ; of which due publication shall be made for the information of the persons entitled to vote at such elections; and such writ may be directed, at the discretion of the governor, to the sheriff or sheriffs of the proper county or counties, or to a special commissioner or commissioners to be named by the governor for the purpose. If the officer who fails or refuses to take such oath or affirmation be appointed by the governor, he shall fill the vacancy without writ; but if such officer be appointed otherwise than by the governor or by election, the writ shall be issued by the governor, directed to the appointing power, requiring it to fill the vacancy.

ARTHUR J. BOREMAN,
President

G. L. CRANMER, *Secretary.*

This convention, in pursuance of the declaration and ordinance aforesaid, elected a governor, lieutenant governor, and attorney general; each to serve for six months, and until their successors could be elected by the people of the State (which election was had on the 23d day of May, 1862). The governor, by proclamation, convened the legislature, under and by virtue of the power vested in him by the Constitution of the State so to do, to meet in the city of Wheeling on the ——— day of July, 1861, and addressed an official letter to the President of the United States, calling upon him, as the

Chief Executive of the United States, to aid him, as the executive of the State, in suppressing the insurrection in the State, and to protect the people of the State from domestic violence. To this letter the President of the United States responded, recognizing the governor, thus elected by the June convention, as the chief magistrate of the Commonwealth of Virginia.

On the 9th day of July, 1861, the legislature elected Senators of the United States, who were admitted on the 13th day of July to seats in the United States Senate, as senators from the State of Virginia.

On the 20th of August, 1861, the convention at Wheeling passed the following ordinance:

An ordinance to provide for the formation of a new State out of a portion of the territory of this State.

Whereas it is represented to be the desire of the people inhabiting the counties hereinafter mentioned to be separated from this Commonwealth and to be erected into a separate State and admitted into the Union of States and become a member of the Government of the United States.

The people of Virginia, by their delegates assembled in convention at Wheeling, do ordain that a new State, to be called the State of Kanawha, be formed and erected out of the territory included within the following described boundary: Beginning on the Tug Fork of Sandy River, on the Kentucky line, where the counties of Buchanan and Logan join the same, and running thence with the dividing lines of said counties and the dividing lines of the counties of Wyoming and McDowell to the Mercer County line, and with the dividing line of the counties of Mercer and Wyoming to the Raleigh County line; thence with the dividing line of the counties of Raleigh and Mercer, Monroe and Raleigh, Greenbrier and Raleigh, Fayette and Greenbrier, Nicholas and Greenbrier, Webster, Greenbrier, and Pocahontas, Randolph and Pocahontas, Randolph and Pendleton to the southwest corner of Hardy County; thence with the dividing line of the counties of Hardy and Tucker to the Fairfax Stone; thence with the line dividing the States of Maryland and Virginia to the Pennsylvania line; thence with the line dividing the States of Pennsylvania

and Virginia to the Ohio River; thence down said river, and including the same, to the dividing line between Virginia and Kentucky, and with the said line to the beginning, including within the boundaries of the proposed new State the counties of Logan, Wyoming, Raleigh, Fayette, Nicholas, Webster, Randolph, Tucker, Preston, Monongalia, Marion, Taylor, Barbour, Upshur, Harrison, Lewis, Braxton, Clay, Kanawha, Boone, Wayne, Cabell, Putnam, Mason, Jackson, Roane, Calhoun, Wirt, Gilmer, Ritchie, Wood, Pleasants, Tyler, Doddridge, Wetzel, Marshall, Ohio, Brooke, and Hancock.

2. All persons qualified to vote within the boundaries aforesaid, and who shall present themselves at the several places of voting within their respective counties on the fourth Thursday in October next, shall be allowed to vote on the question of the formation of a new State, as hereinbefore proposed; and it shall be the duty of the commissioners conducting the election at the said several places of voting, at the same time, to cause polls to be taken for the election of delegates to a convention to form a constitution for the government of the proposed State.

3. The convention hereinbefore provided for may change the boundaries described in the first section of the ordinance, so as to include within the proposed State the counties of Greenbrier and Pocahontas, or either of them, and also the counties of Hampshire, Hardy, Morgan, Berkeley, and Jefferson, or either of them, and also such other counties as lie contiguous to the said boundaries or to the counties mentioned in this section, if the said counties be added, or either of them, by a majority of the votes given, shall declare their wish to form part of the proposed State, and shall elect delegates to the said convention, at elections to be held at the time and in the manner herein provided for.

4. Poll books shall be prepared under the direction of the governor for each place of voting in the several counties hereinbefore mentioned, with two separate columns, one to be headed, "For the new State," the other "Against the new State." And it shall be the duty of the commissioners who superintend, and the officers who conducted the election in May last, or such other persons as the governor may appoint, to attend at their respective places of holding

elections, and superintend and conduct the election herein provided for. And if the said commissioners and officers shall fail to attend at any such place of holding elections, it shall be lawful for any two freeholders present to act as commissioners in superintending the said election, and to appoint officers to conduct the same. It shall be the duty of the persons superintending and conducting said election to employ clerks to record the votes, and to endorse on the respective poll books the expenses of the same.

If, on the day herein provided for holding said election, there shall be in any of the said counties any military force, or any hostile assemblage of persons, so as to interfere with a full and free expression of the will of the voters, they may assemble at any other place within their county, and hold an election as herein provided for. It shall be the duty of the commissioners superintending, and officers conducting said election, and the clerks employed to record the votes, each, before entering upon the duties of his office, to take, in addition to the oath now required by the general election law, the oath of office prescribed by this convention. It shall be the duty of the officers and commissioners aforesaid, as soon as may be, and not exceeding three days after said election, to aggregate each of the columns of said poll-books, and ascertain the number of votes recorded in each, and make a return thereof to the secretary of the Commonwealth in the city of Wheeling, which return shall be in the following form, or to the following effect:

"We, ———, commissioners, and ———, conducting officer, do certify that we caused an election to be held at ———, in the county of ———, at which we permitted all persons to vote that were entitled to do so under existing laws, and that offered to vote, and that we have carefully added up each column of our poll-books, and find the following result:

"For a new State, ——, votes; against a new State, ——— votes.

"Given under our hands this —— day of ——, 1861."

"Under which certificate there shall be added the following affidavit:

"——— county, to wit:

"I, ———, a justice of the peace, (or any officer now authorized by law to administer oaths), in and for said county, do certify that the above-named commissioners and conducting officer severally made oath before me that the certificate by them above signed is true.

"Given under my hand this —— day of ——, 1861."

The original poll-books shall be carefully kept by the conducting officers for ninety days after the day of the election, and upon the demand of the executive shall be delivered to such person as he may authorize to demand and receive them.

5. The commissioners conducting the said election in each of said counties shall ascertain, at the same time they ascertain the vote upon the formation of a new State, who has been elected from their county to the convention, hereinbefore provided for, and shall certify to the Secretary of the Commonwealth the name or names of the person or persons so elected to the said convention.

6. It shall be the duty of the governor, on or before the 15th day of November next, to ascertain and by proclamation make known the result of the said vote; and if a majority of the votes given within the boundaries mentioned in the first section of this ordinance shall be in favor of the formation of a new State, he shall so state in his said proclamation, and shall call upon said delegates to meet in the city of Wheeling on the 26th day of November next, and organize themselves into a convention: and the said convention shall submit, for ratification or rejection, the constitution that may be agreed upon by it to the qualified voters within the proposed State, to be voted upon by said voters on the fourth Thursday in December next.

7. The county of Ohio shall elect three delegates; the counties of Harrison, Kanawha, Marion, Marshall, Monongalia, Preston, and Wood shall each elect two; and the other counties named in the first section of this ordinance shall each elect one delegate to the said convention. And such other counties as are described in the third section of this ordinance shall, for every seven thousand of their population according to the census of 1860, be entitled to one delegate, and to an additional delegate for any fraction over thirty-five hundred: but each of said counties shall be entitled to at least one

delegate. The said delegate shall receive the same per diem as is now allowed to members of the general assembly; but no person shall receive pay as a member of the general assembly and of the convention at the same time.

8. It shall be the duty of the governor to lay before the general assembly, at its next meeting, for their consent, according to the Constitution of the United States, the result of the said vote, if it shall be found that a majority of the votes cast be in favor of a new State, and also in favor of the constitution proposed to said voters for their adoption.

9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of the said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.

The lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents therein. No grant of lands or land warrants issued by the proposed State shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed State now liable thereto.

10. When the general assembly shall give its consent to the formation of such new State it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the Union of States.

11. The government of the State of Virginia, as reorganized by this convention at its session in June last, shall retain, within the territory of the proposed State, undiminished and unimpaired, all the

powers and authority with which it has been vested, until the proposed State shall be admitted into the Union by the Congress of the United States; and nothing in this ordinance contained, or which shall be done in pursuance thereof, shall impair or affect the authority of the said reorganized State government in any county which shall not be included within the proposed State.

A. I. BOREMAN, *President.*

G. L. CRANMER, *Secretary.*

Under this ordinance the people within the boundary prescribed, having voted almost unanimously for a new State, and having elected delegates to a convention as provided for, those delegates thus elected from the counties named lying in the boundaries of the proposed new State met, and formed the constitution now before the committee, which, was, on the 3rd of April, 1862, ratified and adopted by the people of the counties named by the vote accompanying the constitution; and, as required by the ordinance, the legislature of the State of Virginia was convened by proclamation of the governor, and passed the act accompanying the constitution, giving the assent of the legislature of Virginia to the formation of the proposed State of West Virginia.

ELBERT H. CALDWELL.
JAMES W. PAXTON.
E. B. HALL.

APPENDIX D.

COMMONWEALTH OF VIRGINIA.

INVESTMENTS IN CAPITAL STOCK.

Investments in Companies Lying Wholly Within the Territory Now Constituting the Commonwealth of Virginia:		
Banks	$ 2,108,591.00	
Turnpike and Road Companies	1,897,747.22	
Bridge Companies	49,622.16	
Navigation Companies	908,173.17	
Railroad Companies	13,713,256.55	
Alexandria Canal Company	272,000.00	
Total Investment in Virginia Companies		$18,949,390.10
Percentage of Total Investment 62.9120		
Investments in Companies Lying Wholly Within the Territory Now Constituting the State of West Virginia:—		
Banks	$ 391,800.00	
Turnpike and Road Companies	700,103.49	
Bridge Companies	78,412.50	
Navigtion Companies	210,500.00	
Total Investment in West Virginia Companies		$1,380,815.99

Brought forward		$20,330,206.09
Percentage of Total Investment 4.5844		
Investments in Inter-State Companies:—		
Turnpike and Road Companies	$ 175,108.58	
James River and Kanawha Company (3.49% located in West Virginia).....	9,245,140.46	
Winchester and Potomac Railroad Company	120,000.00	
Total Investments in Inter-State Companies		9,540,249.04
Percentage of Total Investment 31.6736		
Chesapeake and Ohio Canal Company; Maryland Division		250,000.00
Percentage of Total Investment ...0.8300		
Total Investment in Capital Stock		$30,120,455.13

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

No. 3, Original. October Term, 1910.

NOTES OF ARGUMENT OF COUNSEL FOR COMPLAINANT.

PREFATORY NOTE.

EXPLANATORY OF ARRANGEMENT OF THE RECORD AND OF REFERENCES MADE IN THE ARGUMENT.

The principal references in the argument of the case will be to—

1. The large volume of exhibits and evidence, returned by the Master with his report, entitled "Record."

This will be referred to by pages, as follows, "R. 20," "R. 55," etc.

The tabulated statements or schedules which constitute a valuable part of that volume, and embody in a condensed form the most important data in the case, have been, for convenience, also printed and bound together in a separate volume, where they will be found arranged for ready reference according to the paging and order in which they appear in the larger volume, and can be readily examined acordingly.

These schedules are designated "Plaintiff's and Defendant's Exhibit" "A-1," "B-1," etc.; or "Defendant's Exhibit" "D1;" or "Plaintiff's Exhibit" "E-3," etc. The great advantage of the method which, under the direction of the Master, was adopted in making up all of the "Joint Exhibits," and some of the more important of "Plaintiff's Exhibits," and of "Defendant's Exhibits," comes from the fact that in those exhibits, so certified by the accountants for both parties, the *figures* stated are *agreed* figures,—the only question left open being as to the proper or legal application or use to be made of those agreed amounts in making up the respective accounts to which they relate.

These tabulated statements present in concrete form the claims of the opposing parties, and contain the very gist of the case.

It is important therefore to an intelligent understanding of the numerous questions presented, to clearly understand the method adopted by the Master for presenting the claims of the parties, respectively, and the evidence in support thereof. A clear appre-

hension of this method can be had from a preliminary examination of the "Record," and the exhibits and schedules referred to, together with the master's report.

2. The Statutes, and extracts from Ordinances, and Constitutions of the two States, most material to the questions in the cause, have been compiled under the direction of the master in a separate volume, designated as "Appendix to the Record." This will be referred to as "App. p. 12, 26," etc.

3. West Virginia has caused two volumes to be compiled, printed and filed in the clerk's office of the Court, containing most of the record of the case down to the appointment of the Special Master; including also the arguments of counsel on the general hearings in this Court, and some papers and documents not a part of the record. The first volume of this compilation was edited by the Hon. Clarke W. May, the late attorney general of West Virginia; the second volume by Hon. W. G. Conley, the present attorney general of that State.

When for convenience this compilation is referred to it will be designated, "West Virginia's Compilation, Vol. 1," etc.

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

No. 3, Original. October Term, 1910.

NOTES OF ARGUMENT OF COUNSEL FOR COMPLAINANT.

PRELIMINARY STATEMENT.

This suit is a result of the dismemberment of the Commonwealth of Virginia and the formation of the State of West Virginia out of her territory.

It is instituted for the purpose of having an accounting with West Virginia, and determiniing her equitable share of the indebtedness of the undivided Commonwealth.

That indebtedness,—independently of the bonds belonging to the sinking fund and the literary fund, held by the corporations known as the Commissioners of the Sinking Fund and the President and Directors of the Literary fund,—amounted to $33,897,073.82 on the 31st of December, 1860; of which $32,919,863.93 were principal and $977,209.89 were accrued interest. The correctness of these figures is conceded by West Virginia.—See Master's Report, pages 1, 2, 3 and 29.

The specific relief sought by Virginia is to have West Virginia's equitable proportion of this common indebtedness fairly ascertained, and to secure the payment of the same by that State.

This large indebtedness—an enormous liability, having reference to the resources of the Commonwealth at the time it was contracted—came upon her with added force after the close of a long and disastrous war; but notwithstanding her impoverishment Virginia has, down to the present time, paid more than thirty-eight millions of dollars in interest, and has retired a considerable amount of the principal of the original debt, in addition to large payments made upon the portion of the debt, payment of which she has assumed and for which she has given her obligations. And yet there are some twenty-five millions of dollars of obligations, issued by Virginia as she exists to-day, outstanding and unpaid, upon which the interest is regularly met by the Commonwealth. So that Virginia has paid off and retired, or assumed and issued her own bonds for, over seventy-four millions of dollars, principal and interest, down to the present year, including the bonds which he has redeemed since 1865.

While the Commonwealth has made this large contribution to the payment of the principal and interest of the common debt, since the formation of the new State,—much of it made during the decades following the Civil War, at a painful sacrifice, from the scant means of an impoverished people.—West Virginia has not paid one dollar upon that common indebtedness, but has refused to pay, and denied her liability to pay, any part of the same. See Resolutions of West Virginia Legislature denying any liability for, and refusing to negotiate in reference to, the Virginia Debt.—App. 247, 248.

There is another fact which it is proper to call to mind in this connection:

The bulk of this large common debt was contracted with the sanction and by the votes of the representatives in the General Assembly of Virginia from the counties now constituting the State of West Virginia,—a large part of it having been actually put upon Virginia by the votes of those representatives over the votes

of a majority of the representatives of the counties constituting the Virginia of to-day; and but a small part of that indebtedness would have been contracted had the representatives from West Virginia counties in the General Assembly of Virginia opposed and voted against the Acts by virtue of which the debt was created.

These pregnant facts are specifically alleged in the complainant's bill, and are not denied or quesitoned in the defendant's answer.—See Paragraph III of the Bill, R. 4; and Paragraph III of the Defendant's Answer, R. 144.

It is also true that more than seven-eighths of the indebtedness of Virginia at the time of the formation of West Virginia was represented by equivalent sums expended on works of internal improvement, which were either designed, begun, and built for the purpose of penetrating and developing West Virginia territory, or are to-day parts of railway systems and lines of communication which served the territory and people of West Virginia, and afford large regions of that State their best access to the Atlantic seaboard and to the markets of the world.—See Appendix I to this Note of Argument.

The foregoing statement of facts is made here, because they have an important bearing upon the broad equities of the case and entitle Virginia to fair and just consideration in the application of rules of construction to the statutes, ordinances and provisions of constitutions which are relied upon as determining the rights and obligations of the parties.

They are tremendous facts, and have a mighty bearing upon questions which go to the very right of the cause.

This suit is brought by Virginia for her own protection and relief; and yet, to the extent that it shall result in her exoneration, it will inure to the benefit of the common creditors who have deposited their bonds in her keeping.

She actually to-day holds every bond which was issued by the Commonwealth prior to the formation of West Virginia, which is known to be in existence, and she also holds more than nine-tenths of the certificates which she issued to the common creditors of the two States, who confided those bonds to her keeping.—R.102.

So that Virginia, and Virginia alone, has, and represents here every substantial right and interest, adverse to the defendant, in any way connected with the unsettled debt of the undivided State, or directly or indirectly involved in this suit.

Such are some of the more important facts which underlie this suit, and such generally are the relations of Virginia to, and her vital interests in, the litigation.

ARGUMENT.

There can be no question, as a principle of public law, public justice and public right, that, on the 20th day of June, 1863, when West Virginia became one of the States of the American Union, the public debt of Virginia, then existing, constituted, independently of any stipulation between Virginia and the new State, an equitable and a moral claim against the people and the property, both of West Virginia and Virginia; and that, as has been decided by the Supreme Court of Virginia in more than one case, and has been held by this court, both States, and the people of both States, were bound for the payment of those obligations.

Higginbotham v. *The Commonwealth*, 25 Gratt., 627;
Greenhow v. *Vashon*, 81 Va., 336;
Hartman v. *Greenhow*, 136 U. S., 672.

Independently of any convention between the two States, according to recognized authorities, the debt should have been ratably apportioned between the two States.

The entire debt of the Commonwealth was created in carrying out what was known as her "Internal Improvement Policy."

The history of that policy of Virginia, from its inception nearly a century ago until 1861 when it was rudely interrupted by war and revolution, will show that the enormous debt incurred by Virginia in carrying it out, was incurred mainly upon the expectation of the return which would reasonably come to the State and her people from the *prospective* enhancement of the values of real estate which would follow the development of the regions which those works of internal improvement, built in whole or in part by the money represented by the State debt, would create and stimulate.

That these expectations have been largely realized, though not always precisely, perhaps, in the way anticipated, is impressively shown by the remarkable increase of the assessed values of the real and personal property in the two States, and particularly in West Virginia, down to 1908, the latest year for which those facts are established in the cause.

As will be seen from Plaintiff's Exhibit E-3, R. 651, which is made up from the official records of the two States, the aggregate of the assessed values of the real estate, personal, and railroad property in West Virginia were

For 1867 (the first year for which the official figures could be obtained)	126,060,743.00
For 1908	937,232,718.54
An increase of	$811,171,975.54,

Or 643 per cent!!!

The assessed values of taxable property in Virginia for the same period advanced from ..... $354,848,482.69, in 1867,
To ..... 661,796,631.00, in 1908,
An increase of $306,948,148.31,
Or about 84 per cent.

While this enormous difference in the increment of the assessed values of taxable property may doubtless be, in part, accounted for by the different standards of valuation adopted in the two States, by no means all of it is ascribable to that circumstance; and the facts and figures shown by the exhibit just referred to have an influential bearing upon the essential equity of the plaintiff's claim that to determine fairly the portion of the burden of the common debt which, as a matter of justice, should be borne by West Virginia, account should be taken of the great enhancement of values which have come to the territory which the internal improvements referred to were designed to develope and have in large measure created. The debt was contracted far

more in reliance upon future and prospective values, than upon the values existing at the date of its creation.

There were certain enactments and certain conventional agreements of the restored government of Virginia, at Wheeling, and the new State of West Virginia, which have to be considered in determining what the respective rights and liabilities of the parties are in the premises.

The first of these, was the so-called "Wheeling Ordinance," an ordinance adopted on the 20th day of August, 1861, by what purported to be a convention of the people of Virginia, "to provide for the formation of a new State out of a portion of the territory of this State."—(Appendix to the Record, pp. 119 to 122, inclusive).

The ninth section of that ordinance dealt with the debt and provided—

> "9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

That ordinance purported to be an enactment of Virginia alone. It prescribed, *upon its face*, an arbitrary and what would seem to be an inequitable basis of settlement.

In so far as it provided for the assumption by the new State of a "just proportion" of the debt of the Commonwealth, its language was free from objection. But when it came to indicate the manner in which that proportion should be ascertained, its terms were not only artificial, but *on their face*, inequitable.

And yet the dominant purpose of the enactment, expressed in the clearest terms, was to require the new State to assume a "just proportion" of the public debt of the Commonwealth prior to the first of January, 1861. Upon elementary principles of con-

struction this will be taken, certainly by a court of equity, to be its controlling purpose; and that intendment will not be suffered to be defeated by such a construction of the language of the ordinance as will lead to a result inconsistent with it, when that language can be sensibly, reasonably, and fairly construed and applied so as to operate in harmony with that expressed paramount purpose.

Fortunately, in the interest of justice, that was not the only enactment upon the subject.

There was a later, a more significant, and a more effective enactment by the legislature of the restored government of Virginia, accepting the provisions tendered by West Virginia, resulting in a compact between the two States, and creating a contractual relation governing both Commonwealths in reference to the settlement of their common debt.

These later enactments of the two States were—

First, that of West Virginia, embodied in the eighth section of the eighth article of the first Constitution of that State (Appendix to the Record, p. 125), which is as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

And, second, the act of the legislature of the restored government of Virginia, at Wheeling, passed May 13, 1862, giving the consent of the legislature of Virginia "to the formation and erection of the State of West Virginia within the jurisdiction of this State * * * * * under the provisions set forth in the constitution for the said State of West Virginia and schedule thereto annexed."—Appendix to the Record, p. 125.

Under section 3 of Article IV of the Constitution of the

United States the new State of West Virginia could not be formed without the consent of the legislature of Virginia.

That consent was given in this instance upon the terms, and in accordance with the provisions, set forth in the constitution adopted for the government of the new State, among the more important of which were the provisions and stipulations set forth in section 8 of Article VIII of that instrument, which required that the new State should assume "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first of January in the year one thousand eight hundred and sixty-one"; and that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years."

This proposal of the new Commonwealth, thus clearly expressed in its constitution, submitted to the legislature of Virginia and accepted by that legislature as one of the terms and conditions upon which it gave its consent to the partition of her territory and the erection of a new State out of that territory, and sanctioned by Congress, created a contractual relation between the old State and the new—a compact between them, which absolutely determined their rights, and which, whenever the provisions of the antecedent Wheeling ordinance shall come in conflict with the terms of such compact, shall prevail over the terms of that ordinance.

Now the insistence of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to be ascertained under the Wheeling Ordinance construed so as not to defeat the expressed controlling purpose of its enactment, and qualified and ruled by the provisions of Article VIII of the West Virginia Constitution, upon which the consent of the Legislature of Virginia and of the Congress of the United States to the formation of the new State, was predicated.

Agreeably to the decision of this court in its opinion, delivered by the late Chief Justice (R. 136), the view of Virginia is, and has been, that the Ordinance and the provisions of the West Virginia

Constitution should be read as being *in pari materia;* but that the constitutional provision, being the latest, must prevail, if, and whenever there is any conflict between them.

As a logical and inevitable consequence from this, the claim of Virginia was, and is, that, if the language of the Wheeling Ordinance is fairly and reasonably susceptible of such a construction as will, when fairly applied to the facts of the case, lead to an equitable result, and place upon West Virginia an equitable proportion of the debt, such construction should be given to that Ordinance; and that, if the language of the Ordinance is not reasonably and fairly susceptible of such construction, then the Ordinance must be discarded, and the mandate of the West Virginia Constitution followed. And that, in any event, the provisions of that Constitution will govern in placing a contractual obligation upon West Virginia to pay an equitable portion of the common debt of the undivided State, and to pay interest upon the same from the date when that express contractual obligation accrued, until it shall have been discharged.

But the claim of Virginia was, and is, farther, that the provisions of the Wheeling Ordinance—fairly, justly and sensibly construed, and applied, according to its manifest purpose—places upon West Virginia a just and equitable proportion of the debt: *and that West Virginia cannot be heard to repudiate this result of her own express covenant and promise.*

On the other hand, West Virginia has insisted, and still contends, that there is no obligation upon that State to pay any part of the Virginia debt; but that, if there is any liability whatever upon West Virginia, it is a liability for a settlement and accounting which must be made under a construction of the language of the Ordinance,' which would absolutely defeat its declared purpose, and, instead of placing a just proportion, or any proportion, of the debt upon West Virginia, would actually, as was contended for West Virginia, bring Virginia in debt to West Virginia.

With the issues thus made up, this court, in order to place in its possession the data necessary to enable it to intelligently and fairly decide the case, referred the cause to Special Master Charles

E. Littlefield, by its decree of reference, entered on the 4th of May, 1908, and directed the Master to take and report to the court seven separate accounts set forth in seven paragraphs of the decree.—R. 173, 174, 175 and 207.

After considering a great mass of testimony, statements, and accounts prepared by the accomplished expert accountants employed by the parties, respectively, and the elaborate arguments of counsel, and after a laborious and painstaking investigation and consideration of the case, the Master, on the 17th of March last, filed his report, in which he returns his findings upon each of the seven inquiries submitted to him, and with great fairness and great ability presents the grounds upon which those findings are based.

The cause is now submitted for final adjudication.

It comes before the court upon the pleadings and papers formerly considered by the court, upon the decisions and decrees heretofore rendered in the cause, and upon the Master's report, together with the evidence returned therewith and referred to therein, and upon the exceptions filed by the parties to that report.

Your Honors must have been already impressed with the fact that it is a cause of as much complexity as any which has ever come before you for decision, and with the novelty and difficulty of some of the problems which it presents.

Much of what appears at the threshold to be complex will disappear upon a careful examination of the bill and answer, the 9th section of the Wheeling Ordinance, the 8th section of Article VIII of West Virginia's Constitution of 1862-3, the decisions and decrees heretofore rendered in the cause, and the tabulated statements or accounts, the figures in which have, in almost every instance, been assented to by both parties.

Still a painstaking consideration of the Master's report, and of the exhibits and evidence referred to therein and in the arguments of counsel, will be necessary to any fair understanding of the issues in the cause, and to their decision according to the very right of the case.

We have, therefore, to crave the patient and indulgent attention of the court to a somewhat detailed and tedious discussion of the facts, figures, and principles upon which a righteous decision of the cause depends.

The chief points of difference are sharply presented by such of the exceptions to the Master's report as are specifically relied upon by the parties respectively, and by the "Joint Exhibits" or accounts which exhibit their opposing claims in contrast.

Upon the great majority of these the Master's findings are, and are shown by him to be, so plainly right that further discussion of them is rendered needless.

After full consideration, however, the counsel for Virginia deem it to be their duty, upon the case as it is presented, to earnestly urge objections to a few of the Master's conclusions, in reaching which we are persuaded that he is in manifest error. But it is our purpose to urge no objection to his report which rests upon a proposition which can be fairly regarded as debatable.

I.

The first paragraph of the decree directed the Master to ascertain and report to the court:

> "1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness."

In the view which we take of this branch of the case and for the principal purposes of our argument it will be only necessary to consider the amount of the public debt of the Commonwealth outstanding on the 31st of December, 1860, in the hands of the general public.

Fortunately there is no controversy as to the amount of that indebtedness then so outstanding.

As ascertained by the Master, the amount of that indebtedness is, as fixed by the records of the Commonwealth, as follows:

Aggregate amount of old Virginia debt in the hands of the general public January 1, 1861:

Amount bearing 6 per cent. interest	$30,842,659.43
Amount bearing 5 per cent. interest	2,077,204.50
Interest on 6 per cent. outstanding debt from July 1st to Dec. 31st, 1860	925,279.78
Interest on 5 per cent. outstanding debt from July 1st to Dec. 31st, 1860	51,930.11
Total outstanding indebtedness	$33,897,073.82

See "Plaintiff's and Defendant's Joint Exhibit A-1" R. 215 and Master's Report, pp. 1, 2 and 29.

The authority of law by which, the purposes for which, that indebtedness was contracted, and the dates and nature of the bonds or evidences thereof, are shown by the references and entries upon "Plaintiff's and Defendant's Joint Exhibit A-1;" by the copies of the bonds and certificates of indebtedness issued for much the greater part thereof—"Plaintiff's Exhibit A-2," R. 219 to 285; by the abstract of the statutes in reference to the State debt and the appropriation of the avails thereof to works of internal improvement—"Plaintiffs General Exhibit I," R. 900 to 988; and by other evidence in the case; none of which are any longer matters of controversy.

The only controverted questions which have arisen under this branch of the case have been in respect to the inclusion or exclusion of the sinking fund and the literary fund from the statement of the debt.

As to the sinking fund, frankness compels us to say that we are convinced that the finding of the Master in reference thereto is right.

As to the literary fund, we are content to rely upon the complainant's first exception to the Master's report.

II.

The second paragraph of the decree required the ascertainment of—

> "2. The extent and assessed valuation of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately."

The figures as to the area and assessed valuation of the real estate embraced in the territory of the two States, respectively, and as to the population thereof, with and without slaves, having been taken from authentic public records of the United States and of Virginia, incorporated in "Plaintiff's and Defendant's Joint Exhibit B-1," the agreed statement prepared by the expert accountants of the parties,—those figures have been adopted by the Master and made the basis of his findings under this paragraph of the decree.

We are unable to conjecture how these figures, thus authoritatively established and adopted, or the results deducible therefrom, can now be brought in question. R. 366, 367.

The figures furnished for West Virginia in "Supplemental Exhibit 7," and now relied upon by that State would be more advantageous to Virginia than those adopted by the Master, for the reason that the assessed valuation of the real estate embraced in the State of West Virginia, as given by that exhibit, is larger and the assessed valuation of the territory of Virginia is less than that adopted by the Master, taken from the assessments of Virginia. The figures submitted by West Virginia would make her share of the debt, on the basis of assessed valuation of real estate in the two States, $154,166.09 more than she would owe under the master's findings. But we are content to accept the values adopted by the Master, because we are satisfied that they are correct.

The Master's findings under this head are as follows:

The Extent and Assessed Valuation of the Territory of Virginia and of West Virginia June 20th, 1863, and the Population Thereof, with and without Slaves, Separately.

PARAGRAPH II OF DECREE.

1. EXTENT:

Land Area:

Virginia	40,262 Square Miles	=	62.6314%
West Virginia	24,022 Square Miles	=	37.3686%
Total	64,284 Square Miles	=	100%

Total Area:

Virginia	42,627 Square Miles	=	63.8157%
West Virginia	24,170 Square Miles	=	36.1843%
Total	66,797 Square Miles	=	100%

2. ASSESSED VALUATION:

Real Estate:

Virginia	$296,085,460.31	=	78.2188%
West Viriginia	82,449,252.04	=	21.7812%
Total	$378,534,712.35	=	100%

3. POPULATION:

Estimated—With Slaves:

Virginia	1,221,319	=	75.4855%
West Virginia	396,633	=	24.5145%
Total	1,617,952	=	100%

Estimated—Without Slaves:

Virginia	748,171	=	66.4769%
West Virginia	377,289	=	33.5231%
Total	1,125,460	=	100%

III.

The third account directed by the decree is one ascertaining—

> "3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

This is one of the accounts which is called for under section 9 of the Wheeling Ordinance, which requires that in order to ascertain the proportion of the debt which the new State shall take upon itself, that State shall be charged with "all State expenditures within the limits thereof * * * * * since any part of said debt was contracted."

The divergent contentions of the parties are shown by the tabulated statements embodied in "Plaintiff's and Defendant's Joint Exhibit C-1," pp. 1 to 6, R. 371-377.

The total of said State expenditures in the territory constituting West Virginia, as shown by plaintiff's statements of this account (R. 371) was	$5,639,302.66
As shown by defendant's statements	1,251,288.92
Difference in the two results is	$4,388,013.74

In considering the questions which are presented by the controverted items in the schedules filed under this paragraph, it is important always to bear in mind the precise language of the decree, which, following the terms of the Wheeling Ordinance, directs the ascertainment of:

> "*ALL expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted."

It is manifest that that language in explicit and comprehensive terms, embraces, without exception or qualification, all expen-

ditures of whatever character or description, and on whatever account, or for whatever purpose, or in whatever manner made, which were made by the Commonwealth of Virginia in any part of the territory now constituting West Virginia, after March 19, 1823, the agreed time at which any part of the debt in question was contracted.

The only questions to be considered, therefore, in determining whether any particular expenditure made during that period should be charged against West Virginia, are: First, Was it made by the Commonwealth? and, Second, Was the money expended in West Virginia?

Now, governed by these plain requirements of the decree, the accountants engaged on behalf of Virginia have embraced in this account all such items of expenditure, and only such items of expenditure as were made by the Commonwealth within the territory of the new State during the period stated.

To a number of these items of charge counsel for West Virginia make objections, not on the ground that the expenditures they challenge were not made, or were not made in West Virginia territory, but in some instances because of the manner in which the expenditures were made; in others because of the character of the particular expenditure, or the purpose for which it was made; and in other cases, as for instance the expenditures made in West Virginia on the Covington & Ohio Railroad, and upon the Berryville and Charlestown Turnpike, upon the ground that Virginia has, since these several expenditures were made, in some way, by acts or transactions in reference to these subjects, lost her right to embrace those items of expenditure in this account.

As appears from Joint Exhibit "C-1," R. 371, the charges upon this account allowed by the accountants for plaintiff, and excepted to by the defendant, are classified as follows:

Items of Plaintiff's Charges Excepted to by West Virginia:

Expenditures in W. Va. upon railroads	$1,316,992.42
Expenditures in W. Va. upon turnpikes	430,252.89
Miscellaneous expenditures in W. Va.	1,154,000.10
*Expenditures in bridges, river improvements, banks owned by joint stock companies, and loan to Town of Bath	1,486,768.33
	$4,388,013.74

We will consider these in the order in which they are stated in Exhibit "C-1," and are considered by the Master.

1. The expenditures upon railroads which West Virginia questions, are—

Expenditures on the Covington & Ohio R. R.	$1,146,460.42
Expenditures on the Winchester & Pot. R. R.	170,532.00
	$1,316,992.42

(1) The expenditures upon the Covington & Ohio R. R. This item of $1,146,460.42, is allowed by the Master.

The Master very clearly shows the propriety of this item of charge, and little if anything need be said in support of his conclusion.

There is no question that those expenditures were made by the Commonwealth "since any part of the debt was created:" nor that they were made "within the territory now constituting the State of West Virginia."

But opposing counsel claim that in some way Virginia has lost her right to have those expenditures charged against West Virginia by reason of the public acts and transactions of Virginia and West Virginia in reference to this railroad. This ob-

NOTE:—The charge under this paragraph for amounts invested in Bank Stocks is withdrawn, as those stocks should be accounted for under Paragraph VII. and have been allowed by the Master under that Paragraph.

jection has been stated so vaguely that we are at a loss to know upon what ground it is based.

The Covington & Ohio Railroad was owned and built by the Commonwealth under the Acts of February 15, 1853; March 13, 1856; March 20, 1858, and February 29, 1860. (Appendix 33, 34.) The work was unfinished at the time of the formation of the State of West Virginia, though over $2,787,000.00 had been then spent upon it.

How West Virginia should account for that property and the expenditures which it represented, was distinctly prescribed by section 9 of the Wheeling Ordinance (App. 119, 122), and was prescribed nowhere else.

After June 20, 1863, West Virginia owned the portion of the Covington & Ohio Railroad in that State as completely as Virginia owned the portion of that road within her limits.

As is shown by the subsequent legislation of the two States, both States were very anxious to secure the completion of that railroad from its intersection with what was then known as the Virginia Central Railroad at Covington, Virginia, to a point on the Ohio River, thus giving a through railroad connection from Richmond, Virginia, through the entire state of West Virginia to the Ohio river at the mouth of the Big Sandy, or at the mouth of the Great Kanawha, with the right to build to both points.

Both States were, as is shown by that legislation, willing to give to the company which should complete that through line of railway, the right of way and property of each State, respectively, in the parts of the unfinished road located in each State, and the benefit of the large expenditures made in its partial construction. Virginia, though very little of the proposed new railway would be within her limits, made still more liberal concessions to the builders of the through road, in reference to the sale to the new company of the Blue Ridge Railroad wholly within Virginia, and to the sale of the stock of Virginia in the Central R. R. Co., and to the settlement of the indebtedness of the Central R. R. Co. to Virginia.

To effectuate the purposes of the two States, concurrent Acts

were enacted by their respective Legislatures for the incorporation of the Covington & Ohio Railroad Company, passed by Virginia February 26, 1866, (Appendix 35), and by West Virginia March 1, 1866, (Appendix 37), and to authorize the consolidation of the Covington & Ohio Railroad Company with the Virginia Central Railroad Company and other companies, and the formation of the Chesapeake & Ohio Railroad Company for the purpose of completing "a continuous line or lines of railroad from the waters of the Chesapeake to the Ohio river," passed by West Virginia February 26, 1867, (Appendix 40), and by Virginia March 1, 1867, (Appendix 43.)* See also section 9 of Act of Virginia Feb. 26, 1866 (App. 36), and section 9 of Act of West Virginia March 1, 1866 (App. 39.)

It will be seen that the interests which West Virginia had in the building of the proposed railroad were far greater and more vital than those of Virginia.

West Virginia at that time had no railroad within her limits, except the Pennsylvania across the Pan Handle, and the Baltimore & Ohio through the northern portion of that State.

The New river and Kanawha valleys, and the entire southern portion of West Virginia, were without a mile of railroad, and large parts of those sections were inaccessible to the outside world by any practicable line of communication.

The enterprising young State accordingly freely donated all the property rights which she had in the Covington & Ohio Railroad, situated within her limits, to the builders of that railroad, just as the older State, in larger degree, contributed even more generously to the same important object.

The legislation of the two States upon this subject, printed in the Appendix, pp. 35 to 49, will be read in vain to discover any provision which can be so wrested as to be construed to refer in any way to the liability of West Virginia to pay some part of the

*By Act of January 26, 1870, the Legislature of West Virginia amended the charter of the Chesapeake and Ohio R. R. Co., and confirmed the contract made by the commissioners on behalf of the two States with the Virginia Central R. R. Co., under authority already granted by Virginia, by the Act of February 26, 1866 (Appendix p. 35-36) and by West Virginia by Act of March 1, 1866 (App. 37-39 and 46.)

Virginia debt, or to release that State from any part of that liability.

Those concurrent enactments can be construed to do only what they did do, that is, to give the consent of the two States to the establishment of, and by their respective grants to secure, a through line of railway from the waters of the Chesapeake to the banks of the Ohio, and to grant the property rights of each State in and to the portion of the respective railroads situated in each State, to the consolidated company, for that purpose.

The Wheeling Ordinance prescribed the basis on which the proportion of the Virginia debt to be assumed by West Virginia was to be ascertained, and vested in the new State the ownership of the portion of the Covington & Ohio Railroad located in West Virginia, and there is not a line or a syllable of those concurrent Acts of the two States in reference to the Chesapeake & Ohio Railroad, which can be construed to repeal or to modify the provisions of that Ordinance.

It would require far-off and capricious flight of the imagination to construe the language of those concurrent Acts so as to make them operate to prevent Virginia, when she comes to have a settlement with West Virginia as to the part of the common debt which West Virginia should pay, from insisting that West Virginia should, according to her own agreement, be charged in making up that account with the amount expended upon the Covington & Ohio Railroad within the limits of the new State, if the Wheeling Ordinance is to control to any extent in that accounting.

There is nothing in any of these concurrent Acts of the two States to suggest that either State was conceding anything to the other. Both were conceding a great deal to the Covington & Ohio and to the Chesapeake & Ohio Railrod Companies, and for obvious reasons.

The account of this matter, as claimed by the plaintiff and found by the Master, is distinctly responsive to the decree.

That claimed by the defendant would not satisfy the decree, and cannot be set up without going counter to both the decree and the Ordinance.

(2) The expenditures upon the Winchester & Potomac Railroad in West Virginia .....$170,532.00.

The Master rejected this item of charge—15/27th of it because it was a loan by Virginia to the railroad company, and 12/27ths of it because it was, in his view, an investment made by the State in the shares of the capital stock of this Company.—Master's Rep. 47; Joint Exhibit C-1, p. 2; R. 373.

We cannot be unmindful of the fact that there are circumstances connected with Virginia's dealings with the Winchester & Potomac Railroad Company, which sharply differentiate any charge on account of her expenditures in West Virginia upon that railroad from the other expenditures made by the Commonwealth in building works in West Virginia territory, which were built through internal improvement companies.

We are constrained to admit that the circumstance that Virginia commuted all her claim against, and interest in, that company under the Act of February 24, 1846 (App. 30, 31), gives West Virginia a strong equity to have that charge eliminated from the account, even though it be true that the transaction was not consummated and Virginia was not paid the commuted price, until after the formation of the new State.

We, therefore, beg leave to withdraw our objection to the disallowance by the Master of this item of Virginia's claim.

We do not, however, at all assent to the reasons upon which, in part, the Master bases his rejection of so much of this item as was represented by the shares of stock which Virginia received therefor.

We will consider those grounds under the next head, when we come to discuss the question presented distinctly as it is there, free from other complications, in connection with the large expenditures made by the Commonwealth through internal improvement companies, in building roads, turnpikes and bridges, etc., upon West Virginia soil.

(3) *Expenditures made by Virginia in West Virginia territory in the construction of works of internal improvement*

located in West Virginia but built through the agency of joint stock companies.

Passing over a number of items under this paragraph of the decree, as to which the findings of the Master, in so far as they are in favor of the contention of the plaintiff, afford no just ground of objection to the defendant, for the reasons clearly shown by the Master, the only items of charge against West Virginia under that paragraph of the decree, to the disallowance of which we deem it our duty to object, are the items specifically stated in complainant's second exception, as follows:

(1) For Bridges: Expenditures made by Virginia upon bridges in West Virginia territory, built by joint stock companies, owned partly by the Commonwealth—Items 57 to 65, inclusive, of Joint Exhibit C-1, p. 4; R. 375; Special Master's Report, p. 85—aggregating		$ 78,412.50
(2) Expenditures made by Virginia in the improvement of the navigation of West Virginia rivers by joint stock companies—Items 66 to 69, inclusive, of Joint Exhibit, C-1, p. 4; R. 375; Special Master's Report, p. 85—aggregating		$ 210,500.00
(3) Expenditures made by Virginia upon turnpikes wholly in West Virginia territory, built by joint stock companies:		
(a) On Charlestown & Berryville turnpike, in West Virginia—Item No. 6 of Joint Exhibit, C-1, p. 2; R. 373; Special Master's Report, pp. 64, 84	$ 11,932.52	
(b) On turnpikes and roads mentioned in Items 70 to 147, inclusive, of Joint Exhibit,		

C-1, pp. 4, 5 and 6; R. 375, 376 and 377; Special Master's Report, pp. 78, 79 and 85	$803,555.83	
Total expenditures made by Virginia, through joint stock companies, on turnpikes and roads in West Virginia territory	$815,488.35	815,488.35
Total aggregate of items, the disallowance of which is here excepted to		$1,104,400.85

This exception raises one of the most important questions in the case under the Wheeling Ordinance and the provisions of the first Constitution of West Virginia as it involves $1,104,400.85, principal sum, of the amount of the debt to be assigned to West Virginia.

With the utmost deference for the ability, learning, and fairness of the Master, we are convinced that he erred in his rejection of these items of the account against West Virginia.

We believe that there is no question as to the propriety of their being charged against West Virginia under Paragraph III of the Decree and under the language of the Wheeling Ordinance. If we fail to demonstrate this, it will be because of our inability to fairly present to the minds of the court the facts and considerations which should control in the decision of the question.

The principal grounds upon which this objection to the Master's finding is based are concisely stated in the formal exception taken thereto.—See Complainant's Exceptions, pp. 4 and 5.

The material facts as to all of these expenditures are, for the purpose of this inquiry, substantially the same, and the same principles should control in determining the proper disposition to be made of these items, in the accounting.

The money appropriated by the Commonwealth in each instance was unquestionably expended in West Virginia territory; for all of these improvements were physically located in West Virginia counties.

The chief ground relied on for excluding these items from the debit account against West Virginia is, *because of the manner in which the expenditures were made;* that is, because they were not made by the State directly through the hands of her own officers or immediate employees, but were made by the State indirectly through the medium of joint stock companies; that they were not made upon bridges, locks, dams and other improvements in rivers, and upon turnpikes, wholly owned by the State, but upon such works of internal improvement as were only partly owned by the State.

The works and highways upon which these expenditures were made in every instance had their situs in West Virginia, and the State money appropriated to them was expended in West Virginia.

The chief difference between these expenditures and those made directly by the State through its own officers and employees, which are conceded by the defendant to be proper charges under this head, was, that in the one case the State received a certificate of stock in a joint stock company (which stock usually proved valueless), as the representative of the expenditure, while in the other case the State would receive merely a receipt or voucher from her officers as an evidence of the outlay.

In either case the Commonwealth, and West Virginia as her successor, received the benefit of the bridge, improvement of navigation, or turnpike on which the State money had been expended; and it is manifest from the history of these public works that the benefits which it was hoped that the public would derive from their construction generally constituted the chief inducement and consideration both to the public and to private investors.

There can be no question that any expenditure made by Virginia, by her several and independent acts, upon any work of internal improvement, or other object, in West Virginia, during the defined period, is a proper and necessary charge against West Virginia under the terms of the 3rd paragraph of the decree, and under the Wheeling Ordinance.

This is conceded by the counsel for West Virginia.

Now, it is equally clear that any such expenditure made by Virginia in association, or in partnership, with other corporations or individuals, would be also a proper and necessary charge against West Virginia under the decree and Ordinance.

Here, in a number of cases, Virginia, instead of going into an ordinary partnership with her associates in the various enterprises in question chose to form a limited liability company to do the same thing which could have been effected by an ordinary partnership; for a joint stock company is, in law, and in fact, nothing more than a limited liability company.

In the country from which we so largely derive our institutions and our laws, they are termed "limited liability companies."

How can it be even plausibly contended that, because Virginia, for obvious considerations of convenience and public interest chose to expend her input in these public improvements and other enterprises in West Virginia territory, through the medium or agency of a limited liability company, such expenditure is any less an expenditure by the State than it would have been had it been made through an unlimited liability partnership?

There is no qualification of the expenditures which are to be charged, such as counsel for West Virginia have had to attempt to make, either in the decree or in the Ordinance. The words "direct" and "indirect" are not found in either decree or Ordinance. No such classification is justified by the language of either the decree or the Ordinance.

Opposing counsel are forced by the stress of their case to interpolate the word "direct" both in the decree, and in the Ordinance, an interpolation which, while deemed necessary for the purposes of their argument, is absolutely unwarranted by the decree or by the Ordinance.

But even if that word were in the decree and Ordinance, it would not justify their contention; for an expenditure such as the State made in the improvement of Coal River, or upon the Huntersville and Parkersburg Road, or upon any one of the turnpikes and roads built partly by State aid, was a *direct* expenditure by the State, though paid, for the purpose of building the road or

other internal improvement, to the treasurer of a corporation having its domicile and situs in West Virginia territory.

It is a conclusive answer to all of these objections to these items of expenditure that the account directed by paragraph 3 of the decree is not limited to such expenditures as were made directly by the State; nor to expenditures made upon bridges, locks, dams, and sluices, and upon turnpikes wholly owned by the State; nor to expenditures for which the State received no return, nominal or otherwise, in the shape of shares of stock. That account is required by the decree to include "*all expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

The question considered by the Master, and which he has decided in the negative, is, as stated by him:

"Whether the subscribing and paying for stock in an internal improvement company, whose improvements were located within the limits of West Virginia, was 'an expenditure made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia' etc."? (See Master's Report, p. 47.)

With the utmost deference, that is not an accurate statement of the question presented here.

The exact question is:

Whether the expenditures made by Virginia in works of internal improvement physically located in West Virginia lost their character as State expenditures in that territory, because those works were built by joint stock companies formed by Virginia and individuals and corporations for the purpose of building those very turnpikes, roads, bridges, &c., and the Commonwealth received stock of such companies for the money so expended by her through them upon said works?

The history of the internal improvement system, and of the legislation of Virginia in regard thereto, as shown by the records and statutes of the Commonwealth, significant portions of which are referred to by the Master in his discussion of this subject at pages 47 to 55 of his report, will show, beyond controversy, that the paramount and controlling motive of the Commonwealth in all

these expenditures of money upon works of internal improvement was, not any direct or pecuniary return for the money expended in the shape of dividends or interest thereon, but was the advancement of the local and general interests of the people by the development of the resources of the Commonwealth, and of the facilities and lines of communication between the different sections of the State and the markets of the country.

It was the "public utility" which would be served by the construction of these works of internal improvement which the General Assembly had in mind, and not the return which might be expected in the shape of dividends upon the stock which was issued for these investments.

This will be apparent from reading the extracts from the public records of the Commonwealth, which show the purpose, policy, and motive of Virginia in expending her money on works of internal improvement, built by internal improvement companies, printed with this Note of Argument as Appendix II.

Noticing further one of the grounds chiefly relied upon for the exclusion of these items of expenditure, namely, that the expenditures were "investments" made by the State with a view to realizing some profit from them, we would say: That, while it was true that the hope of ultimate financial gain, or of some profitable return from the investment, was in some instances at least one of the inducements which led Virginia to make those expenditures in works built through the agency of joint stock companies, that was in no instance the dominant or controlling motive.

But, if the hope of ultimate financial gain constitutes any reason for excluding these public expenditures from the debit account against West Virginia, then there are few, if any, of the expenditures, which were made by Virginia in West Virginia counties which would not, by the same token, be excluded upon the same ground.

There were, and in the nature of things there would necessarily be, very few, if any, expenditures made by the State of the character indicated, which were not, or would not be, made in

whole or in part in the hope that they would not prove absolutely unprofitable.

The fact is that nearly the whole of the expenditures admitted by West Virginia to have been properly chargeable under this item, amounting to $1,251,288.92, were expenditures made in part with a view to the direct profits which it was hoped would be realized by the State from them in the shape of tolls or other income from the works thus constructed, as well as the anticipated indirect profits from the development of the territory which those works of internal improvement would serve.

For example, of the expenditures made by Virginia on turnpikes and roads in West Virginia, which are admitted by the defendant, there were expended—

On the Northwestern turnpike $469,148.53,
And on the Staunton & Parkersburg turnpike 264,043.07,

Or $733,191.60,

of the total admitted items of $859,050.92.—See Plaintiff's and Defendant's "Joint Exhibit C-1, p. 2," R. 373.

Now it will be found that Virginia actually derived in tolls from these two investments the following sums:

From the Northwestern turnpike $126,339.89
From the Staunton & Parkersburg turnpike 17,080.71

Or a total of $143,420.60

See Plaintiff's and Defendant's Joint Exhibit F-1, R. 805.

So we see that, of the two grounds of objection to the allowance of these charges against West Virginia;

(1) that the expenditure may be regarded as an investment made by the State, or,

(2) that anticipated profits or income may have been a motive for the expenditure, neither constitutes any just criterion or ground for either the allowance or rejection of such expenditures.

The fact is, undoubtedly, that every dollar expended by Virginia in works of internal improvement was an *"investment."*

Another pregnant fact is also unquestionably established by the record in this case, that by far the greater part of the money thus expended was expended in the hope of some direct return from the investment; and that every dollar that was expended was expended with the expectation of some indirect, ulterior, or ultimate return through the improvement and development of the territory in which the several works of internal improvement were constructed.

It is also true beyond a doubt that nearly all of these investments made by the Commonwealth in West Virginia territory, whether made in the works wholly owned by the State, or made in works owned by the State in conjunction with other stockholders, proved, so far as dividends or direct earnings were concerned absolutely unprofitable and unremunerative; and that some of the investments made by the State in works wholly owned by the State proved more remunerative than the expenditures made through the agency of joint stock companies in the construction of similar works of internal improvement.*

It is a significant fact that the view which is here urged as to the expenditures of the Commonwealth in works of internal improvement constructed in West Virginia territory and as to the classification of such of those expenditures as were made through the media, or agency, of joint stock companies is the view heretofore consistently taken by the representatives of West Virginia most familiar with the subject.

The eminent citizens of that State who constituted the Debt Commission appointed by the Governor of West Virginia pursuant to the resolutions adopted by the Legislature of that State

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NOTE:—It is an important circumstance in this connection that every expenditure made by the State on internal improvements whether built by the State or by joint stock companies, was, by the terms of the Act of February 5, 1816, and the Acts amendatory thereof, made exclusively for the purpose of building such works. Any earning or profit received from any such investment went into the Internal Improvement Fund, to be there used for building other internal improvements. So that the only hope of gain or prifit, which actuated Virginia in making all cf these expenditures or investments, was to provide money to build roads, bridges, turnpikes and railroads to which every dollar thus received was dedicated.

See Appendix II, to this note of argument.

February 15th and 20th, 1871, in the elaborate report made by them on the 7th of August, 1871, reviewing the entire subject of West Virginia's liability for a portion of the Virginia debt, found that the expenditures made by Virginia in the construction of turnpikes and bridges, and in the improvement of rivers, built or improved by joint stock companies, were properly chargeable against West Virginia under the Wheeling Ordinance in like manner as were expenditures on roads constructed wholly on the State account.

Accordingly we find that in their report they charge West Virginia with $3,343,929.29 "for amounts expended and invested in her territory," the items of which they state in detail in Statement "F," exhibited as part of their report, which sum and the items of which it consists include large amounts expended in West Virginia through the medium of joint stock companies, as will be seen by an examination of that exhibit.—See Report of West Virginia's Debt Commission, West Virginia's Compilation of the record of *Virginia* v. *West Virginia*, Vol. 1, pages 471, 472, and Statement "F," 479 to 486, filed by the defendant in the clerk's office of this court.

The gentlemen composing that Commission were J. J. Jackson, J. M. Bennett, and A. W. Campbell. Mr. Bennett had been the first auditor of Virginia from 1857 to 1865. Messrs. Campbell and Jackson were active participants in the movement for the formation of the new State of West Virginia. Gen. Jackson was a member of the Wheeling Convention, and Mr. Campbell was one of the leaders throughout the movement for the establishment of the new State. They were doubtless familiar with the inside as well as with the outside of that transaction, and with the true intent and meaning of the Wheeling Ordinance.

There are some very large errors of omission in Statement "F," and patent errors on the face of their report; but still it serves a valuable purpose in showing what was the construction placed upon the Wheeling Ordinance in this regard by these very intelligent representatives of West Virginia in the very earliest stage of

this controversy,—at a time when most of the framers of that Ordinance were still alive.

Two years later, in December, 1873, a Committee of the Senate of West Virginia, of which Mr. J. M. Bennett was the chairman, came to again review the question of West Virginia's liability for the debt of Virginia.

In a carefully considered report, dated December 22, 1873, that committee unanimously adopted the figures above given as to the amount expended by Virginia in West Virginia territory and which they conceded to have been "contributed to the development of the territory of West Virginia."

This last mentioned report is printed as Exhibit No. 3 with the Answer of the Defendant, R. 166, 167, 168, 169.

When, years afterwards, West Virginia was urging the payment of her claim against the United States for the refunding of the direct tax, which was being withheld because the United States held certain bonds of the old State for the payment of which it was claimed that West Virginia was liable, Messrs. Alfred Caldwell, formerly attorney general, and E. W. Wilson, former Governor of West Virginia, in their brief filed before the attorney general of the United States again adopted the construction of the Wheeling Ordinance previously approved by the West Virginia Debt Commission, and by the Finance Committee of the Senate of West Virginia.—See quotation from brief of Messrs. Caldwell and Wilson, printed as Appendix No. III to this Note of Argument.

This construction of the Wheeling Ordinance in respect to the expenditures made by the Commonwealth of Virginia through the agency of joint stock companies in the territory of West Virginia adopted by the representatives, public officials and eminent citizens of West Virginia most familiar with the subject remained unchallenged for more than a generation, until after this suit was instituted, when a new and strange light seems to have dawned upon the representatives of that resourceful State, and for the first time in all the long agitation and discussion of this subject a new, and we respectively submit, a forced and unnatural, con-

struction is attempted to be placed upon the Wheeling Ordinance, so as to limit the amount for which West Virginia is to be charged on account of expenditures made by Virginia in West Virginia territory, so that the account shall not embrace "ALL EXPENDITURES," but so that it shall include only a portion, and much the smaller portion, of those expenditures.

The decree requires the Master to report ALL expenditures—but the Master distinguishes between expenditures, classifying them as "direct" and "indirect," and construes the decree and the Wheeling Ordinance as referring to expenditures made by the State through its officials, which he classifies as "direct" expenditures and as excluding expenditures made by the State through the agency of joint stock companies, which he classifies as "indirect" expenditures; and he states the following reasons for his finding:

> "To hold these subscriptions thus made for investment to be expenditures by the State 'within the territory' it would be necessary to read into the decree the words 'either directly or indirectly' which I do not feel at liberty to do." Master's R. 62.

The language of the decree and of the Ordinance is explicit, and we agree that the Master was not at liberty to read anything into either; but in order to support the conclusion he has reached he has been obliged to read into the decree the word "direct," and by construction to hold that the court and the Wheeling convention when they used the word "All" meant something less than all; that they meant by "all" expenditures only such as the Master has classified as "direct."

We submit that this construction is not warranted, and that there is no authority for the Master under the language of the decree, which requires a report of ALL expenditures, to classify expenditures as "direct" and "indirect" and allow only such as he classifies as "direct." The effect of the Master's construction is to read out of the decree the word "ALL" and substitute for it the word "direct;" and then to give to that substituted word a narrow meaning not justified by the facts and circumstances of the case.

SUMMARY.

The Master has allowed under this paragraph of the decree as proper charges against West Virginia, items amounting to $2,811,559.98

To this we are convinced that there should, beyond peradventure, be added, for expenditures made by Virginia in bridges, improvement of rivers, turnpikes and roads, through the agency of joint stock companies organized by Virginia for that purpose, the items mentioned in the tabulated statement on pages 28 and 29 of this Note of Argument, aggregating 1,104,400.85

Giving a total of State expenditures in West Virginia—the aggregate amount chargeable against West Virginia under Paragraph III of the Decree $3,915,960.83

See Master's Report, pp. 47 and 83; R. 399, 401, 433, 459, 478, 488 and 512.

The findings of the Master as to the other items passed upon by him in response to the third paragraph of the decree, and not here specifically objected to by counsel for the complainant, are, we think, in the main shown to be correct upon the face of his report, and by the evidence in the cause, and are accepted on behalf of the complainant.

IV.

The fourth paragraph of the decree directs the ascertainment of—

> "4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States."

The differences in the computation of the total ordinary expenses of the State government between March 19, 1823, and January 1, 1861, as stated by the Master, and as claimed by the defendant, arise entirely from the difference in the classification of the several items of State expenditures during the prescribed period.

The defendant has so classified the greater part of these expenditures as to exclude them from this account. The Master has treated most of the State expenditures during that period as being ordinary, and has included them.

This inquiry is manifestly predicated upon the language of the Wheeling Ordinance, which provides that the new State shall be charged with "a just proportion of the ordinary expense of the State government since any part of said debt was contracted."—R. 6.

The decision of the issue thus presented turns upon the meaning which those words carry in that connection; and their correct interpretation is necessary to enable us to determine the items of expenditure which go into this account.

The defendant has construed that language most narrowly, and so as to exclude many items, not only of usual and ordinary public expenditures, but also many that are appropriate and necessary for meeting important and usual, if not essential, wants of the people of the State under the conditions of civilization obtaining in this country for more than a century.

Nor are the ordinary expenses of a State government merely those which are necessary and regular in their occurrence, but quite as largely such as are usual, though not periodical, and such as are appropriate, though not essential, to the needs and aspirations of an enlightened and progressive people, and as are lawful.

In the constrained and narrow meaning ascribed to those words, and the consequent classification of State expenditures, made by the defendant, the contrast has been between some selected usual regularly recurring expenditures of what are claimed to be of a purely governmental character on the one hand, and all other expenditures of the State government, however proper, lawful, appropriate, regular, or indeed necessary in a free American State, on the other hand.

Now we respectfully submit that the contrast implied here is not between the word "ordinary" on the one hand, and the word "regular," or even the word "annual," or any combination of those words, on the other hand.

The contrast is, and was manifestly intended to be, between "ordinary" and "extraordinary,"—all ordinary expenses of the State government not already embraced in the account being intended to be included, and all extraordinary expenses to be excluded from the computation of the expenses, a just proportion of which should be charged against the new State.

Nor is the inquiry limited by its terms to such expenses as may be argued to be purely governmental,—as, for instance, the "civil list," and such as are usually incurred by a government acting in its political capacity. There is no such limitation expressed or suggested by the language of the decree or of the Ordinance.

The account is required to embrace "the ordinary expenses," and therefore *all* of the ordinary expenses of the State government, during the prescribed period, not embraced in the preceding account, of whatever character, must be included in it, so that it is not necessary for us to enter upon the field of conjecture and speculation, which opposing counsel would have us traverse, in order to determine what expenses were, and what expenses were not, distinctly governmental.

The fact is that under the uniform practice of enlightened States and communities such expenses as are usual, though not regularly periodical, and as are necessary, or appropriate, and are lawful—that is, *within the legitimate powers of the State government*—are ordinary expenses, and such as are unnecessary, or abnormal are to be considered as extraordinary expenses of a State government.

In a modern State, and particularly in a State of the American Union, caring for, conserving and promoting the economic and material, as well as the social, sanitary, physical, intellectual and moral welfare of its people, many expenditures which may not be regarded as strictly governmental, and some which may not be absolutly necessary, are proper, lawful, usual and ordinary.

It will be found that the terms "ordinary expenses of government" have been carefully considered by learned, trained, and able experts upon the subject of State revenues, expenditures, and finance, by experienced statisticians and accountants, and by courts of high standing, and that these authorities sanction the reasonable and natural construction and application of those term which we claim to be their true meaning and intendment.

The following are some of the precedents and authorities bearing directly upon this subject, to which we have had access. They will be found to clearly and absolutely confirm the views above expressed.

We give, first, the classification as adopted by the United States government.

The ordinary expenditures of that government are classified and stated as given below.

For this we take as an example the statements for the fiscal year ending June 30, 1874, from the Report of the Secretary of the Treasury of the United States, as follows:

"For Civil Expenses	$ 17,627,115.09
For Foreign Intercourse	1,508,064.27
For Indians	6,692,462.09
For Pensions	29,038,414.66

For Military Establishment, including Fortifications, River and Harbor Improvements and Arsenals	42,313,927.22
For Naval Establisment, Including Vessels and Machinery, and Improvements at Navy Yards	30,932,587.42
For Miscellaneous Civil, *Including Public Buildings, Light Houses,* and Collecting Revenue	50,506,414.25
For Interest on the Public Debt	107,119,815.21
Total *Net* Ordinary Expenditures, Exclusive of the Public Debt (that is payments on the Public Debt)	$285,738,800.21"

Report of the Secretary of the Treasury of date December 7, 1874, page iv.

At page v of the same report, Hon. B. H. Bristow, the then Secretary of the Treasury, gives a similar itemized summary and classification of the ordinary expenditures of the National government for the first quarter of the fiscal year ending June 30, 1875. And on page vii of the same report he gives an estimate of the ordinary expenditures of the government for the fiscal year ending June 30, 1876, amounting to $272,778,000.00, made up of the items as stated and classified in the statements of actual expenditures for the two preceding years.

In this statement there is estimated for,	
Interest on the public debt	$98,000,000.00
On the Pacific Railway bonds	3,878,000.00

as part of the ordinary expenses of the government.

The report of the Secretary of the Treasury for 1904 (House Documents, 58th Congress, Vol. 31, p. 5) gives the total *ordinary* expenditures, exclusive of Postal Service:

	For 1903	For 1904
	at $506,099,007.04	at $582,402,321.31
including in these aggregates the following:		
For Indian Service..	$ 12,935,668.08	$ 10,438,350.09
For Pensions	138,425,646.07	142,559,266.36
For interest on Public Debt	28,556,348.82	24,646,189.81

The attention of the court is called to the items which make up the above aggregate of expenses for those years which are given on pp. 3, 4 and 5 of that report, which will be found to be very interesting as showing what expenditures of the government were classified as "ordinary."

The annual report of the Secretary of the Treasury for year ending June 30, 1908, gives the following statement of the ordinary expenses of the United States government:

"*Disbursements*:		
Civil Establishments		$175,420,408.57
Military		175,840,452.99
Naval		118,037,097.15
Indian Service		14,579,755.15
Pensions		153,892,467.01
Interest on Public Debt		21,426,138.21
		$659,196,319.68
Postal Service		191,478,663.41
Total *ordinary* disbursements, including Postal		$850,674,983.09

See also the classification of ordinary expenses of the National government tabulated for the ten years ending June 30, 1890, in the Eleventh Census. House Miscellaneous Documents, 1st Sess. 52d Cong., 1891-92, Vol. 50, Part II., "Wealth, Debt, and Taxa-

tion," pp. 418, 419. The more carefully these tables are examined the more confirmatory they will be found of the natural and reasonable construction of the words "ordinary expenses of the government of Virginia," adopted by the accountants for Virginia.

Examples to the same effect, as to the practice of the United States government in the classification of the expenditures which are ordinary expenses of government might be multiplied, but the above will suffice.

As to the expenses of State governments which are regarded and treated as "ordinary," we beg leave to refer to the volume of the 11th Census of the United States, just cited, where at page 464 to 477 the annual and aggregate ordinary and other expenditures of each of the States of the American Union are stated for each year and for the decade ending with the fiscal year 1890.

It will be seen that in each instance the great mass of the expenditures of the State governments of a public character, including "charities and gratuities" (such as the maintenance of eleemosynary institutions and pensions), and, including in every case "interest on State debt," are counted as ordinary expenditures of the State governments.

At pages 516 to 533 of the volume of the 11th Census just cited will be found a tabulated statement of the expenditures of 1,319 counties of the different States reporting in 1890, in which there is a compilation of such county expenses as are to be considered as "ordinary," which gives data very interesting and pertinent to our present inquiry. In every instance the "interest on county debt," as well as a number of other items of public expenditure of a more or less irregular occurance, and not at all always politico-governmental in their character, such as expenditures coming under the heads of "Buildings, grounds, and *improvements*," "Roads, ditches, and *bridges*, charities and *gratuities*," and "*Miscellaneous*" are put inthe category of ordinary expenses of government.

The same comments will be found to apply with emphasis to the returns and classification of the expenditures of cities having 50,000 or more inhabitants given at pages 556-557; and to the tables giving

the same statistics as to municipalities having 4,000 or more, but less than 50,000 inhabitants, at pages 580-590 of the same volume of the 11th Census.

Strongly confirming the reasonable classification for which we contend will be also found the practice of both the States and cities of our country on this subject.

In this connection we would call attention to the Report of the "Bureau of Inspection and Supervision of Public Offices" of the State of Ohio for 1906, which gives conparative statistics of cities of Ohio. This report gives us a scientific and accurate clas-ification of all public expenditures.

At pages 72-89 is printed a detailed schedule of ordinary expenditures of the cities of that State, each of which embraces the great mass of the expenditures of those cities for any public purpose, and in every instance counts interest upon the public debt as an "ordinary" expense.

A very valuable contribution to the law and literature upon this subject is the 46th Annual Report of the Comptroller of the City of Chicago, 1902. This particular report is of all the more significance because it is approved by Messrs. Haskins & Sells, Certified Public Accountants, of 30 Broad Street, New York, who were employed by the City of Chicago to supervise the preparation of all portions of the Comptroller's Annual Report relating to the receipt, accounting for, and disbursement of moneys for the year 1902. (See their certificate at page 43.) This is all the more interesting because Mr. Thomas Bird Dixey, the accomplished chief accountant for West Virginia, testified that he was at one time the manager of Messrs. Haskins & Sells. At pages 90 to 97 of this report will be found tabulated statements giving in considerable detail the items of the ordinary expenses of the City of Chicago for the year 1902, and the extraordinary expenses of that city for the year 1902, at page 98.

It will be seen that all interest paid, whether on bonded debt or upon miscellaneous accounts, and all cost of exchanges is charged as an ordinary expense of the city, and so also a vast number of items for salaries, maintenance of charitable and other institutions,

maintenance, repair, and renewal of buildings, etc., are treated as ordinary expenses.

Some items, are by these skilful accountants for Chicago rather arbitrarily classified as "extraordinary," which are among the usual, appropriate and necessary expenditures of city governments, such as the purchase of new boilers for fire boat, the extension or the erection of new bridges, and the enlargement of various public works, expenditures which, however expert accounts may regard them, are, according to judicial interpretation, as well as according to the uniform practice of the Federal, State, municipal and county governments, properly to be classed as ordinary expenses of a municipality or other local government.

Still the classification and system of accounting sanctioned by the City of Chicago supports the correctness of more than 95 per cent. in amount of the items which have been embraced by Virginia in the account of ordinary expenses of the State government.

Very many more examples and precedents from the well-considered and enlightened experience and practice of the National, State, county and municipal governments, in America, can doubtless be cited, but it would be merely cumulative authority for propositions which are almost axiomatic, and the precedents and authorities in the support of which are as to all the items claimed by Virginia overwhelmingly preponderating, and as to more than nineteen twentieths in amount of those items practically unanimous.

We desire now to invite attention to the views of Doctor Bastable, a writer of recognized ability and authority upon any such question.

In his work on "Public Finance," in discussing the subject of "Public Expenditures," that eminent political economist says:

> Sec. 1. "State outlay like that of an individual may be distinguished into normal or 'ordinary,' and abnormal, or 'extraordinary.' These terms almost explain themselves, but may be thus contrasted: Normal expenditure is that which recurs at stated periods and in regular manner; it is accordingly capable of being regularly estimated, and provided for. Extraordinary expenditure has to be made at indefinite times and

for uncertain amounts, and it cannot be reckoned for with any approach to accuracy."

But he adds:

"The distinction is not always applied in the same way, and indeed the boundary line is not sharply drawn." P. 130.

And again on page 132:

"There is also in modern States a greater facility for foreseeing, and so to say discounting the future. The refined financial mechanism by which public borrowing is carried out enables 'extraordinary' expenditure for a short period to be transformed into 'ordinary' expenditure for a long one."

And again at page 133:

"Abnormal expenditure also frequently occurs in a somewhat different way, as in the case of durable public works or other improvements. * * * Outlay of this kind is, in mercantile phraseology, 'chargeable to capital, not to revenue,' and is clearly abnormal. The method almost invariably adopted is to meet the abnormal outlay by an abnormal receipt, viz., borrowing, or to put it in another way, to turn the extraordinary expense of a given year into the ordinary one of interest on debt."

This distinguished author wrote with reference to British precedents. In the States of the American Union there are many subjects of public expenditure which are usual, appropriate, and often necessary, though not regularly recurring, which are doubtless unknown to Great Britain, but which are none the less ordinary.

The tendency of expert accountants seems recently to be to assimilate the accounts of expenditures of governments to those of public service and other like corporations; that is, to treat those which are "chargeable to capital" as "extraordinary," and those "chargeable to revenue" as "ordinary."

A little reflection will show that there are many expenditures of a State which are necessary, proper, and usual under the condi-

tions of modern civilization, and which therefore are "ordinary," but which adds to the public, though not always to the fiscal, assets of the State.

As will be seen, the rule as sanctioned by judicial decision, and by the great majority of precedents, while affirming the main doctrine as laid down by Doctor Bastable, is in this particular somewhat different from that stated by him, and is in accordance with the reasonable and just contention of the plaintiff.

See also paper prepared by Professor T. S. Adams, of the Department of Economics in the University of Wisconsin, which contains an able, learned and non-partizan discussion of this subject, printed as Appendix IV of this Note or Argument.*

These conclusions are also supported by the decision of the Supreme Court of Alabama in the case of the *Intendant and Council of Livingston* v. *Pippin*, 31 Ala. 542, and by the decision in the case of *State ex. rel. Branch* v. *Leapheart, State Treasurer*, 11 South Carolina 458, and by a number of other authorities, which have been ably reviewed by the Master.—See Master's Report, pp. 87 to 113.

There were some items of expenditure which the Master has deemed it proper to reject on the ground that they were not ordinary expenses of the State government, which we think can and should be classified as ordinary expenses. Such is the item of $258,906.28, on account of constitutional conventions, a usual, regular and ordinary expenditure, though not one of periodical occurrence, in Virginia and other States of the American Union; also

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*Note.—This very instructive paper was obtained under the following circumstances:

Mr. Anderson, then Attorney General of Virginia, in 1909, wrote to Doctor Richard T. Ely, of the University of Wisconsin, (than whom there is no more learned and eminent master of the science of Economics in this country), for information as to the most trustworthy authorities upon the subject of public finance, particularly in reference to the proper definition and classification of such expenditures as are "the ordinary expenses of a State."

Doctor Ely referred Mr. Anderson's letter to Professor Adams, for whom he vouched, as being better situated to give the desired information.

Professor Adams, thereupon, prepaid the able and elaborate paper which is printed as Appendix IV hereunto, a service which was generously rendered by him as a free contribution to the literature of this case.

expenditures for establishing boundary lines of the State, for making maps of its territory, and expenditures for the enlargement and improvement of the buildings and grounds of the deaf, dumb and blind institutions, and other charitable and educational institutions of the State, which we think the Master should have allowed as items of ordinary governmental expenditures, under the precedents and under the conditions of life prevailing in Virginia and the other States of the American Union, and in all other enlightened and civilized countries. If, as we are confident is true, the provisions of the Wheeling Ordinance should, under the circumstances under which it was enacted, be construed more strongly against West Virginia, whose citizens and representatives were its actual framers and enactors, then there can be no question but that all of these items of charge against her, rejected by the Master, should be allowed. We are content, however, to submit to the court the propriety of the Master's action in disallowing these several items, without further prolonging the discussion.

We are convinced that the conclusions reached by the Master under this paragraph of the decree, except as to the cost of constitutional conventions and the expenditures upon the instrumentalities and institutions of the State government rejected by him, are in general and in almost every particular, in substantial accordance with the legal and equitable rights of the parties and with the foregoing principles, and we therefore make no other exception to his finding under this head.

The reasoning of the Master and the authorities cited by him in support of his conclusions leave little, if anything, to be said in support of their correctness.

1. *As to the Ordinary Expenses of the State Government.*

The Master finds the total aggregate ordinary expenditures of the Commonwealth during the agreed period, from March 19, 1823, to December 31, 1860, to have been.....$40,274,896.70

Of this sum the defendant concedes the correctness of items aggregating 18,207,784.29

The defendant contests items aggregating $22,067,212.41

The most important of these items of expenditure objected to by the defendant are the payments regularly made by the Commonwealth during all of that period on account of interest on the public debt, aggregating $18,574,747.84.—See Master's Report, pp. 87, 139.

The Master's findings on these different controverted items, and the reasons given by him in support thereof, are so clearly and fully stated by him, and so entirely supported by the record, and by reason and authority, that we are saved the necessity of any very elaborate argument in support of the correctness of those findings.

We will notice only two of the controverted items, the allowance of which by the Master, is objected to by the defendant.

(a)

The Master has allowed, as a proper item of ordinary expenditure of the State, the sum of $3,056,239.64 expended out of the State treasury, during that period, upon schools.—Master's Report, 132.

West Virginia certainly cannot justly object to this charge. There cannot be a shadow of a doubt that this sum was expended in the several counties of the Commonwealth during that period, and that they were annual ordinary expenses of the State government for the purpose stated—the most regular and the most ordinary of all the expenditures of the Commonwealth during that period, except the annual disbursements on account of interest.

The complainant had urged before the Master that so much of the expenditures made by the State on account of schools as were actually paid out in West Virginia counties, being distinctly allocated to those counties, should be charged against West Virginia under Paragraph III of the decree, as being "expenditures made by the commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted," "all" of which expenditures were required by the decree and by the Wheeling Ordinance to be charged against West Virginia.—See Exhibit C-1. p.3, R. 374.

There was no question but that expenditures, amounting to the identical sum of $830,865.37 as shown by that exhibit, had been made out of the State treasury distinctly in West Virginia counties on account of schools between March 19, 1823, and January 1, 1861.

The Master took a different view, his conclusion being that the expenditures made on account of schools should not be treated as distinctly expenditures made in West Virginia territory under Paragraph III of the decree, but as a part of the general, ordinary expense of the State government; and that, instead of charging West Virginia with the sum of $830,865.37, shown by the record to have been actually spent in the counties of that State out of the treasury of Virginia on account of schools, he would ascertain the total amount expended in the State for schools as a part of the ordinary expenses of the State government, and assign to West Virginia her proportion of those aggregate ordinary expenses.

While we think the actual expenditures should have been charged against West Virginia, and not the computed expenditures, we are disposed to waive that point; particularly if the apportionment is made on the basis of the average population *without slaves*, which certainly ought to be the basis adopted, inasmuch as the slaves received no portion of that, or of any other items of the ordinary expenditures of the State government, but as a rule all of said expenditures were made on account of the white population; and, so far as expenditures on account of schools were concerned, they were absolutely confined to white schools and to the white population, and were under the law always actually apportioned upon the basis of free white population.—Appendix to Record, pp. 146 and 147.

Apportioning the total school expenditures on the basis of average white population, as the same is ascertained by the Master (Master's Rep., 141), we have 26.6631 per cent. of $3,056,239.84, or $814,793.53, as the amount assignable to West Virginia; or only $16,071.84—say, 2 per cent.—less than $830,865.37, the agreed proved amount which was actually expended by Virginia in West Virginia counties, on that account, between 1823 and 1861.—See Exhibit C-1, p. 3; R. p. 374.

This result is significant in two particulars of great interest in connection with the question of the rule by which ordinary expenses should be apportioned, which will be considered later on under this paragraph of the decree:

First, in strongly supporting the justice of our contention that the true basis for the apportionment of ordinary expenses is the average white population; and

Second, in showing that that average should be ascertained by decades in the manner approved by the Master.

Stronger confirmation of these two contentions could not be well given than this concrete illustration where the aggregate of proved actual expenditures in West Virginia counties is so nearly the same as the same expenditures in those counties ascertained by estimating them on the basis of total average white population computed by the method adopted by the Master.—Master's Rep., 139, 140 and 141.

We are now come to consider the largest item of this account, involving a question which, because of the amount which it involves, is one of the most important which has arisen in the case, and that is—

(b)

The interest paid by the Commonwealth upon the public debt between March 19, 1823, *and December* 31, 1860, *amounting to* $18,574,747.84.

There were no expenditures of the State government from 1823 to 1861, which were more regular, certain and ordinary than the annual interest on the public debt of the State.

If this was not an ordinary expense of that government, then there was no such expense.

As has been already shown all governments and all authorities, and all expert accountants and statisticians so far as we have been able to ascertain, agree in classifying the interest on a public debt as among the ordinary expenses of government.

It is to be assumed that the framers of the Wheeling Ordi-

ance intended to do equity. At all events, a court of conscience will not put an unconscionable construction upon that enactment, particularly where a natural and reasonable construction can be given to it, and one which will tend to an equitable result.

Now, if the language of Paragraph IV of the decree, and the language of the Ordinance upon which that paragraph is predicated be so construed as not to require the new State to be charged with its just proportion of the regular and ordinary expenses of the State in the matter of the payment of interest on the common public debt, then West Virginia would be given credit in the account for all her contributions to the treasury of the Commonwealth on account of said interest charges from 1823 to 1861, and yet she would not be charged with her aliquot just proportion of those same expenditures.

It is not to be presumed that such an unjust provision was intended to be made by the framers of the Wheeling Ordinance; nor will a court of equity give such a strained, unreasonable and unwarranted construction to the language used in that Ordinance, and used also in the decree of reference as would lead to such inequitable and unconscionable results.

The decree, following the Wheeling Ordinance, requires West Virginia to be charged with a just proportion of the ordinary expenses of the government, and this requirement will not be satisfied, if the largest, the most important, and among the most regular, necessary and ordinary of those items of expenditure are omitted from those accounts.

2. *As to the Basis of Apportionment of the Ordinary Expenses of the State Government*:

The decree directs that this shall be made on the average total population of Virginia, with and without slaves, as shown by the census of the United States.

In ascertaining the average population of Virginia during the period, the defendant argues that the average for the whole period should be ascertained, and the apportionment made accordingly.

The plaintiff has ascertained that average by decades.—(See Exhibit D-1, p. 2, R. 516).

The master has adopted the method approved by the plaintiff's accountants.

The purpose of the court in requiring the average population to be struck was doubtless to get as nearly to the true population year by year, and for the very year in which the expenditures were made, as was possible.

It is manifest that this can be more nearly attained by taking the average for each decade, than by taking the average for the entire forty years in lump.

For instance, the average population for the decade from 1830 to 1840 could be fairly ascertained by taking the population as determined by the census year 1830 and in the census year 1840, and dividing the sum by two, so as to give approximately the average for each year from 1830 to 1840; and so as to each of the other decades. And this has been done accordingly in the account as stated and adopted by the Master.

In no other way can an approximation to the truth be reached, and it is the truth which the court, and which we all wish to attain.

Another important question in this connection is—

Whether the average population with slaves, or the average population without slaves, should be taken as the basis upon which to apportion the ordinary expenses of the State government between Virginia and West Virginia.

This is a question which was left open by the court in its decree of reference, which accordingly has not been passed on by the Master, but is necessary to be decided by the court.

We respectfully submit that the white population of the Commonwealth, and particularly of West Virginia, constituted the best and fairest basis for this apportionment. That is, the free population—the citizenship,—and not the total of the free and the slave population.

The care and policing of the slaves cost the State little or nothing. Those matters were regulated by the masters on the plantations.

The debt was contracted solely by the white population or their white representatives. It was expended by them or under laws of their enactment.

The taxes were levied exclusively upon the property of the free population, andthe revenues were appropriated and expended as they directed.

The negroes owed no part of the debt, did not constitute a part of the citizenship of the State during any part of the period of time during which it was contracted, or the money realized from it was expended; nor did they constitute any part of the body politic.

As has been seen a large part of the ordinary expenses of the government, as classified by the Master, consisted of school expenditures, which were entirely confined to the white children.

Under these circumstances we would urge as a just criterion for the apportionment of the ordinary expenses of the State government between West Virginia and Virginia, the white population of the territory embraced in West Virginia, and of the territory still remaining to and constituting the present Commonwealth of Virginia at the period when the expenditures to be apportioned were made.

V.

The fifth inquiry directed is, that the special Master will ascertain—

> "5. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

As stated by the Master "this paragraph is clearly in the alternative with the last clause of Paragraph IV."

A correct response to this inquiry may have an important bearing upon the equities of the case; but it is difficult to see how the valuation of property, real or personal, in the two States would furnish any just criterion for the apportionment of the ordinary expenses of government.

It will be noted that this paragraph fixes no date as of which the fair estimated value of the real and personal property in the counties constituting what is now Virginia and what is West Virginia shall be ascertained.

The second paragraph of the decree fixed the 20th of June, 1863, the date when the formation of the new State was consummated, as the date for ascertaining the assessed valuation of the lands embraced in the two States, and that date was presumably the one contemplated in the fifth paragraph.

It will be recognized as true that the accurate ascertainment of the value of the real and personal property in a State is an exceedingly difficult problem, at any time.

Because of the conditions of disaster, confusion, loss and destruction of values occasioned by the ravages of the then pending war, the difficulty of the solution of this problem is here greatly enhanced. And yet an approximation to a result fair and just under all the circumstances can, we trust, be reached as nearly as is

practicable, by proceeding along the lines of investigation and testimony which have been pursued on behalf of the plaintiff, and as to the real estate by the Master also. The only difference between the method adopted by the Master in this regard, and that pursued by the plaintiff is that the Master has applied that just method to the ascertainment of the value of the real estate in the two States, while the plaintiff has applied it to the ascertainment of the values of both personal and real property.

The land assessments afforded, if not a fair criterion, the only now accessible standard of value of the lands in the counties of undivided Virginia in 1860.

But those valuations were made in 1856, seven years before June, 1863, at which latter date at least four-fifths of the present territory of Virginia and one-fifth of the present territory of West Virginia had been ravaged and desolated by war, so that that valuation of 1856 afforded no just measure of values in 1863. It would suffice, however, to furnish a basis by which the depreciation occasioned by the war could be approximately determined.

The lands were assessed as of their cash specie value in 1856.

The personal property in Virginia counties was assessed annually, on the 1st of February of each year, as of its then cash value, in the currency which then constituted the medium of exchange and the standard of value.

After the war became flagrant, and particularly in February, 1863, that medium of exchange and standard of value, which was the only currency of the people, and the currency with reference to which as a standard of value all their transactions were conducted, was the depreciated currency of the Confederate States.

This was uniformly true in all the regions dominated by the Richmond governments.

There can be no question that the market values of all personal property, and indeed of all property, real and personal, in Confederate Virginia was, throughout 1863, fictitiously enhanced by reason of the depreciation of the currency in circulation in those regions in which currency alone those values were measured.

This was true also as to West Virginia counties within the Confederate lines, where the assessments were made by officials under the Richmond government.

The personal property in West Virginia counties, outside the Confederate lines, where assessments were made by officers under the Wheeling government, was valued with reference to United States treasury notes (green backs) as a measure of value. The true value of this assessed personal property in these West Virginia counties could be ascertained approximately, therefore, by applying the scale of gold to the assessment in each case.

It was impossible to get the assessed value of the personal property in a number of Virginia counties because they were so ravaged and so harried by war in 1863 that no assessments were made in them of the very small quantity of personal property which was then left there.

As to real estate, it was by no means an easy matter to get at its true value in 1863, and yet a way has been found by which, taking the assessed valuations of 1860 or 1861 as a basis, this has been reached as nearly as is now possible.

A number of witnesses of unusual intelligence, of the highest character, and most of whom had the best opportunities of ascertaining the facts as to the matters in respect to which they testified, were called on behalf of Virginia. Their testimony will be found at pages 739 to 786 of the record. By them the great destruction and deteroriation in value of property, real and personal, in Virginia in June, 1863, is satisfactorily proved, and the fact that the lands had been diminished in value at least one-half, as compared with their value in 1860 or 1861, is established.

This general testimony is powerfully confirmed by the proof of a large number of facts and transactions, proof of actual sales of land in 1863 in Confederate money, and of the valuation by sworn and intelligent commissioners or appraisers of houses and lots in the City of Richmond in the spring, or in June, 1863.

For instance, Capt. Gordon McCabe testified (R. 784) that Westover, an historic estate on James river, for which the owner,

to his personal knowledge, had refused $75,000 in 1859, was sold in 1863 by the owner for $60,000 in Confederate money,—then worth not more than $15,000 or $20,000 in specie; and Major Wellford (R. 762) testified that he was offered the Moss Neck estate on the Rappahannock river, an estate worth at least $40,000 before the war, in the fall of 1863 for $100,000 in Confederate money, then worth about $7,000 in good money; and by Mr. John B. Lightfoot, Jr., a number of most informing and significant facts were proved, which are set forth in the tabulated statements at pages 653 to 664 of the record, which furnish the proof of a number of contemporary sales of lands in Richmond city, Henrico, Hanover and Chesterfield counties, in 1863, at prices showing a depreciation exceeding 50 per cent., as compared with the antebellum assessed values of the same properties.

These were not selected transactions, but Mr. Lightfoot took all of the transactions of the character indicated, which took place about that time, of which the records of those counties and of Richmond City furnished any evidence as to the lands then sold or valued in Confederate money, the assessed value of which in 1860 or 1861 could be ascertained.

The evidence of these concrete facts, taken together with the testimony of the eight witnesses, and the known facts of the history of those times, fully support the contention of the plaintiff that the real estate in Virginia, and in the ten or eleven counties of West Virginia which were usually dominated by the Confederate forces and were generally within the jurisdiction of the Richmond governments, had depreciated at least one-half, as compared with the assessed valuation of the same lands in 1860 or 1861.

The Master has accordingly adopted this valuation as to real estate, and in this he was clearly justified by the proofs, as well as by the history of those times, known and accepted of all men.

To our surprise, however, the Master did not apply the same rules of depreciation to the personal property in the two States.

While he properly finds that the value of the real estate in Virginia had been cut in half and reduced from $296,085,460.30 to $148,042,730.15, he finds that the fair estimated value of the per-

sonal property, including slaves, in Virginia counties had increased, notwithstanding the destruction of war, from $264,512,799 in 1861, to $403,696,228.59 in June, 1863. (See figures given in the Master's report, at pages 167 and 168).

In this finding of the Master he estimated the value of the personal property, other than slaves, in Virginia in June, 1863, at $152,844,637.59, as compared with the estimated value of the same kind of property, as stated by him, in 1861, of $102,114,863,—finding that, notwithstanding the depreciation and destruction caused by the war, the personal property in Confederate Virginia was actually worth, in June, 1863, $50,729,774.59, (or nearly fifty per cent.), more than its fair estimated value in 1861.

An examination of the figures adopted by the Master, given on pages 167 to 169 of his report, will show that he gives, as the fair estimated valuation of all personal property, including slaves, in Virginia counties in June, 1863.....$403,696,228.59

Of all personal property, without slaves, in the same counties 152,844,637.59;

And that accordingly he computes the fair estimated value of the slaves in Virginia counties, in June, 1863, to have been.....$250,851,591.00;

While he finds that the fair estimated value of slaves in the same counties in 1861 was....$162,537,936.00, the *agreed* valuation of slaves in those counties in that year.

The Master's findings, therefore, give us the astounding result, that a considerably smaller number of slaves in Virginia counties in June, 1863, (nearly six months after Mr. Lincoln's emancipation Proclamation had taken effect, by its terms, and had become actually effective in large portions of the territory embraced in those Virginia counties), were actually worth, in good money, $87,329,635 more than a considerably larger number of slaves were worth in 1861, prior to the beginning of the war, and when they had a specie market value.

These results are not only in conflict with the overwhelming proofs in the case, but they are contradicted by the recognized facts of the history of those times.

The slaves in Virginia counties, as well as in West Virginia counties, were all of them then more than three-fourths, if not more than nine-tenths free. As soon as any of that territory came within the Federal lines (and at least one-third of Virginia was at that time within those lines or dominated by the guns of Federal gunboats), or as soon as the slaves went within the Federal lines, they became actually and absolutely free.

It is especially impossible that it can be true that the smaller property, other than slaves, in Confederate Virginia, was worth anything like as much in June, 1863, as that personal property was worth in 1860 or 1861, before it had been subjected to the disastrous and destructive effects of the war which was then prevailing.

It is especially impossible that it can be true that the smaller number of slaves in Virginia in June, 1863, (395,105. See Joint Exhibit, E-1, p. 7, R. 645), after Mr. Lincoln's Proclamation, were worth as much as, and still less that they could be worth more than the larger number of slaves (472,494, as per U. S. Census of 1860, and Report of First Auditor of Virginia., 1860-61, p. 75, and Exhibit West Va. 2, R. 823 and 824), in those counties prior to the beginning of the war, when the title of the master and the status of the slave were unquestioned.

The proof shows that slaves were such a precarious property at that time as to possess very little value. As an instance of this, Col. Branch testifies (R. 756), that he purchased a slave in July, 1863 for the equivalent of $225 in gold—"a servant who would certainly have brought $1,200 in 1860, previous to the election."

But no proof ought to be required to show that the slaves in Virginia counties were, in June, 1863, worth very much less than the slaves in the same counties were worth, in good money, in January, 1861, prior to the beginning of the war.

It will be remembered that Virginia at that time was the theatre of the war.

In 1861 large armies had encamped upon her soil.

In 1862 and 1863 armies numbering in the aggregate from 250,000 to 350,000 men had occupied her territory, and largely sub-

sisted upon what they could take from the limited resources of her people.

The Federal troops, in 1863, occupied the greater part of her tidewater counties and large portions of Northern Virginia; and all of her coasts along the Atlantic Ocean and Chesapeake bay, and the navigable waters of the Potomac, the Rappahannock, the York and the James were dominated by the gunboats of the United States, where not actually occupied by their troops. In all of these sections there were large numbers of slaves.

The *uncontradicted evidence* in the case shows that the depreciation in value extended not only to slaves but to all personal property, and was at least fifty per cent. as a *minimum*. There had been enormous consumption and destruction of every kind of personal property, and what remained had greatly depreciated in value.

Now, it may be that the Master is correct in holding that the plaintiff has failed to show definitely that the depreciation in value of personal property in Virginia counties was, in 1863, 75 per cent. of its value as compared with 1861.

But there can be no question, that the evidence in the cause (found at pages 739 to 786 of the record), corroborated as it is by the known and unquestioned and unquestionable facts of history, abundantly justifies the conclusion that that depreciation amounted to at least fifty per cent. in June, 1863, as compared with January, 1861.

We recognize that a similar depreciation existed in ten or eleven West Virginia counties which were generally held by the Confederate forces and controlled by the Richmond governments, during that period.

The chief importance of the question here discussed is in its bearing upon the question of an equitable proportion of the debt to be borne by West Virginia, and it is because of its bearing upon that aspect of the case that we have taken so much of the time of the court in its discussion.

VI.

By Paragraph VI of the decree the Master is directed to take an account ascertaining—

> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union."

The Master finds (see his report, pp. 174-179) that the total payments made into the Treasury of Virginia from the counties of West Virginia, for which the latter State is entitled to a credit in the accounting under this paragraph of the decree, amounted to $6,105,884.75.

The plaintiff is satisfied that the findings of the Master under this paragraph do substantial justice between the parties, and therefore waives any objection thereto.

The defendant objects to the Master's findings under this head because he fails to give West Virginia credit for items aggregating $807,646.89.

These items are as follows:

Item 7.—Dividends from Banks in West Virginia counties	$786,666.98
Item 8.—Dividends and interest from Turnpike Companies in West Virginia Counties	13,595.48
Item 9.—Dividends from Bridge Companies in West Virginia	6,028.51
Item 10.—Dividends from Interstate Turnpike Companies (proportion)	1,355.92
	$807,646.89

See Joint Exhibit, F., p. 1, R. 805; Master's Report, pp. 176, 180.

The Master's findings upon these items is evidently justified by the facts, and is consistent with the language of the decree and of the Wheeling Ordinance.

The amounts received by Virginia upon the accounts and items objected to by the defendant, particularly the dividends upon bank stock, were in no sense money paid into the treasury of the Commonwealth from the counties included in the State of West Virginia.

They were the profits earned by Virginia's own money which she had invested in fiscal institutions; or the returns made to Virginia upon the investments mentioned, and not moneys paid to Virginia from West Virginia counties, within the meaning or within the reason of the sixth paragraph of the decree and of the ninth section of the Wheeling Ordinance, on which that paragraph of the decree is based.

None of them could be regarded as contributions from West Virginia counties, but they were the legitimate earnings from the State's own money invested in the banking business, and in the properties created by its companies.

As to the banks, while they had their principal place of business in West Virginia, their assets were transitory and of a movable character, having their situs not at all necessarily in West Virginia.

It will be seen that the Master had already held, under Paragraph III, that West Virginia was not properly chargeable under that paragraph with the money paid out by the Commonwealth on account of stock subscriptions to banks, located in West Virginia, and had excluded that item from the debit account against West Virginia under that paragraph.

We are convinced that the Master's ruling upon this point was correct, and by analogous reasoning the conclusions reached by the Master under the sixth paragraph, that these dividends were not in any sense public payments, or payments from West Virginia counties, was inevitable.

VII.

The seventh paragraph of the decree directs an account pertaining—

> "7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items, and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof."

This direction of the decree was doubtless given in response to the provisions of sections 1, 2 and 5 of the act of the Wheeling Legislature passed February 3rd, 1863.—Appendix to the Record, pp. 128, 129, 130.

There was a large amount of property, chiefly unappropriated or abandoned, and delinquent or forfeited lands, to which the Commonwealth had title, which passed to the new State by the said act of the Wheeling Legislature, and with the value of which property West Virginia was chargeable by the terms of that act upon such settlement as should be made between the two States.

After the decree of reference was entered it was ascertained by the accountants and counsel for Virginia that West Virginia had recognized the land warrants issued by Virginia prior to June 1863, and had allowed them to be used, without additional payment to that State, in the acquisition of vacant and unappropriated lands within its limits to the extent of many thousands of acres, and that the new State received nothing for those lands. This was done although the entries were made and the warrants located upon those entries since the formation of the new State.

Under these circumstances, as the new State recognized the warrants of the undivided State, it was considered by counsel for Virginia that it would be inequitable to make any charge against West Virginia on account of those transactions.

It was also found to be impracticable, if not impossible, to find any satisfactory records of the disposition which had been made by the new State of large quantities of lands, delinquent and forfeited to the Commonwealth prior to June, 1863, for the non-payment of taxes, or for failure to enter the same upon the land books for taxation, and that inquiry, therefore, has not been pressed.

So that the only charges made by Virginia under the seventh paragraph of the decree are for money and bank stocks actually received by West Virginia from Virginia after the formation of the new State in 1863 and in 1864.

The fact as to the receipt by West Virginia from the Commonwealth of amounts aggregating $170,771.46, stated in plaintiff's exhibit G-1, R. 819, is assented to and certified by the accountants for both parties, and is reported by the Master at page 181 of his report.

The requirement of Paragraph VII of the decree was that the master should ascertain and report "the amount * * * * * of all money * * * * * which West Virginia received from the Commonwealth of Virginia" * * * * *.

Under these circumshances it is difficult to understand upon what ground the Master excluded these items, amounting to $170,771.46, as to which the facts are unquestionable.

These sums of money were undoubtedly received by the new from the old State. At that time the officials of the restored government of Virginia consisted of West Virginians. That government was dominated by West Virginians, and the new State could appropriate and take out of the treasury of the State of Virginia, at Wheeling, whatever it chose; and it did undoubtedly receive from the "restored" government of Virginia $170,771.46, for which sum, we think, it is fairly chargeable.

It is proper here, however, to call attention to the fact that the Special Master has included in the charges against West Virginia, under Paragraph VII, the value of the stock which represented the amounts expended by the Commonwealth on turnpikes and bridges built by the following companies:

Sweet & Salt Sulphur Springs Co.	$ 7,578.00
White & Salt Sulphur Springs Co.	4,000.00
Fairmont & Palatine Bridge Co.	12,000.00
Making a total of	$23,578.00

The complainant has insisted, and still urges, that, under the terms of Paragraph III, of the decree, and under the language of the Wheeling Ordinance fairly construed, the expenditures made by the Commonwealth in the construction of these internal improvements should be charged against West Virginia under the third paragraph of the decree; and by her second exception she has objected to the Master's report for not charging West Virginia with items 60, 136 and 145, Joint Exhibits C-1, R. 375, 377,—which items cover the expenditures made by Virginia on said Sweet & Salt Sulphur and White & Salt Sulphur Turnpikes, and on said Fairmount & Palatine Bridge.

If the complainant's second exception is sustained as to those items, the corresponding items charged by the Master under Paragraph VII, of the decree, aggregating $23,578, covering the values of the expenditures in those works which were transferred to West Virginia, should be deducted from the aggregate charged against West Virginia under said seventh paragraph.

We submit herewith a statement showing the amount chargeable against West Virginia under this paragraph of the decree in accordance with the facts here stated, which are entirely sustained by the record.

Statement of Money, Property, and Stocks received by West Virginia from Virginia on and after June 20, 1863,—Paragraph VII:

(a) As found by the master (Master's Rep. 193).	$500,828.00
(b) Add for cash received by West Virginia from Virginia (Master's Rep. 181 and 193)------	170,771.46
Making a total of ----------	671,599.46
Deduct for value of stock in the Sweet & Salt Sulphur Springs, and White & Salt Sulphur Springs Turnpike Companies, and the Fairmount & Palatine Bridge Company, the expenditures upon which are included in the total of $1,104,400.85 which complainant claims should be charged under Paragraph III (see Plaintiff's Exceptions, p. 12, and Joint Exhibit C-1, pp. 4, 5 and 6, R. 375, 376 and 377, and Master's Rep. 193)--------	23,578.00
Balance chargeable to West Virginia--------	$648,021.46

VIII.

What is West Virginia's Share of the Debt?

Our rapid review of the Master's report, brings us to the application of its findings—modified in the particulars covered by the few, but important exceptions, which we have taken to those findings—to the solution of the main question in the cause, namely:

> *What, upon the data thus ascertained, is the proportion of the Virginia debt for which West Virginia is liable?*

(1)

It cannot be too strongly emphasized that it is the just and equitable liability of the new State which is to be determined: for the Wheeling Ordinance imposed a just proportion of the debt upon her, and by the compact created by the provisions of section 8 of Article VIII of the West Virginia Constitution and the Acts of Virginia and of Congress, by which she was granted statehood, it was stipulated that an equitable proportion of that debt should be assumed by the new State.

Upon elementary principles there can be no question but that these provisions of the first Constitution of West Virginia constituted an essential stipulation and condition upon which the consent of the Legislature of Virginia to the creation of the new State was predicated. We have a right to assume that the consent of Virginia to her dismemberment would never have been given but for the fair and reasonable stipulation clearly expressed in that Constitution, that the new State should assume an equitable proportion of the common debt, and would provide for the payment of the accruing interest of the principal in thirty-four years.

It is equally, though no more, certain that the United States Congress would never have given its consent to the partition of Virginia and the erection of the new State out of her domain, but for the fact that the new State had undertaken to assume an equitable proportion of the then existing public debt of the Commonwealth,

and to pay the same with the interest thereon. No evidence is needed to establish this; but if it were required it would be furnished by the records of Congress, and by the statements of honorable and distinguished actors in that momentous transaction.

On the 31st of December, 1862, the Act providing for the formation of the State of West Virginia was passed by Congress.

When the bill giving the consent of Congress to the erection of the new State was under consideration in the House of Representatives, the following discussion took place:

> Mr. Olin: * * * * "I desire to ask what will become of the bonds, and other obligations which Virginia has issued or incurred, by the recognition of a new State?" * * * *
>
> Congressional Globe, Pt. I, 3rd Session, 37th Congress, p. 45.

> Mr. Hutchins: "I will answer my friend from New York. Here is the provision of the Constitution of West Virginia in reference to that matter: 'An equitable proportion of the debt of Virginia prior to January the first, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as practicable.'" * * * *
>
> Idem, page 46.

And again, while the bill was still under discussion in the House, the following colloquy occurred:

> Mr. Crittenden: "Mr. Speaker, there is another question to which I invite your attention. The old State of Virginia, when she embraced east and west, owed a large debt. She owes it to this day. Who is to be bound for that debt? Is the new State? How is this debt to be divided?" * * * *

> Mr. Blair, of Virginia: "In regard to the public debt, the Constitution framed by the convention of the people of the proposed new State of West Virginia, binds the new State to pay its just proportion of whatever public debt the State of Virginia owed prior to the Ordinance of Secession." * * * *

> Mr. Crittenden: "I only knew, Mr. Speaker, that in this bill there was no provision made for a division of the State

debt. The gentleman tells us there is provision made for it in the Constitution, and I am satisfied with that. That was only a question of mere expediency which I wished to suggest; but although a matter of expediency it was also a matter of justice. If it has been attended to, I have no more to say about it." * * * *

Idem, page 47.

Years afterwards when the subject of the Virginia debt was again under discussion in the United States Senate, statements of great significance and importance upon the very fact we are now considering, were given out by Senator John Sherman, and ex-Senator Waitman T. Willey. Senator Willey was one of the senators from (Restored) Virginia, was one of the makers of the new State, a member of the Wheeling convention, and was an active participant in all of the transactions which led to the formation of west Virginia, had been for years a very active, intelligent, leading and useful member of the Legislature of Virginia, and was as well acquainted with the facts as to the origin and history of the Virginia debt, and with West Virginia's relations to it as any citizen of either State. Under his leadership, and upon the views which he earnestly urged, the United States Senate passed the bill giving the consent of Congress to the creation of West Virginia. Even with his able advocacy of that measure it was only passed by a majority of six votes. Besides his intimate acquaintance with the essential facts upon which West Virginia's obligation for the payment of an equitable proportion of the debt rests, Senator Willey was a man of very high character.

Senator Sherman had been a member of Congress when the bill for the creation of West Virginia was passed. Being from Ohio, an adjoining State, he had taken a deep interest in its enactment and had actively supported it. No two men in the world knew more about the history of that transaction than those two eminent men.

We state here now upon the authority of these honorable senators that the bill admitting West Virginia would never have been

passed but for West Virginia's assumption of an equitable proportion of the debt of Virginia.

During the discussion of the subject in the 47th Congress, Senator Sherman read the following extract from a letter which he had received from Senator Willey:

> "I have a pretty distinct recollection that while the application for admission was pending before the United States Senate, you suggested to me this very matter, and that when I pointed out to you the clause in the Constitution which I have above quoted, you expressed your satisfaction and stated to me that it removed one of the difficulties which had been embarrassing you; and I say to you now, what I have said to the people of West Virginia, that but for that clause in her Constitution, the State would never have been admitted. I SAY FURTHER, THAT IN MY OPINION, NO HONEST MAN, OR HONEST PARTY, IN WEST VIRGINIA, OR OUT OF IT, WILL DENY THE OBLIGATION OF WEST VIRGINIA TO PAY AN EQUITABLE PART OF THE PUBLIC DEBT OF VIRGINIA." (Capitals ours.)

After quoting this extract, and after reading the 8th clause of Article VIII of West Virginia's Constitution, Senator Sherman said:

> "But for this stipulation in the Constitution of West Virginia, which was submitted to the Senate at the time of the passage of the bill to admit that State, it never would have been a State of this Union."—Congressional Record, Vol. 12, 47th Congress, p. 450.

No one can doubt, therefore, that West Virginia owes her existence to her promise to assume an equitable proportion of the debt of the old State, and to provide for the payment of the accruing interest thereon and of the principal of the same.

It is the corner-stone of her existence as a State.

The methods adopted for the purpose of ascertaining what West Virginia's share of the debt is, are merely means for reaching that end, and can be sanctioned only in so far as, fairly pursued, they shall lead to an equitable result.

It becomes important therefore, to determine, what, independently of any conventional arrangement, would, under the circumstances which confront us here, be the equitable share of that debt to be borne by West Virginia?

The case presented is a peculiar one. It is *sui generis.*

History furnishes no counterpart, no precise parrallel or precedent to guide us, by a clearly blazed path, to a correct conclusion.

Kingdoms, empires, and republics have been divide and subdivided, but never has a State been dismembered just as was Virginia in 1863.

And yet there are certain established rules of right and principles of equity which will enable us to reach a conclusion which will do substantial justice between these parties.

According to the authorities upon public, or international law, copious quotation from which will be found in the Appendix No. 1 to the reply brief for Virginia upon the motion to refer the cause to the master, printed in Vol. II of West Virginia's Compilation, pp. 163 to 167, the accepted doctrine seems to be, as the same is stated by Mr. John Bassett Moore in his Digest of International Law, as follows:

> "In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for as Story says, 'the division of an empire creates no forfeiture of previous vested rights of property.'"
>
> 1 Moore's Digest Int. L., p. 334, citing
> Abdy's Kent, p. 96, and
> Lawrence's Wheaton, 52 (m) 20.

The debt should, therefore, be apportioned "ratably" between the old and the new State.

For reasons already abundantly appearing in this case it is exceedingly difficult, to determine accurately the true taxable values of the property in Virginia as at present constituted and in West Virginia, on the 20th of June, 1863. There is less difficulty in determining the relative values as to the real estate in the two

States, respectively, than as to the personal property in the two States.

The destructive and exhausting effects of the war then flagrant, the depreciation of the currency in general use in Confederate Virginia, were much more disastrous in their operation in what is now Virginia, than they were in the greater portion of what is now West Virginia. The destruction of personal property was far more final and complete than of real property. When horses or cattle were carried off, or wagons or farming implements were worn out or destroyed, that was an end of them as property to their owners.

The lands might be, and were, greatly impaired in value by the destruction of fences and buildings, and by neglect, but these ravages of war could be, and in fact, in the forty-five years of peace, have been in great part remedied.

Moreover, land existed as property, and as a subject of taxation much more uniformly throughout the territory embraced in both States than did any other species of property.

It constituted therefore a more uniform, as well as a more permanent and stable measure of the wealth and taxable resources of the two States, at any time, and particularly at the date of the formation of West Virginia.

The court must have been influenced by these considerations in framing the second paragraph of the decree of reference, in directing the ascertainment of the "assessed valuation of the territory of Virginia and of West Virginia June 20, 1863," and in excluding from that account the value of the personal property therein.

Now taking up the Master's findings and applying them *seriatim*, as they should be applied, we will endeavor to ascertain what the result is, or should be, as to the part of the debt to be paid by West Virginia:

(1)

There need be no farther discussion under the first paragraph, by which the amount of the debt is ascertained.

(2)

Under the second paragraph it is ascertained that West Virginia had 36.1843 per cent. of the total area of the undivided State.

Apportioning the admitted $33,897,073.82 of the common debt on that basis would assign to West Virginia $12,265,418.88, of which $11,911,822.32 would be principal, and $353,596.56 would be interest.

West Virginia had 33.5231 per cent. of the total population, excluding slaves. On that basis West Virginia would owe $11,363,349.95, of which $11,035,758.90 would be principal, and $327,591.05 interest.

West Virginia had 24.5145 per cent. of the total population, including slaves. On that basis she would owe $8,309,698.16, of which $8,070,140.04 would be principal, and $239,558.12 interest.

West Virginia had 21.7812 per cent. of the total values of real estate upon the basis of the assessed valuation of 1863. Upon this basis she would be charged with $7,383,189.44, of which $7,170,341.40 would be principal, and $212,848.04 would be interest.

What part of the debt does West Virginia owe?

While taxable property seems, as a rule, to be the measure accepted by writers on public law dividing a common debt between two states formed by the division of a State into two states, it may not be inequitable to bring population into the account here along with property; for population, such as that of these two States certainly constitutes an important factor of productive wealth.

Bringing the total population and the assessed valuation of the real estate into the account as factors, and combining the two and taking the average, we have $7,846,443.80 as West Virginia's portion of the debt, of which $7,620,240.73 would be principal, and $226,203.07 interest.

If, discarding the method defined in the Wheeling Ordinance, the apportionment should be made according to the fair value of the taxable property in the two States in June 1863, taking for those values the figures arrived at in our consideration of the

Master's findings and the evidence under paragraph V, we will have the following results:

Fair estimated value of the taxable property in Virginia and West Virginia Counties, June 20, 1863.

Fair estimated value of real estate in Virginia counties, as ascertained by the Master and accepted by the Plaintiff (Master's Report, p. 168)	$148,042,730.15
Fair estimated value of personal property, other than slaves, in Virginia counties—not exceeding one-half of $152,844,637.59, its Confederate inflated assessed valuation in 1863,	76,422,318.79
Fair estimated valuation of slaves in Virginia counties, not exceeding in good money as a possible maximum, one-half of $162,537,936, the agreed value on January 1, 1861, of the slaves in Virginia*	81,268,968.00
Fair estimated value of all property, real and personal, in Virginia counties	$305,734,016.94

*Note.—(Explanatory of the item of $81,268,968.00).—Upon the hearing before the Master on the first of January, 1910, the following agreement was made between the counsel for the parties, and made a part of the record:

"It is agreed, between the counsel for Virginia and West Virginia that there were 490,865 slaves in the Commonwealth of Virginia on the 31st of December, 1860, and that the fair estimated valuation of such slaves was $344 apiece; that of them, 472,494 were within the territory of the present Commonwealth of Virginia, and that their fair estimated valuation at that time was $162,537,936; and that there were 18,371 of such slaves on the same date in the counties that now constitute the State of West Virginia, and that the fair estimated valuation of such slaves was at that time in the aggregate $6,319,624.

"(Upon request the foregoing agreement was read aloud by the stenographer, and there was no objection to it by counsel for either party).

"Mr. Anderson: The Commonwealth of Virginia does not admit that the facts here conceded to be true are either relevant, material, or responsive to any issue in this case or any direction of the decree. Counsel for Virginia further object to the consideration of these facts by the Master in this case for the reason that both parties have down to the present day construed Section 5 of the decree as referring to the fair estimated value

Fair estimated value of real estate in West Virginia counties as per Master's Report p. 168	$ 67,676,127 44
Fair estimated value of personal property, excluding slaves, in same counties (Master's Report 168-169)	24,739,894 21
Fair estimated value of slaves in West Virginia counties as conceded by Defendant, (Master's Report 169-170)	6,319,624 00
Total fair estimated value of all property, real and personal, in West Virginia	$ 98,735,645 65
Fair estimated value of all taxable property in Virginia and West Virginia as of June 20, 1863,	$404,469,662 59
Of which there was in Virginia	$305,734,016 94
And in West Virginia	$ 98,735,645 65
or 24.4111 per cent. in the latter State.	

Upon the basis of the fair estimated value of all property in the two States in June, 1863, according to the Plaintiff's statement of those values, West Virginia's share of the debt would be 24.4111

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of the real and personal property in Virginia as of the 20th day of June, 1863, and have taken their testimony, prepared their schedules and exhibits, and until to-day argued the case upon that basis; and they object to the introduction of this new issue into the case at this stage of the litigation."

* * * * * * * * *

"The Special Master: Have you any objections to adding this to the agreement?

"It is futher agreed, inasmuch as Paragraph 5 requires a report of the real and personal property by counties, it is agreed that the aggregate number of slaves stipulated for in the foregoing agreement was taken from the United States Census of 1860, and that in apportioning the number of slaves and the valuation thereof to the various counties, the same census, showing the slaves in the various counties as the basis for making that distribution, shall be used.

"Mr. Anderson: There is no objection to that. Let it be stated in the record that this agreement was made at the close of the argument, on the 1st day of January, 1910."

Stenographic Report of the Hearings before the Master, Vol. 20, pp. 3153-3154.

per cent. of $33,897,073.82, or $8,274,648.58; of which $8,036,100.90 would be principal and $238,547.68 accrued interest.

These estimates are more than liberal to West Virginia for they include the slaves, both those still nominally in bondage, and those who were actually free, at a valuation equivalent to more than half what those slaves were individually or collectively worth in January, 1861.

We most earnestly and confidently insist that the slaves in Virginia and West Virginia in June, 1863, as a mass constituted no such description of property as to be any just basis upon which to rest any State indebtedness.

The tenure by which they were held was so precarious, both by reason of Mr. Lincoln's Emancipation Proclamation, and because of the facility with which they could secure actual freedom by escaping into the lines of Federal occupation, where they were not already within those lines, as very many of them were, that they constituted no fair basis for the ascertainment of the share of the common debt with which either State should be charged.

The above conservative figures seem clearly to demonstrate that, ascertaining West Virginia's share of the common debt, independently of the Wheeling Ordinance, her equitable share of that liability, computing it upon any basis which would be fair or just, would be $7,383,189.44, with interest on $7,170,339.47 from January 1, 1861,—*as a minimum*, if it be ascertained on the *assessed* values of real estate in the two States June 20, 1863; and that it would be $8,274,648.58, with interest on $8,036,100.90 from January 1, 1861, if the apportionment be made on the basis of fair *estimated* value of both real and personal property (including slaves) in the two States June 20, 1863, and estimating the slaves at a very large value considering all of the facts of the case.

These figures will be found not to vary very radically from the results which will be reached by applying the terms,—(and using the method prescribed by the Wheeling Ordinance, which West Virginia in her answer insists, determined the nature and extent of her liability), to the ascertainment of West Virginia's share of the debt construing that Ordinance fairly with reference to the established facts and circumstances of the case.

(3.)

West Virginia's Just Share of the Debt Computed under the terms of the Wheeling Ordinance.

We ask the attention of the Court to the question of the amount of West Virginia's liability ascertained in accordance with the findings of the Master's Report under paragraphs III, IV, VI and VII of the decree.

We beg leave to file at this point as part of this argument alternative statements prepared by Mr. A. G. Potter, the accomplished expert accountant under whose immediate direction the accounts for the plaintiff were made up in this case, showing the amounts due by West Virginia applying the figures as ascertained by the Master, under each of the paragraphs of the decree. (Appendix V to this Note of Argument).

Mr. Potter has also, at our request, prepared a statement showing what would be the result under the alternative directions of Paragraphs III, IV, V, VII, and VI of the decree, if the Wheeling Ordinance is construed and applied in accordance with the contentions of West Virginia, which statement is filed as Appendix VI to this printed argument.

Examination of this statement will show that, if West Virginia's attempt, by *construction*, to defeat the expressed purpose of the Ordinance, and to repudiate the compact which was the condition of her statehood, should be successful, then, instead of West Virginia owing anything, the balance on the accounting would be in her favor, to the extent of from $769,073.57, as a minimum, to $3,123,618.76! ! !

These astounding results are reached by ignoring or distorting the unmistakable requirements of the Wheeling Ordinance:

(1) By charging West Virginia with only *some* and a comparatively small part of the actual expenditures made by Virginia in West Virginia territory during the debt period, when the decree and the Ordinance requires the new State to be charged with ALL of those expenditures.

(2) By omitting to charge West Virginia with any share whatsoever of the largest items of the "ordinary expenses," and failing to charge her with a *just proportion* of such expenses as West Virginia concedes to have been "ordinary."

(3) By taking credit for large sums as having been paid into the treasury of Virginia from West Virginia counties, which were never in fact paid into the Virginia treasury, from those counties; and

(4) By omitting to charge West Virginia with money and the fair value of bank stocks which she received from Virginia on and after June 20, 1863.

These results are so unconscionable as to absolutely discredit the data upon which, and the methods by which they are reached.

We will submit alternative statements, showing the amount of West Virginia's liability upon the basis of the Master's report under paragraphs III, IV, VII and VI of the decree, modified as we consider it should be in respect to the so-called "indirect" expenditures made by Virginia in building roads, turnpikes, bridges, &c., in West Virginia territory, and by the addition of the money received by West Virginia from Virginia in 1863 and 1864.

These paragraphs following the Wheeling Ordinance, direct West Virginia to be charged with three classes of debits:

(1) With all State expenditures in West Virginia counties:

(2) With a fair proportion of the ordinary expenses of the State government during the specified period; and

(3) In addition to these items under the Ordinance, West Virginia is chargeable with the value of certain bank stocks and with the money which the new State received from Virginia on and after June 20, 1863.

West Virginia is to be credited under the Ordinance and Paragraph VI of the decree with all payments made into the treasury of Virginia from West Virginia counties during the same period.

As we have already seen, the chief points of difference arise in the determination of

(1) What expenditures were made by Virginia in West Virginia territory;

(2) What were the ordinary expenses of the State?

(3) What was West Virginia's fair propotrion of those ordinary expenses; and

(4) What payments were made into the State Treasury from West Virginia counties?

These questions have been, already, fully discussed in a general way.

The points of divergence between opposing views will be clearly presented by the following concise tabulated statements, showing the results in dollars and cents:

STATEMENT I.

Stating West Virginia's liability, apportioning ordinary expenses on basis of total population, *including slaves*:

Debit Charges:------

Paragraph III.—Actual expenditures made by Virginia in West Virginia counties:		
(a) Amount allowed by the Master ----------	$2,811,559 98	
(b) Add amount actually expended by Virginia in West Virginia territory through public improvement companies ----	1,104,400 85	$3,915,960 83
Paragraph IV.—Proportion of ordinary expenses, on basis of total population including slaves, ascertained under this paragraph of the decree by the Master (Master's Report, p. 140)		8,147,455 92
Pragraph VII.—Money property and stock received by West Virginia from Virginia:		
(a) As found by the Master ---- (Master's Report p. 193)	$500,828 00	
(b) Add for cash received by West Virginia from Virginia (Master's Report, p. 181) ----------	170,771 46	
	$671,599 46	
Deduct for value of stock, as charged by Master under Paragraph VII.		

of the Sweet & Salt Sulphur Springs and White & Salt Sulphur Springs Turnpike Companies, and the Fairmount & Palatine Bridge Co., the expenditures upon which are included in the above total of $1,104,400.85 (para. III)—See p. 12 Complainant's Exceptions, and Joint Exhibit C-1, pp. 4, 5, 6, R. 375, 376, 377.	23,578 00	648,021 46
		$12,711,438 21

Credit West Virginia:

Paragraph VI.—By receipts from West Virginia counties (Master's Report, p. 179)----------	6,105,884 75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be------	$ 6,605,553 46

STATEMENT II.

Stating West Virginia's liability, apportioning ordinary expenses on basis of population, *excluding slaves*:

Debit Charges:

Para. III.—Expenditures made by Virginia in West Virginia counties, as shown in Statement I	$ 3,915,960 83
Para. IV.—Proportion of ordinary expenses, on basis of population without slaves (Master's Rep. 140)	11,452,862 66
Para. VII.—Money and stocks received by West Virginia from Virginia on and after June 20, 1863,—as shown in Statement I	648,021 46
	$16,016,844 95

Credit West Virginia:

Para. VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884 75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$ 9,910,960 20

For reasons already shown to the Court, we consider this a fair, just and equitable basis of adjustment—far fairer than it would be to include the slave population as a factor in making this apportionment. It is the amount assignable to West Virginia under the Wheeling Ordinance, reasonably, and fairly construed and applied.

But, following a suggestion made by Mr. Justice Harlan during one of the former hearings of the case (See West Virginia's Compilation, Vol. II, p. 227) we have had an alternative statement prepared, apportioning the ordinary expenses of the State Government on the Federal basis, by which *three-fifths* of the slaves would be counted, as follows:

STATEMENT III.

Ascertaining West Virginia's liability, apportioning ordinary expenses on the basis of total white and three-fifths of the slave population:

Debit Charges:

Para: III.—Expenditures made by Virginia in West Virginia counties, as shown in our Statement I, supra		$ 3,915,960 83
Para: IV.—West Virginia's share of ordinary expenses, averaged by decades, on basis of total white and three-fifths of slave population, as follows:		
Mar. 19, 1823 to Sept. 30, 1830	$ 584,731 27	
Oct. 1, 1830 to Sept. 30, 1840	1,087,063 53	
Oct. 1, 1840 to Sept. 30, 1850	2,017,673 93	
Oct. 1, 1850 to Dec. 31, 1860	5,472,521 32	9,161,990 05
Para: VII.—Money and stock received by West Virginia from Virginia on and after June 20, 1863,—as shown in Statement I, *supra*		648,021 46
		$13,725,972 34

Credit West Virginia:

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884 75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$7,620,087 59

It is a significant circumstance that the amount which West Virginia would have to pay upon this basis is so nearly the same as the sum which would be assigned to her, if, discarding the Wheeling Ordinance, the apportionment were made on the basis of the assessed value of the real estate in the two States as of June 20, 1863 which gives West Virginia's share of the debt as being $7,383,189.44, the difference being only $236,898.15, or only about 3 per cent.

Following the Master's Report, we will now submit statements of the amount of West Virginia's liability, under the directions of paragraphs III, V, VII and VI of the decree:

STATEMENT IV.

Giving West Virginia's liability, apportioning the ordinary expenses of the State on fair estimated value June 20, 1863, of real and personal property, *with slaves*—estimated values of personal property and slaves being those adopted by the Master but excepted to by Plaintiff:

Debit Charges:

Para: III.—Expenditures by Virginia in West Virginia territory, as shown in our Statement I, above...	$ 3,915,960 83
Para: V.—Proportion of ordinary expenses of State Government on basis of estimated value of real and personal property, *including slaves*, counted at the figures rerported by the Master for said personal property and slaves on June 20, 1863,—excessive as we believe, and as we think we have shown those valuations to be (Master's report, p. 172).....	6,078,367 90
Para: VII.—Bank Stocks and money received by West Virginia from Virginia, on and after June 20, 1863, as shown by Statement I, above...	648,021 46
	$10,642,350 25

Credit West Virginia:

Para: VI.—By receipts from West Virginia counties (Master's report, p. 179).....	6,105,884 75
On this basis West Virginia's share of the debt as of January 1, 1861, would be	$ 4,536,465 50

STATEMENT V.

Showing West Virginia's share of the debt on same basis as No. IV, except that the *slaves* are *excluded* from the computation of estimated values of real and personal property in June, 1863:

Debit Charges:

Para: III.—Expenditures in West Virginia territory, as shown in our Statement I, above	$3,915,960 83
Para: V.—Proportion of ordinary expenses, apportioned according to fair estimated value of real and personal property, *without slaves*. (Master's Report 172)	9,463,553 58
Para: VII.—Value of stocks and money received by West Virginia from Virginia on and after June 20, 1863, as shown in our Statement I (Master's Rep. 193)	648,021 46
	$14,027,535 87

Credit West Virginia:

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884 75
On this basis West Virginia's share of the debt as of January 1, 1861, would be	7,921,651 12

These Statements IV and V are given, *not* because we consider that property values constitute the fairest or a fair criterion for the apportionment of the ordinary expenses of the State, or because we consider the Master's large estimates of the value of the personal property and slaves in Virginia in June, 1863, as at all justified by the proofs, but merely to indicate that even upon those excessive valuations the indebtedness of West Virginia would be $4,362,964.50, on January 1, 1861, if personal property and slaves be

counted as being worth in Virginia in June 1863, very much more than they were in January, 1861, and would be $7,921,651.12, if slaves is excluded from the calculations, as they ought to be as a matter of fair dealing, in apportioning the ordinary expenses of the State.

STATEMENT VI.

Showing West Virginia's share of the debt, apportioning ordinary expenses on basis of property values, as of January 1, 1861:

Debit Charges:

Para: III.—Expenditures made by Virginia in West Virginia territory, as shown in our Statement I, above	$ 3,915,960	83
Para: V.—Proportion of ordinary expenses on basis of fair estimated property values, *including slaves*, on January 1, 1861, (Master's Rep. 173)	6,805,289	57
Para: VII.—Value of money and Bank stocks received by West Virginia from Virginia on and after June 20, 1863, as shown in Statement I, above	648,021	46
	$11,369,271	86

Credit West Virginia:

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884	75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$ 5,263,387	11

STATEMENT VII.

Showing West Virginia's share of the debt, apportioning ordinary expenses on basis of property values, *excluding slaves,* as of January 1, 1861:

Debit Charges:

Para: III.—Expenditures made by Virginia in West Virginia territory, as shown in Statement I, above	$ 3,915,960	83
Para: V.—Proportion of ordinary expenses on basis of fair estimated valuation of property, *excluding slaves,* as of January 1, 1861, (Master's Report 173)	8,586,648	25
Para: VII.—Value of stocks and money received by West Virginia from Virginia on and after June 20, 1863, as shown in our Statement I, above	648,021	46
	$13,150,630	54

Credit West Virginia:

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179)	6,105,884	75
On this basis West Virginia's share of the debt, as of January 1, 1861, would be	$ 7,044,745	79

These last two tables are given not because we consider the principle on which they are stated a correct one, but merely to show that even upon the inaccurate basis upon which they rest, West Virginia will owe a very large sum.

The more we consider the problems presented in this case the stronger our conviction is that the amount of West Virginia's liability, ascertained under the terms of the Wheeling Ordinance—if

that ordinance be sensibly, reasonably, and fairly construed—is justly and equitably ascertained in Statement II, hereinabove submitted by us. That statement, which is supported by strong considerations of reason and justice, ascertains that indebtedness to be $9,910,960.20, as of January 1, 1861.

In any case and upon any amount for which West Virginia shall be decreed to be liable, we most respectfully and most earnestly insist that interest should be decreed against her according to her moral and legal obligation under the terms of her contract.

With entire deference for the sincerity of the divergent views of our honorable opponents upon these questions, we are persuaded that less than this would not do justice to the complainant, and to the common creditors of the complainant and the defendant here.

(4)

The Liability of West Virginia for Interest.

Is West Virginia justly, legally, equitably, and contractually chargeable with interest?

In this connection, we must remember that the contract which we are considering was a Virginia contract.

Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.

In Jones v. *Williams*, 2 Call, 106, decided in 1799, Edmund Pendleton, who was one of the great judges of our country, delivering the opinion of the court said:

> "Interest is allowed because it is natural justice that he who has the use of another's money should pay interest for it." Cited with approval in *Baker* v. *Morris*, 10 Leigh 284, *McVeigh* v. *Howard*, 87 Va., 599, and *Stuart* v. *Hurt*, 88 Va., 343.

In *Hatcher* v. *Lewis*, 4 Randolph 152, 157, the court laid down the rule in the following expressive language:

> *"The interest follows the principal as the shadow does the substance."*

In *Chapman* v. *Shepherd*, the court said:

> "In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse."

Chapman v. *Shepherd*, 24 Gratt, 377, 384.
Roberts v. *Cocke*, 28 Gratt, 207.
Tidball v. *Shenandoah National Bank*, 100 Va. 741.

"Interest is favored both by the legislative and judicial bodies of the State."

Tazewell v. *Saunders*, 13 Gratt, 354, 370.

In *McVeigh* v. *Howard*, 87 Va. 599, the Supreme Court of Appeals of Virginia said:

> "It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals." * * *

Citing *Jones* v. *Williams* and *Hatcher* v. *Lewis*, quoted above.

Such is the law of Virginia as to interest.
The law of West Virginia in regard thereto is the same.

In *Shipman* v. *Bailey*, 20 W. V. 140, 146, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

> "Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the

adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

In *Pickens* v. *McCoy*, 24 West Va. 344-352, the court affirms *Shipman* v. *Bailey*, and adopts the language just quoted from that decision.

Independently of these West Virginia decisions, such parts of the common law and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of Article XI, of the first West Virginia Constitution. And see present West Virginia Constitution.

The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

As a part of this body of laws, the law of Virginia as to interest became, and has continued to be, a part of the laws of West Virginia.

Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidenced by the public Acts of Virginia and West Virginia set forth in complainant's Bill.

This is the rule in Virginia as to debts due by the Commonwealth

The question was presented in the celebrated case of *Higginbotha's Executrix* v. *Commonwealth*, 25 Gratt. 627.

That was a suit against the Commonwealth to recover the amount due Higginbotham's Executrix on certain past due dividends on stocks which had been guaranteed and assumed by Vir-

ginia by the Acts cited in the opinion of the Court.—26 Gratt. 630, 631.

There was no express contract by the State to pay interest upon said dividends. The petitioner's claim was for the amount of the dividends "with its accruing interest."

The unanimous decision of the Supreme Court of Virginia was that "judgment should be entered for the peitioner for the amount of her demand with interest."—Idem, p. 641.

The framers of the Wheeling Ordinance must be presumed to have drawn that instrument with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest court.

To Virginia and West Virginia lawyers of that day, as since that time, Judge Colter's apt formula that, "the interest follows the principal as the shadow does the substance," was as familiar as any other accepted rule of equity or of law.

Under the law of Virginia in force at the time of these transactions, interest upon the portion of the debt which West Virginia was to take upon herself, was an essential incident of the debt, and its payment as much a part of the obligation as was the payment of the principal.

But, even if the *lex loci contractus* had not brought us to this conclusion, the language of the ordinance itself, fairly construed, leads to the same result.

That language is that:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," etc.

Now, that debt was an interest bearing debt. It was represented by obligations of the undivided State, some of them payable at a future day, some of them at a future day and thereafter at the pleasure of the Commonwealth, but all of them interest bearing obligations, obligations in which the payment of the stipu-

lated interest was made as much a part of the debt as was the payment of the principal.

The interest was an integral part of the debt, and as many of the bonds were payable thirty-four years after date, and over $10,000,000 of them at the pleasure of Virginia, with interest from date, the interest as to much of the debt constituted much the greater part of it.

It was the manifest intention of the enactors of that ordinance, unless we are to ascribe to them the sinister purpose of perpetrating a flagrant wrong and injustice, that the new State should take upon itself, and relieve what remained of the old State of a part of the burden of debt which rested upon both States. They knew that that burden consisted as well of interest, as principal, and as much, of interest as of principal.

It was not proposed that the new State should, as soon as she became a State, pay in cash a sum to be ascertained in the manner indicated in the Ordinance. The framers of the ordinance understood too well that under the conditions then existing, it would be impossible for the new State to raise and pay any considerable sum in cash.

Why the new State was dependent upon the old State for the money necessary to enable her to begin business and she did not have and in the nature of things could not command sufficient amount of cash to pay off one-tenth or even one-twentieth of the then Virginia debt.

The stipulation was not that the new State should pay a sum in cash on account of its share of a common indebtedness; but that it should take upon itself a just proportion of that debt, to be ascertained as in the Ordinance prescribed.

Are we to understand that a court of conscience is to be asked to construe that stipulation to mean that the new State shall take upon itself only a proportion of a part of that debt? That it shall assume a share of the principal only of the debt, but shall be exonerated from any part of the interest which was, and is, as integral a part of the Virginia debt, and of the obligations which

represent it, as the branches are a part of the tree from whose trunk they spring?

In their elaborate arguments in this case, opposing counsel have heretofore devoted very little attention to this important question, although it was plainly in their minds when they prepared their draft of decree, and although their attention was challenged to it by the argument for Virginia. In so far as they have discussed it, they have ignored the facts and principles upon which West Virginia's legal "equitable," and "just" obligation to assume and pay the interest as well as the principal of her share of the debt, rests.

But West Virginia's equitable and legal liability to pay interest upon her share of the debt of Virginia does not at all depend alone upon the Wheeling Ordinance, or upon the law of Virginia and West Virginia, which makes the interest an essential part of the debt; but it rests still more and beyond the possibility of question upon the express terms of the Constitution under which West Virginia became a State.

The fact, the character, and the legal effect of the compact created by that important transaction have already been fully discussed.

West Virginia's solemn covenant in regard to the equitable proportion of that debt which she assumed was that her Legislature should "provide for the liquidation thereof by a Sinking Fund, sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This was precisely in accordance with the plan which had long theretofore been adopted by the Commonwealth for the payment of her debt.

This plan was embodied not only in the statutes but also in the Constitution of Virginia, in force when West Virginia became a State.

It was embodied in that Constitution in the following terms:

> "29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand

eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no other part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. Whenever, after the first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except intime of war, insurrection or invasion."

Section 29 of the Constitution of Virginia, in force from January 1, 1852. Code of Virginia for 1860, p. 47; Appendix to the Record, p. 200.

It was expressed and given further effect by the second section of the following Act passed by the General Assembly of Virginia:

"Chap. 17. An act establishing a sinking fund and providing for the payment of the semi-annual interest on and redemption of the public debt.
Passed March 26, 1853.

"2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the Commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner hereinbefore directed."

Acts of General Assembly of Virginia, session of 1852-3, p. 29; Appendix to the Record, pp. 200, 201.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the Commonwealth, and which experience had approved.

That scheme was, the creation from the annual revenues of the State, of a fund equivalent to seven per centum of the principal of the debt. Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the principal sum, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and if the calculation is made it will be shown to be true, that *one per centum* of any sum invested and compounded at six *per centum* interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was the plan with which Messrs. Willey, Van Winkle, Hall, Brown, Haymond, and other members of the first West Virginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar: And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a State rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new State should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *assume* "an equitable proportion of the public debt of the Commonwealth" existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument, the plan which for nine years or more had been a part of the organic and staturtory

law of Virginia for the extinguishment of her public debt, and the Legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the part of the State to pay the accruing interest, and to liquidate or redeem the principal of each bond representing the debt, within thirty-four years.

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the principal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that language, is conclusively shown when we read it in the light of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt which plan was adopted by the new State as to its share of that debt.

And so, we find that both by the express terms of the Wheeling Ordinance fairly construed, and by the express terms of the Constitution under which Virginia and the National Congress consented that West Virginia should become a State, this new State has become expressly obligated to pay interest upon the share of the principal of the common public debt for which she is liable.

These positions are not at all in conflict with the general rule of American and of public law, as clearly defined by this court in *United States* v. *North Carolina*, 136 U. S., 211, as the law governing that case, that,

1. "Interest, when not stipulated by contract or authorized by statute, is allowed by the courts as damages for the detention of money or property;"

2. "Interest is not to be awarded against a sovereign unless its

consent has been manifested by an act of its legislature, or by a lawful contract between executive officers;"

3. "By decisions in North Carolina that State, unless by or pursuant to an explicit statute is not liable for interest, even on a sum certain which is over due and unpaid."

See also *South Dakota* v. *North Calolina*, 192 U. S., 286.

The question presented in the case at bar is taken out of the reason and the decision of this Court in the North Carolina cases by the following circumstances:

(1) The obligation to pay interest is determined by the *lex loci contractus*, and under the settled law of Virginia which was the law of the contract between West Virginia and Virginia, and under the law of West Virginia also, interest is not and never has been allowed as damages for the detention of money, but in those jurisdictions interest is allowed as an essential incident of a contract, whether express or implied, for the payment of money, and as a matter of right and justice.

This court, in its opinion in *United States* v. *North Carolina*, expressly rested that decision upon the fact that under the law of North Carolina no interest was payable on such a contract.

(2) The payment of interest is here an obligation imposed by statute—first by the Wheeling Ordinance, and second by the Constitution under which West Virginia became a State.

(3) The express contract of West Virginia upon which her existence as a State was conditioned requires her to pay interest on the part of the debt which she assumed.

This is a very much stronger case for a decree for interest than *United States* v. *State of New York*, 160 U. S. 600, righteous as was the allowance of interest there.

Paraphrasing the language of this court in that case, p. 621, "It would be a reflection upon the" honorable motives of the members of the Convention which framed the Wheeling Ordinance

and the West Virginia Constitution "if we did not place a liberal interpretation upon those acts and give effect to what, we are not permitted to doubt, was intended by their passage."

Another question which arises in connection with the consideration of this subject, is, from what time is West Virginia justly and equitably bound to pay that interest?

Answer to this is furnished by the Wheeling Ordinance and by the section of the first West Virginia Constitution above quoted.

The settlement by the terms of both instruments was to be made as of the arbitrary date of January 1, 1861, or to be precisely accurate, as of December 31, 1860. That, accordingly, is the date from which fairly, equitably, and legally, (because it accords with the express terms of both the ordinance and the Constitution), the interest should be computed.

As already shown the debt, a proportion of which as of that date, West Virginia was to assume and pay, was an interest bearing debt, and the interest was as integral a part of it as was the principal.

A farther kindered inquiry to the last is: To what time should West Virginia be required to pay such interest?

Our response to this is, that she is justly, equitably and legally bound to pay this interest.

(1) *By the terms of the Wheeling Ordinance;* certainly, for the period during which the debt of the Commonwealth existing on the 31st of December, 1860, would continue to be an interest bearing debt: And we have seen that that was not only until the obligations representing the debt became due, but under the just rule of the law of Virginia as to interest, in force during the whole period of the creation of the debt, until that principal should be fully paid.

(2) By the terms of the section of her Constitution above quoted, accepted by Virginia and by the Congress, West Virginia undertook to pay all the accruing interest on, and the principal of, her share of that debt in thirty-four years.

She has failed and refused to pay that share, or any part of it.

The interest accruing thereon from December 31, 1860, has continued to accrue, as to her, until it now amounts to vastly more than the principal. It was that interest which West Virginia agreed to pay, and it was that principal for the payment of which West Virginia's Legislature was to make provision, so that the same should be paid within the thirty-four years.

We are unwilling to aniticipate that the learned counsel for the defendant will argue that West Virginia, by the language of that provision of her Constitution, is only bound to pay interest for thirty-four years from December 31, 1860, or from June 20, 1863, because we are unwilling to assume that our distinguished opponents would contend that a state, any more than an individual, should be allowed to take advantage of her own wrong, or profit by her own procrastination, and neglect of duty.

Here, West Virginia has not only not paid a just, or any other proportion of the common public debt, nor provided for the payment of the accruing interest thereon, and for the payment of the principal, but she has persistently failed and refused to do either of these things, and has by the votes of her Legislature, again and again repudiated any and all liability whatever for any part of that indebtedness.

(See Resolutions of Legislature of West Virginia, App. 247, 248.)

With all deference for the distinguished counsel for the defendant, we venture to believe that a court of equity will not allow any defendant, and particularly a State, which should be an exemplar of fair and hororable dealing in all of its transactions, to make gain out of its own palpable dereliction of duty.

And so, our response to such contention, if it shall be urged, is, that equity will not suffer any party to take advantage of his own wrong.

CONCLUSION

It is, true that the amount which West Virginia is thus equitably bound to pay, including the interest fairly and justly due thereon, will, as of this date, aggregate a very large sum; but

that constitutes no argument for her exoneration from the payment of the same.

Fortunately for West Virginia this indebtedness, even if the very largest sum which under any of the alternative statements in the case could by possibility be found to be due by her, should be decreed against her, would, in the affluence which the record shows she now enjoys, wealth largely resulting from the construction of the very improvements upon which the expenditures made by Virginia in roads, turnpikes, railroads and bridges, and in the improvements of the navigation of her rivers were made,—impose upon her a burden easy to be borne, and light, as compared with what Virginia, during the period of her greatest impoverishment, has assumed and borne.

Virginia not only assumed two-thirds of the original debt and two-thirds of the accumulated interest upon it down to January 1st, 1871, and in addition thereto the accumulated interest upon over $8,000,000 of bonds issued by her on account of unpaid and accumulated interest prior to January 1st, 1871, but she paid off in full large amounts of interest accruing after December 31st, 1860, and before January 1st, 1871; and she has paid off, also, in full very large amounts of the principal of the original debt; and has, also, paid off large amounts of the principal of the two-thirds of the debt assumed by her in 1871.

In addition to this Virginia has paid, as of this date, over $38,000,000 of interest.

It must be remembered that these payments, made by Virginia, have been distributed through a period of more than forty-five years.

Large portions of these payments were made by the people of Virginia out of limited resources, in the period of their greatest poverty and distress.

If interest were to be computed upon the payments thus made by Virginia during the last forty-eight years on account of this common debt,—which would have to be done in order to equalize West Virginia with Virginia in regard to these transactions,—the average period upon which interest should be so computed upon

the payments so made by Virginia in order to thus equalize her with West Virginia, would be considerably more than twenty years; and the amount assumed and paid by Virginia, including the upwards of $25,000,000 of her recognized and regularly met obligations still outstanding, and including the payments she has heretofore made on the whole debt, and on the two-thirds she has specifically assumed, would aggregate considerably over $100,000,000, as of this date.

Large portions of West Virginia would today be a wilderness, but for the building of the works of internal improvement whose construction was secured by the expenditures above referred to and the building of other works of internal improvement which have resulted from the construction of the great lines upon which Virginia expended so many millions of dollars of her substance.

The people of West Virginia are to-day enjoying the fruits of the enterprise and liberality of the Comonwealth in those expenditures, —not only those expended within the limits of West Virginia, but also in the expenditure of millions of dollars on works outside of the territorial limits of West Virginia, but which were built in large part for the purpose of developing the resources of the territory now constituting that State.

Too much emphasis cannot be laid upon these facts and considerations.

Nor can it be forgotten that almost the entire indebtness which is the subject matter of this investigation was created by the votes of the representatives of West Virginia, and that every little of it ever would have been created but for the support they gave to the Acts by which this large indebtness was imposed upon the Commonwealth.

The complainant desires and asks only that a decree which is in accordance with the legal and equitable rights and obligations of the parties shall be entered.

Such a decree, she is satisfied, will impose upon the new State the duty of paying a very large sum on account of this long ignored obligation, but a sum, every dollar of which West Virginia justly owes and the complaint is righteously entitled to recover.

Her earnest plea is that West Virginia is bound both by the terms of the Wheeling Ordinance, and of her first Constitution to pay a just and equitable part of this debt with interest until the same shall be fully paid, and that she shall not be suffered to repudiate either obligation.

She respectfully asks that a decree may be entered for such sum as is thus equitably due, with interest thereon from the 1st day of January, 1861, until the obligation shall be fully discharged.

SAMUEL W. WILLIAMS,
Attorney General of Virginia.

WILLIAM A. ANDERSON,
RANDOLPH HARRISON,
JOHN B. MOON,
Of Counsel for Complainant.

APPENDIX NO. 1

TO NOTES OF ARGUMENT FOR THE COMPLAINANT

Statement showing the principle expenditures made by Virginia prior to June 20, 1863, on railroads, canals, and other internal improvements designed and built for the purpose of opening up and developing West Virginia territory, or which are to-day parts of railway systems and lines of communication which serve the territory and people of West Virginia and afford them outlets to the markets of the world:

I. On railroads which constitute parts of the Chesapeake and Ohio Railway:

On the Virginia Central R. R.	$2,484,134.00
On the Blue Ridge R. R.	1,744,723.00
On the Covington & Ohio R. R.	3,206,461.83
Total on Chesapeake & Ohio R. R.	$7,435,318.83

II. On Railroads which now constitute parts of the Norfolk & Western Railway:

On Norfolk & Petersburg R. R.	$1,341,341.00	
On Southside Railroad	1,833,500.00	
On Virginia and Tenn. R. R.	3,755,000.00	
		$6,929,841.00
On Winchester & Potomac R. R.		$ 270,000.00
On Alexandria, Hampshire & Loudoun R. R.		1,017,248.00
On Marietta & Cincinnati R. R.		202,611.00
Amount expended on Railroads		$15,855,018.83

III. Canals:

On James River & Kanawha Canal	$10,400,000.00	
On Chesapeake & Ohio Canal	250,000.00	
		$10,650,000.00

IV.	Bridges in West Virginia	$ 81,412.00
V.	On Turnpikes and Roads chiefly in W. Va. ..	2,849,579.71
VI.	On Navigation Companies in West Virginia.....	210,500.00
	Total on works built to develop or serving West Virginia	$29,646,510.54

For above figures see message of Governor Walker to the General Assembly of Virginia March 8, 1870, Report of West Virginia Debt Commission, West Va.'s Compilation Vol. 1, page 474, and Joint Exhibit C-1, R. 374 to 377; Reports of Auditor of Public Accounts of Virginia 1861, of 2d Auditor 1872, Journal of House of Delegates of Virginia 1871-2, Document VI.

The above amounts do not include considerable sums expended on roads and turnpikes wholly in what is now Virginia, but which connect with roads or turnpikes lying wholly in West Virginia and constitute lines of travel which serve West Virginia as well as Virginia.

containing extracts from the public records and statutes of the Commonwealth showing the nature, motive, and object of her expenditures through joint stock internal improvement companies:

Report of the Committee on Roads and Internal Navigation to the General Assembly, submitted December, 1815 (Board of Public Works Reports, Vol. 1, p. 43):

"Whatever difference of opinion may have at any time existed as to the expediency of controlling the voluntary direction of the wealth and labor of individuals by the application of legal constraint, there never has existed a doubt but that it is the duty as well as the interest of every good government to facilitate the necessary communication between its citizens.

"Next to the enjoyment of civil liberty itself, it may be questioned whether the best organized government can assure to those for whose happiness all governments are instituted, a greater blessing than an open, free and easy intercourse with one another by good roads, navigable rivers, and canals. Their tendency, by extending commerce to promote the agriculture and manufacture of a nation and thereby to augment its wealth and population, is too obvious to require much illustration.

"The planter and farmer realize their share of this benefit, in the augmented value of their lands; the manufacturer and the merchant, in the increased and diversified demands for their industry and capital. Nor are the higher interests of society less indebted for their advancement to the multiplication and improvement of these channels of useful intercourse. They afford the means of exploring the natural resources of a country and invite the genius of speculation to fit them for the uses of man. Lands too remote from markets to tempt cultivation; forests, hitherto

regarded as inaccessible; beds of minerals and fossils unknown or neglected, are brought within the reach of ordinary enterprise and rendered subservient to the convenient comfort of the citizen or to the defense and safety of the State. They confer on an extended empire the promptitude and energy of action, which are considered peculiarly characteristic of one of narrow dimensions; since without contracting the limits of its territory they reduce the distance and expedite the communication between the seat of its government and its remotest extremities.

"Whether the public force is to be spread out for defence or combined for attack, they alike contribute to the rapidity and vigor of its operations.

"In a republic, especially, where public opinion exerts a controlling influence, and public virtue should be the spring of all public action, they may be considered an important auxiliary, if not a necessary ingredient of public liberty. They tend to diffuse more equally the knowledge which experience acquires and the leisure which wealth alone can purchase; they strengthen the cords of social union and the quick and generous feeling of patriotism, which is ever ready to exclaim at the contemplation of an extended scene of public improvement: 'I love my country because she is worthy of my affection.'

"The duty, which is obligatory upon all governments, is peculiarly incumbent upon one, whose territory like that of Virginia, nature has done so much both to unite and separate—to whom she has presented so many advantages to improve and so many obstacles to overcome.

"No State of the Union is intersected by so many navigable rivers or divided by so many chains of lofty mountains; none perhaps abound with such happy varieties of climate and soil, so many resources for internal commerce. In her coal, iron, lead, tin and salt, she is unrivaled. Her tobacco and grain command the highest prices abroad. The fertile banks of her rivers and the moist valleys of her mountains yield abundant crops of flax and hemp. Her lowlands would supply her with cotton for her own consumption, and the fleeces of the flocks which pasture on her hills are not surpassed in quality.

"Notwithstanding these advantages, the principal part of her commerce and almost the whole of her navigation, pass out of her hands to enrich the coffers of her neighbors. There is scarcely a village to the west of the Blue Ridge and very few above tidewater, from the Roanoke to the Potomac, which derive any part of their supply of manufactured commodities, either foreign or domestic, from the seaports of Virginia.

"While many other States have been advancing in wealth and numbers with a rapidity which has astonished themselves, the ancient Dominion and elder sister of the Union has remained stationary.

"A very large proportion of her western territory is yet unimproved, while a considerable part of her eastern has receded from its former opulence.

"How many sad spectacles do her lowlands of wasted and deserted fields present? Of dwellings abandoned by their proprietors, of churches in ruins? The genius of her ancient hospitality benumbed by the cold touch of penury, spreads his scanty board in naked halls, or seeks a coarser but more plenteous repast in the lonely cabins of the West. The fathers of the land are gone, where the outlet to the ocean turns their thoughts from the place of their nativity and the affections from the haunts of their youth. Beyond the Alleghanies an unexpected revolution threatens the Atlantic States in general, the accomplishment of which will create new interests and views in that flourishing and important section of America, and probably, for them, the hope of reuniting it by commercial ties to the markets of the East.

"If it be true, as your committee confidently believe, that in a connection between the Roanake, the James, and the Potomac, with the waters of the Kanawha or Ohio, this Commonwealth possesses the best means of arresting the progress of this revolution, it is a duty which she owes not only to herself, but to the Atlantic States and to the Union at large to call those means into action * * *

"Your committee are far from intimating that the General Assembly of Virginia has been totally unmindful of those natural advantages or wholly regardless of their improvement.

"The Commonwealth required time to recover from pecuniary losses which she sustained during the War of the Revolution. It found her citizens laboring under very heavy private debts, and left her government encumbered with a public debt of much greater magnitude.

"Yet in circumstances so inauspicious the statesmen of that day and especially the illustrious man to whom, under heaven this nation was indebted for the establishment of its freedom, did not disdain to enquire into the humblest means of giving to that freedom value. From his zealous exertions sprung the Potomac and James River canal companies. To the first of these the Commonwealth is indebted for a water communication 338 miles; and upon it and the contemplated works of the Shenandoah she relies for the further improvement of a navigation of 390 miles. She has shared with a sister State the benefits of the labor already performed on this river; in that which remains to be accomplished on the south branch of the Potomac and Cacapehon and the Shenandoah, she has an extensive interest.

"The James River Company have opened a navigation of 300 miles.

"The Appomattox and Dismal Swamp canal naturally followed into existence those which were indebted for their origin to the patriotism of General Washington. The former opened a navigation of 100 miles. The latter was designed merely to connect waters already navigable, but in its present use and remote consequences is not inferior in importance to any public work in the Commonwealth.

"The expense of the first of the preceding work does not exceed $1,500 per mile upon the navigation already opened; that of the second is about $1,200; the average expense will be annually diminished in the history of future improvements on the branches of those rivers as the principal obstructions to their navigation were removed before their waters could be brought into partial use.

"The actual cost of those public works does not exceed one-third of the expense usually attendant upon the structure of turnpike roads: which in the absence of navigation are the only substitute

for them. It is due to the latter, however, to remark that the addition recently made to them of parallel lines of rails, immovably set in the earth at proper intervals for the wheels of wagons, has more than equalized the advantages of such roads with the best ascending navigation which the resources of Virginia afford above their principal falls; and that the additional cost which this improvement gives to the structure of the turnpike, although great in itself, is inconsiderable when compared with its effect in reducing the expense of loads carried. The turnpike roads of the Commonwealth except a few short pieces of particularly mountainous, and a road recently begun from Fredericksburg towards the Blue Ridge, are confined principally to the county of Loudoun, the adjacent counties of Fairfax, Fauquier, Frederick, and to the vicinity of the seat of Government.

"There is but one to which the funds of the Commonwealth have contributed any aid.

"All of these public works are alike in one respect. They purpose to defray the expense of their first cost and of their subsequent repairs, out of the tolls collected upon them; and these are equitably levied upon those who use them in sums proportionate to the benefit which they respectively derive from such use. Where it is absolutely certain that such works can subsist upon this basis alone, the revenue of the Commonwealth, although it may expedite their progress, is not indispensably necessary to their creation.

"Private wealth will of itself take the direction which personal interest prompts. But there are many such works essential to the prosperity of the Commonwealth, the persons immediately interested in which have not capitals sufficient to commence their foundation, and there are many others of like utility which if completed would require the lapse of many years to make them profitable to the individual subscribers to their stock. The population and commerce which infallibly follow their direction, spread out upon their borders and swell their tolls, cannot be expected to precede their existence.

"Although almost all the turnpike roads within the Commonwealth of Virginia have been made without any other legislative

aid than their respective acts of incorporation, yet it is probable that neither the Potomac nor James River would have been rendered navigable above tidewater with such assistance alone. Maryland and Virginia subscribed more than one-half of the capital stock of the former, and Virginia alone more than one-third of the latter. The tolls hitherto collected on the one would not have justified a subscription to its stock with a view to mere profit; and though those of the latter have for some time realized the most sanguine expectations of its friends and its stock is 80 per cent. above par, yet the revenue of the company apart from the appreciation of its stock, would not net to its members 6 per cent. per annum upon the sums which they have actually expended upon that river from the commencement of their labors to the present period.

"Your committee, however, confidently believe there is not an individual within the Commonwealth alive to a sense of her true interests who would have desired for the sake of a higher profit to the treasury upon the stock of the public in either of these works, to withdraw the funds which were required for their completion and permit this noble resource to return to a state of nature.

"Those who reside near to their banks directly participated in the benefits thus afforded them of a cheaper mode of transporting the productions of their labor to market; and those even who accidently possessed the superior advantages of tidewater, or who were compelled by their distance from both to resort to the common highways in order to reach the same markets, have greatly profited by those improvements of navigation which augment the extent and value of that market, could not fail proportionately to enhance the price for their produce. So true it is that whatever contributes to increase the population and wealth of the towns must contribute to the growth and improvement of the country. And this effect is wrought not solely on the vicinity of those towns, it is seen not merely in the wealth which collects in their suburbs; but is discovered in the augmentation of their means of consumption and the enlargement of their commercial capitals.

"In this necessary and reciprocal relation of commerce and agriculture, the country below tidewater in Virginia has an imme-

diate and even local interest in the progress and perfection of all those public works exclusive of its general interest in whatever advances the growth and prosperity of the Commonwealth. The inhabitants of the lowlands will therefore partake of the benefit of every application of public revenue to the improvement of the connection between their market towns and the country above them. It should be peculiarly their policy to turn the commerce to the west from its northern direction into the bosom of their own territory. In the efforts which are contemplated to improve the roads passing immediately through their own country they have an interest more sensible to the eye but less so to the understanding.

"Although much has been done for the improvement of the interior of Virginia, more yet remains to be accomplished."

"If nature has divided the territory of the Commonwealth by numerous chains of lofty mountains it is only to incite the genius of mankind to climb them, and the period is not unthinkable—nay, it rests with the legislature to determine whether it be remote, when the roads which cross those natural and formidable barriers shall not be surpassed by those which run along their base * * *

"Should the General Assembly determine to patronize by the application of the public revenue all such works as are likely to be of great public utility, it becomes important to decide whether an improvement may not be made in the mode heretofore pursued of extending to them patronage.

"Your committee are fully satisfied that much loss has been sustained by all the canal companies which have been incorporated hitherto for want of skill in their conduct. Their directors have served, it is true, without compensation. They have generally been public spirited private gentlemen, but neither professional engineers nor capable from experience and observation of guarding against the errors and frauds of agents who pretended to be so.

"No single company could afford to purchase or could fully employ in a country where a few public works were begun, the services of a distinguished engineer; and yet without the previous surveys, plans and estimates of such an officer, no very arduous public work could be confidently begun or successfully conducted. To

supply the defect of such an officer would be the obvious interest of the Commonwealth, and if he were not sufficiently compensated by the general utility of his labors, he might demand of each company such an interest in its stock as would be equivalent to the value of the service rendered to the company by such officer.

"Whatever funds the legislature may be inclined to appropriate for internal improvements, a difficulty must occur in settling the relative importance of its principal objects; and if the appropriation were also required to designate some particular object it would be often impracticable from the variety of opinion—always existing in an Assembly representing many local interests—to procure an union in the choice of any one.

"The first of these difficulties may be obviated by organizing a proper body to collect and prepare for the General Assembly the facts and information necessary to cast upon every application for a portion of the fund light enough to guide the sound discretion of the Legislature in the selection of subjects."

"And these facts will be entitled to the higher confidence if reported under the sanction of official responsibility."

"To allay such local jealousies as might obstruct an agreement in favor of any single object of internal improvement, a fund may be previously segregated and set apart for the accomplishment of all by one appropriation. If the term by future application to any, be at the same time prescribed, a like participation in the benefit of the fund would be assured to every interest which it is calculated to promote; and the speedy enjoyment of that benefit will be secured to each by apportioning the magnitude of the fund so set apart to the number and importance of the objects for which it is designed to provide.

"It may be sound policy for the Commonwealth, in order to accomplish some great commercial or political purpose, to throw open to general use, without the charge of toll, a particular canal or road; but it can never be to its interest, for many reasons, to become the sole proprietor of all the public works within its territory.

"Experience testifies that they will be more economically im-

proved and better repaired if their management be left to the individuals who subscribe to their stock, with a view to private gain, than if confined to public officers or agents.

"The Commonwealth should subscribe so much to their stock and on such terms as will suffice to elicit individual wealth for public improvement—and the control which she retains over the conduct of the individual subscribers should extend no further than to prevent or correct such abuses upon the community at large, as might be apprehended from the too eager incentive of gain.

"By yielding to the individual subscribers the profit of the State on its shares of the stock of any company where required to secure such individuals against temporary loss, a much smaller subscription of the public money will suffice to draw forth private enterprise.

"The Commonwealth can never be a loser if a public work judiciously begun be finally perfected—and the public security against such loss will be found in the discretion which the legislature retains over the choice of the object for which its patronage is sought.

"As the market rate of interest decreases in every commercial country with the growth of its capital, the maximum profit of the stock of each company may be reduced after the lapse of a limited period of time.

"The principles laid down in the preceding part of this report the committee has embodied in the resolutions which are subjoined to it; but they would not have performed their duty to the House if before they recommended the application to objects of internal improvement of all the public stock of the Commonwealth as well as the premium which may be hereafter received from the incorporation of new, the extension of the capitals or the duration of the charters of the existing banks, they had not inquired into the actual state of the debts and of the annual revenue and expenditure of the Commonwealth."—

"That inquiry resolves itself into the establishment of the following propositions:

"1st. That for fifteen years prior to the commencement of the

late war, the ordinary revenue of the Commonwealth has not only been adequate to meet the ordinary expenditures charged upon it, but to enable the Commonwealth to arm from time to time a large part of her militia—to lay the foundation of her literary fund, to erect several very costly public edifices, and to complete the purchase of the stock subscribed by the Commonwealth to the Bank of Virginia; objects which occasioned a disbursement from the ordinary revenue of a sum exceeding one million of dollars.

2ndly. That since the commencement of that war the revenue of the Commonwealth more than doubled by additional taxes and farther augmented by considerable loans from the bank, has not only sufficed for the ordinary possible expenditure, but enabled the legislature to assume the State's quota of the direct tax of 1814 and to apply to the defense of the United States a sum exceeding eighteen hundred thousand dollars, exclusive of the interest paid upon those loans.

"3rdly. That the Commonwealth has at present a claim upon the United States of unquestionable justice for more than seventeen hundred thousand dollars of the above amount, together with the interest on such portions of it at least as were obtained on loans, which claim when satisfied will furnish a sum competent to discharge all the debts of the Commonwealth, to provide for the expenditures of the current fiscal year and to leave at the end of that year a balance in the treasury of three hundred and fifty thousand dollars to be applied to any other object of internal interest.

"4thly. That the present taxes may be reduced to the amount levied before the late war, provided the United States shall reimburse the sums advanced for the defense of the Commonwealth; and even should the payment of those sums be withheld, which a just confidence in the good faith of the General Government forbids your committee to expect, a repeal may yet be effected of such proportion of the war taxes as are not absolutely pledged for the payment of the interest, and the redemption of the principal of the public debt.

"From all of which it evidently appears that the fund which it is proposed to apply to the purposes of internal improvement

may be spared from the revenue of the Commonwealth without any embarrassment of her finances, any violation of her engagements or pressure upon her citizens.

"Should the appropriation recommended by the committee receive the sanction of the legislature, the fund for internal improvement will consist of the following stock:

"5,547 shares of stock of the Bank of Virginia on which a dividend is now received, which computed at par is worth five hundred and fifty-four thousand, seven hundred dollars	$554,700.00
"2,400 shares of the stock of the Bank of Virginia whereupon no dividend will accrue until after the first day of May, 1818	240,000.00
"3,344 shares of the stock of the Farmers' Bank of Virginia	333,400.00
"250 shares of the stock of the James River Company, also estimated at par	50,000.00
"125 shares of the stock of the Appomattox Company	12,500.00
"70 shares of the stock of the Dismal Swamp Canal Company	17,500.00
"70 shares of the stock of the Potomac Company	31,111.11-1-9
"100 shares of the stock of the Little River Turnpike Company	10,000.00
"Making a total of	$1,249,211.11-1-9

"Of which, the sum of $938,100 is now productive of an annual revenue exceeding $98,000; and $240,000 will become alike productive after the first day of May, 1818.

"In the present state of the fund the progress of the public works to which it may be expected to give rise will be until the first day of May, 1818, at the rate of $245,000 per annum. After that period it will be further augmented by the addition of $60,000.

"So that the total value of the internal improvements of ten years will be $2,777,500, and this calculation is grounded on a sup-

position that a portion of the stock which is now unproductive will continue to be so; and that no augmentation of the fund will have been made by the creation of new banks. * * * * *

"Be it therefore resolved"

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"8. That the president and directors of the Board of Public Works be authorized to subscribe behalf of the Commonwealth to such public works as the General Assembly may from time to time agree to patronize such portions of the revenue from the fund for internal improvement as may be directed by law; but that no part of the fund shall be subscribed towards the stock of any canal or turnpike company until three-fifths at least of the whole stock necessary to complete such canal or turnpike shall have been otherwise subscribed; nor until of the stock so subscribed one-fifth shall have been paid in by the respective subscribers or the payment thereof effectually secured." (B. P. W. Reps., Vol. I, p. 55 and 59 (11).

APPENDIX NO. II.

1st Annual Report Board of Public Works, for year 1816, Vol. 1, pt. 1, p. 81.

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"The appeal which the board has thus made to the public spirit of the country has not been in vain. Great efforts have been made to fill the subscriptions for opening the navigation of the Roanoke."

* * * "There are several objects within the scope of the system devised by the General Assembly for the improvement of the interior of Virginia which in the present state of her wealth and population it is beyond the reach of her unassisted ability to ac-

complish; but which being equally interesting to her sister States and the Government of the United States, it may not be impossible to further by their co-operation."

"The failure of the stock of those companies which have already been incorporated to yield an immediate income to the subscribers is to be imputable to their tardy progress in building the works which they had begun; and delay which arose from their having commenced their labors with inadequate funds; and which discouraged new adventures from uniting with them or hazarding their fortunes in similar enterprises.

"The foundation which the General Assembly have now laid for future works of this description is calculated to remove this impediment to their progress, and to asure to the Commonwealth a speedy return for such sums as the General Assembly may authorize the Board of Public Works to subscribe out of the funds for internal improvement.

"It is not in the power of the Board in the infancy of their institution to include in this report a detail of the report and condition of any public work commenced under the auspices of the act of their incorporation. With a view, however, of early arousing the enterprise and patriotism of their fellow citizens in general to embark their private fortunes in the career of internal improvement opened to them by the liberality of the General Assembly, the Board of Public Works adopted at their extraordinary session the accompanying resolution:

> "'In a country so diversified as the territory of Virginia by rivers and mountains, possessing such a variety of staples and so many markets for their exploitation, the board could be expected to recommend to the General Assembly but a very small number of those public works which the future policy of Virginia may be inclined to patronize, and the fund for public internal improvements hereafter competent to aid:
>
> "'To open the navigation of those rivers, penetrate deeply into the interior of the country; to unite by commercial and political ties the widely extended territory of the Commonwealth, are in the estimation of the board objects of the first

magnitude in the scale of improvements contemplated by the General Assembly.'"
Resolution "B" p. 87, item.

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"That the making of an artificial road from Staunton to some point on the Ohio River in the county of Wood or Tyler is an object of great importance to the interests of this Commonwealth."

"That the making of an artificial road from some point on Jackson's River to some other point on the navigable waters of the Kanawha River and the extension of the navigation of those rivers as high up the same as practicable, are objects of great importance to the interests of this Commonwealth."

"Resolved, That the making of an artificial road from Salem in the county of Botetourt, to Winchester, is an object of great importance to the interests of this Commonwealth."

"Resolved, That the improvement of the navigation of the Monongalia River is an object of great importance to the interests of this Commonwealth."

"Resolved, That the making of an artificial road from Winchester to a point near the eastern base of the Alleghany Mountain, on the road which the Government of the United States is extending from Fort Cumberland to Wheeling, is an object of great importance to the interest of this Commonwealth."

2d Annual Report Board of Public Works, Vol. I. pt. 2, p. 29, 1817 (In re improvements on Kanawha River.)

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"The report made pursuant to this instruction is now respectfully submitted marked 'X' and will enable the legislature to decide between the different modes of forming the connection;"—

"Much of the richest territory of the State is on the Kanawha and Ohio Rivers, a great proportion of which was granted in large tracts to individuals for military service, many of which tracts have been kept entire and the greatest part of them remain unsettled to this day; this circumstance, combined with the sparse population of the counties through which the improvement was to be made, induces the belief that the usual contributions from individuals cannot be expected in that quarter of the country. It is therefore respectfully suggested that the salutary restriction that requires three-fifths of the stock to be taken by individuals be dispensed with or modified in this instance, or that the co-operation of capitalists may be drawn to the aid of this work by combining a more immediate and profitable employment of capital with its execution."

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3rd Annual Report Board of Public Works, Vol. 2, pt. 1, p. 13, 1818.

"The president and directors of the Board of Public Works beg leave to submit to the legislature whether it is not expedient to appropriate such a portion of the income of the fund for internal improvement not exceeding one-fourth of the annual income, to the aid of turnpike companies, as that, while it shall produce an immediate advantage to many considerable districts of country which cannot otherwise receive any direct benefit from the fund, shall not obstruct the execution of other more important and extensive works. This policy seems to be recommended by the consideration that extensive districts cannot otherwise participate directly in the benefits of the fund, and that all the advantages arising from works on a small scale will be speedily realized.

"If the legislature should adopt this policy, then the board recommends to the patronage of the legislature"—

"The latter of these companies" (referring to the Leesburg Turnpike Company) "has also completed a considerable portion of the road, and a subscription by the Board of Public Works of $33,600, payable in four annual instalments, equal to two-fifths of the stock of the company, of which three-fifths are already taken by individuals, would enable them to complete the road. A statement of the situation of this company is subjoined."

Report of Swift Run Gap Turnpike Co., to Board of Public Works. B. P. W. Reps, Vol. 2, pt. 1, p. 56, 1818.

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"That experience has too fully and universally evidenced the great advantages resulting from good roads, for the transportation to market of the surplus products of a country, to render it necessary for them to enforce it by any remarks on their part, especially when addressing a body whose very name and the object of whose creation must satisfactorily indicate the growth and diffusion of liberal and enlarged views upon the propriety of internal improvement and the extinction of those prejudices which have but too long retarded a measure deeply involving the best interests of the Commonwealth. * * * *

Report of Leesburg Turnpike Co., to Board of Public Works. B. P. W., Reps. Vol. 2, pt. 1, p. 60, 1818.

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"It is further resolved that it be made known to the said president and directors that upwards of one-fifth part of said road is now completed, and that this board are of the opinion that unless the said president and directors of the Board of Public Works shall aid in the completion of said road by subscribing two-fifths of the stock aforesaid, every exertion to produce the desired object must prove abortive, and the public be deprived of a great and important internal improvement."

4th Annual Rep. Board Public Works. Vol. 2, pt. 1, p. 11, 1819.

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"In reviewing the progress and condition of the various improvements now in process of execution under the patronage of the legislature, the Board of Public Works are inspired with a just confidence that the valuable and highly important objects for the attainment of which the fund for internal improvement was created, will be fully attained by a patient perseverance in the application of the daily increasing capital of the fund to those objects."

Supplement to same, idem p. 4, Statement of Thos. W. Randolph, pres. B. P. W.

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"The subject is now mature for the decision of the legislature; and upon that depends what Virginia shall be twenty years hence; whether as now, or with a great and flourishing commerce, populous and wealthy cities, reoccupied plains on the east, and peopled mountains on the west, a connection founded on mutual interests with the great population of the Western States for the most part driven originally by want of profitable employment from her own territory; and the mighty influence such advantages cannot fail to create for the preservation of order, free principles and union in the confederacy."

5th Annual Rep. Board of Public Works, Vol. 2, pt. 5, p. 13, 1820.

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"A review of the state of the fund and of the report of the principal engineer, together with the other reports accompanying

this, affords gratifying proof that whilst the territory of the Commonwealth abounds with objects of valuable internal improvement in every district, the fund appropriated for that purpose is adequate, upon the principles upon which it is founded, to give effectual aid to such improvements to the full extent of the demands which can probably be made upon it; and that several public works of great importance to extensive districts of the State are under the patronage of the legislature rapidly advancing to completion which, without such patronage, might have languished for years, and perhaps have been wholly abandoned."

9th Annual Rep. Board Public Works Vol. 4, p. 168, 1824. (In re improvements on Kanawha River).

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"Your committee cannot close this report without calling the attention of the legislature to the growing importance of the salt trade upon the Kanawha River. At a very early period of this great undertaking this subject engaged the attention of the legislature: and whilst the magnitude of those manufactories, yielding at this time about one million bushels of salt per annum, promised a large revenue to the Commonwealth, reciprocal advantage was expected to accrue to them in the increased facilities of their carriage to their markets upon the Ohio River.

"We cannot, if we would, disguise it from ourselves that Virginia, if not deteriorating, is certainly not advancing with the same rapidity as many of her sister States of this Union. Her population is passing to the West, contributing by their wealth and industry to raise up new and as yet unknown interests in that important part of the United States. It is in this point of view, as your committee conceive, that this subject becomes most deeply interesting, and regarding this great chain of improvement as a social link uniting the East and West, it deserves the highest consideration of Virginia."

10th Annual Rep. Board Public Works, Vol. 4, p. 190, 1825.

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"But few of the stocks of the canal and turnpike companies required by the application of the income of the fund, under the acts of the General Assembly and the resolutions of the Board, as yet pay any dividend, and the revenues derived from that source is at present very inconsiderate. The appropriations made to companies with which this board has thus become connected, though unproductive of revenue, have not failed in producing a good effect."

"A spirit of improvement, it is believed, has been excited in some sections of our State where none existed before; and the assistance afforded in several instances has led to the undertaking of improvements which otherwise would not have been commenced and could not have been accomplished. The board, however, entertains the expectation that in addition to the benefit thus conferred, a revenue will in time be derived which will enable it to extend the sphere of its utility."

14th Annual Rep. Board Public Works, Vol. 6, p. 10, 1819.

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"Although it was not the original purpose of the legislature in creating the fund for internal improvements that the aid to be extended to joint stock companies should be afforded upon the principle of mere money making, yet its productiveness cannot fail to be gratifying not only as yielding income, and thus enlarging the capability of the fund for extended usefulness, but particularly as affording conclusive proof of the beneficial application of its income in the execution of important work."

"There are other companies with whom the fund for internal improvement stands connected whose prospects, though not so bright, are nevertheless encouraging. There are yet some others whose reports scarcely justify the faint expectations of even

deferred income from the capital expended, but whose work nevertheless affords important facilities to the trade of extensive and fertile districts of the State, and thus contributes to the general weal.

"This view of the condition and prospects of the companies who have been arduously engaged in making extensive and valuable improvements in our country, and to whom the aid of this fund is extended, is presented not only to excite attention to the certain and contingent advantages of such improvements, but also to repress, as far as practicable, that spirit of impatience which so frequently manifests itself throughout the country by murmurs at the tardiness and the expense with which the works are prosecuted, and that the unprofitableness of the public investments. These murmurs seemed to indicate the idle expectation that these great public works ought to be conducted as rapidly as the ordinary operations of a farm, and a belief that the public investments are made upon the principles of common stock jobbing."

"This spirit of impatience opposes all its energies to that public spirit which should animate every community in its march to high prosperity. The latter ought to be cherished as being of inestimable value, while the former ought to be suppressed as tending to desolation only. Although it is far from being desirable that the stocks subscribed by the Board of Public Works, under the direction of the General Assembly, should be unproductive of income, yet if the enhancement of real and other property in the country be equal in amount to the investment made, the community has surely lost nothing, and if the enhancement be indefinitely greater, so also is the common benefit. That such enhancement does occur in every community where the improvements of the country are vigorously prosecuted, is abundantly and irrefragibly demonstrated by the experience of Pennsylvania, New York, and New Enland, where lands naturally less valuable command a price from four to ten times greater than they do in Virginia; and although their public stocks should yield them no income, yet the communities are otherwise benefited by them in a ratio of arithmetical progression. Public spirit and due perception of common and mutual interest is the great desideratum in Virginia. Were it to awaken, it would readily find subjects of improvement munificently spread before them. Surely, no country possesses greater capabilities than Virginia."

15th Annual Rep. Board of Public Works, Vol. 6, p. 113, 1830

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"This prosperous state of the fund, combined with the increased solicitude of the public on the subject of internal improvements, a solicitude created by the real necessities that exist for the construction of various improvements throughout the State, and which has been heightened by the example of some of the neighboring States who have been guided by an enlightened and liberal policy on this subject has urged on the Board of Public Works an inquiry into the capacity of the fund for internal improvement to complete the works already commenced and to construct such others as the interests of the public may render necessary. In administering the fund to the wants of so extensive a country, presenting great varieties of situation, soil, and products, with a population in some instances separated by mountains and forests, any uniform rule founded upon the principles of justice and equality seems to be impracticable.

"If the principles of only applying the funds in combination with individuals in the form of stock companies, according to the provisions of the eleventh section of the act creating the fund, should be adopted and adhered to, the consequence would be that the energies of the fund will be exhausted upon local objects of partial benefit and extent, to be found most generally in such parts of the State where the population has already acquired sufficient surplus wealth to enable them to embark in such enterprises, and where the end to be gained is the advancement of the individual interest rather than the public good. On the other hand, if only the income that arises upon the capital stock or investments of the fund is to be applied as it annually accrues, the amount is totally insufficient to effect any extended scheme of improvement commensurate with the great interests of the State.

"The act creating the fund contemplated the 'rendering navigable and uniting by canals of the principal rivers, and of more intimately connecting, by public highways, different parts of the Commonwealth.' The objects embraced by it are so extensive and important in their nature as to be excluded from the reach of individual enterprise and capital; besides it may happen that improvements are required essential to the best in-

terests of the country, but from which no direct income will be realized, although the State would be abundantly remunerated by the stimulus it would give to industry by the development of new sources of wealth, by enhancing the value of lands, and by the increase of population, thereby adding to the moral and physical ability of the State to sustain itself in time of war and peace."

26th Annual Rep. Works, Vol. 12, p. 9.—1841.

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"In connection with the subject of railroads, the board respectfully begs leave to submit the following remarks:

"It is well known that the capital of all our railroad companies proved to be entirely insufficient to complete the formation of the roadbeds and superstructure and to provide depots, work-shops, engines and all other necessary appendages for carrying on the business of the roads. It is equally well known that much of the capital was wasted in consequence of the necessarily imperfect knowledge of the subject which was possessed by engineers at the time of the introduction of railroads into the United States; and partly owing to neglect and want of economy, method and proper supervision in the transaction and management of their affairs at the outset and for some time after.

"The result has generally been that the companies have found the aid so liberally extended to them in the shape of loans very inadequate to their real necessity. They are mostly still involved in heavy debts, exclusive of those to the State, and the urgent demands upon them for the payment of principal and interest which they are compelled to meet promptly in order to keep their works in operation, absorb their profits to such an extent as to deprive them, in a great measure, of the ability to keep the roadbeds and the motive power, and so forth, upon them in the perfect order they should be to insure regularity, safey and expedition.

"*It must be remembered that these improvements were not fostered by the legislature through contributions in subscription and loans merely as investments of so much money in*

profitable stocks, but that they were actuated by a higher consideration, that of promoting the prosperity of the State at large by contracting to build up the local prosperity of its different sections." (Italics not in original.)

"That the most beneficial results have been experienced by every railroad that has been established is not a matter of conjecture. Industry has received from them a new impetus. The cultivation of the soil in every part of the country within the range of their influence has been greatly extended; arts, trades, and commerce flourish to a greater extent, and a greater reduction has been effected in the expense of transporting the produce of the farmer and the goods of the merchant to market, and a speedy and cheap transportation between the citizens of our own State with each other and with the citizens of other States has been established. * * * * *

EXTRACTS FROM ACTS OF ASSEMBLY OF VIRGINIA WITH REFERENCE TO EXPENDITURES FOR INTERNAL IMPROVEMENT, THROUGH JOINT STOCK COMPANIES.

CHAP. XVII.

An Act to create a fund for Internal Improvement.

(Passed February 5th, 1816.)

1. *Be it enacted by the General Assembly*, That a fund shall be, and the same is hereby created, to be denominated "The Fund for Internal Improvement," and to be applied, exclusively, to the purpose of rendering navigable, and uniting by canals, the principal, rivers and of more intimately connecting by the public highways, and different parts of this Commonwealth.

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3. *And be it further enacted*, That, for the purpose of preserving and improving this fund, and of disbursing such portions of it as the General Assembly may, from time to time, direct, to be ap-

plied to any object of internal improvement, it shall be and the same is hereby vested in a corporate body, to be styled, "The President and Directors of the Board of Public Works" in which name they shall have a common seal, and perpetual succession, subject to the limitations hereinafter provided, shall be capable of suing and being sued, pleading and being impleaded, and shall have and enjoy all the rights and privileges of a corporation.

4. *And be it further enacted*, That the Governor of the Commonwealth shall be ex-officio President of the Board of Public Works; that the directors a majority of whom shall constitute a Board for the transaction of any business devolving on the corporation, shall consist of the Treasurer and the Attorney General of the Commonwealth, for the time being, and of ten citizens thereof; of whom three shall reside westward of the Alleghany mountain; two between the Alleghany and the Blue Ridge; three between the Blue Ridge and the great post road, which, passing through the territory of the Commonwealth, crosses the principal rivers thereof at, or about the head of tidewater, and the residue between that road and the sea coast.

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8. *And be it further enacted*, That the President and Directors of the Board of Public Works shall hold an annual meeting in the City of Richmond, or at such other place as may be designated by law, to begin on the first Monday in November of every year, and to continue until the business of the Board is transacted—But, that the President of the Board may, at his own pleasure, or shall, at the request of any three Directors thereof, convene an extra meeting of the Board, for the transaction of any extraordinary business which may devolve on the corporation.

* * * * * * * * *

10. *And be it further enacted*, That the fund for internal improvement, subject to the order of the President and Directors of the board, shall be deposited in the Treasury of the Commonwealth and kept distinct and apart from all other public money: It shall

be paid out or delivered by the Treasurer of the Commonwealth to the order of the board, certified and subscribed by the Secretary, and countersigned by the President; that the Treasurer shall keep fair and regular account of all such disbursements, and carefully preserve the certificates upon which the same shall have been made, and shall render an account thereof, to the General Assembly, at the same time at which he renders his annual account of the disbursements of the ordinary revenue; that once in every year the Board of Public Works shall depute a committee of their body to examine the accounts of all disbursements made by order of the board, during the year next preceding the annual meeting of the board, and to compare these accounts with the Treasurer's books, and the certificates giving authority for the payment of the several sums of money, or stock, entered therein; that their reports shall certify to the board, that the same have been fully accounted for, or otherwise as the case may be.

11. *And be it further enacted*, That the President and Directors of the Board of Public Works, shall be, and they are hereby authorized to subscribe in behalf of the Commonwealth, to such Public Works as the General Assembly may, from time to time, agree to patronize, such portions of the revenue of the fund for internal improvement, as may be directed by law but that no part of the said fund shall be subscribed towards the stock of any canal, turnpike, or other Company, until three-fifths at least of the whole stock, necessary to complete such canal, turnpike or other public work, of such company, shall have been otherwise subscribed; nor until, of the stock subscribed, one-fifth thereof, shall have been actually paid in by the respective subscribers, or the payment thereof effectually secured by bond with approved security, or a deed of trust upon the real estate of such subscriber, of twice the value of such fifth part; such bond to be taken payable to the President, Directors and Company authorized to complete such public work, and to be recoverable against the obligor or his securities, on motion after ten days' notice, in any court of record within the Commonwealth having jurisdiction thereof; and such deed of trust to be proceeded

upon whenever the trustee therein named shall be required to do so by such President, Directors and Company.

* * * * * * * * *

13. *And be it further enacted*, That the President and Directors of the Board of Public Works shall vest in some productive fund the unappropriated dividends accruing upon any of the stock committed to their charge, until the same shall be specially applied by law to some object of internal improvement; and shall have power subject to the control of the General Assembly, to sell, from time to time, as may be ordained by law, the whole or any part of the shares held by the Commonwealth, in the stock of any canal, turnpike or other company subscribed for under the provisions of this Act, for the purpose of investing the proceeds of sale in the stock of some other similar company, subject to the like conditions as have been before expressed in this Act.

14. *Be it further enacted*, That the President and Directors of the Board of Public Works shall have power to appoint, in behalf of the Commonwealth, so many directors of every Public Work, as shall bear to the whole number of the directors of such work the proportion of the Commonwealth's shares of stock in such work, which may be subscribed in pursuance of this Act, to the whole number of shares subscribed thereto; *provided, however*, that whenever it shall be found expedient by the Legislature to authorize the subscription of any part of the fund hereby created to any company already incorporated, the provisions of this section shall not be construed as applying to such company unless it be otherwise directed by the Act authorizing the subscription.

15. *Be it further enacted*, That it shall be the duty of the President and Directors of the Board of Public Works, to keep a fair and accurate record of all their proceedings, which shall be at all times open to the inspection of the members of the General Assembly, and of the President, Directors and other officers of any company interested therein; that they shall report to the General Assembly, at or near the commencement of every annual session thereof, the exact state of the fund for internal improvement; the progress and

condition, noting especially the net income, of all the public works within the Commonwealth; the surveys, plans and estimated expense of such new works as they may recommend to the patronage of the General Assembly, together with such other important information as they may have it in their power to collect, in relation to the objects committed to their trust.

16. *And be it further enacted*, That the public faith shall be and the same is hereby solemnly pledged to fulfill the appropriation made by this Act; and that the said appropriation shall continue in force until the first day of January, of the year one thousand eight hundred and sixty-six, except at such times as the United States of America may be involved in war, or the safety of this Commonwealth, may, in the opinion of the General Assembly require; when the General Assembly may withdraw (during the period of actual hostilities, or of such imminent danger), the whole or any part of the said fund for the purpose of defense; provided such withdrawal can be made without a violation of any engagement entered into under this Act.

17. This Act shall commence and be in force from and after the passage thereof.

APPENDIX III.

Extract from brief filed on behalf of West Virginia, with the Attorney General of the United States, by Hon. Alfred Caldwell, former Attorney General, and Hon. E. W. Wilson, former Governor of West Virginia, upon the question of the right of the United States to set off any claim against West Virginia on bonds of the Commonwealth of Virginia acquired by the United States before the Formation of West Virginia, against the claim of West Virginia against the United States for a refund of the Direct War Tax.

* * * * * * * *

"Upon the adoption of the ordinance of secession, by the Virginia Convention, in April, 1861, the Wheeling Convention which, June 11, 1861, had assembled for the reorganizaiton of the government of Virginia after adopting an ordinance for such reorganization, proceeded to, and did, August 20, 1861, adopt 'An ordinance to provide for the formation of a new State out of a portion of the territory of this State."

Section 3 of said ordinance provided for changing the boundaries of the proposed new State, so as to include other counties therein named, among which were Jefferson and Berkeley, upon a favorable majority vote by the people of said counties, respectively.

Section 9 of said ordinance is as follows:

'The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period.'

From this proposition West Virginia has never receded. She proposed to be, was taken, received and admitted as a State of

the Union, by the Congress of the United States, with this provision as of the basis of settlement with the State of Virginia. The government of the United States is the creator of the new State, and is therefore precluded absolutely, and under any possible contingency from avoiding the provisions of this ordinance, in order to retain West Virginia's money. The Supreme Court of the United States has decided this ordinance to be binding as between Virginia, West Virginia and the United States. *Virginia* v. *West Virginia*, 11 Wall. 39.

* * * * * * * * *

The public debt of Virginia, January 1, 1861, was incurred almost exclusively in works of public improvement, railroads, turnpikes, canals, bridges, etc., and amounted to $31,779,067.32.

Of this sum there was incurred for public improvements in West Virginia, $2,784,329.29; for all other expenditures in West Virginia $559,600.00, making a total of $3,343,929.29.

The commission, summarizing from the various tabulated statements, strike the following account between the two States.

West Virginia to the State of Virginia,		Dr.
For the amounts expended and invested in her territory, as set forth in statement F....		$3,343,929 29
		Cr.
By one-fourth of the estimated value of the public buildings and other assets, as given in statement G	$968,750 00	
By three-thirteenths of the United States surplus fund, as per statement	446,032 92	
By three-sevenths of the literary fund, as per same	647,079 92	
By the amount collected in West Virginia after January 1, 1861, as per statement E.....	328,706 22	2,390,569 06
Balance		$953,360 23

Under the resolutions creating and defining the duties of this commission, its report was made subject to the approval and ratification of the Legislatures of West Virginia and Virginia.

Under resolutions introduced into the Senate of West Virginia, the finance committee thereof made further examination of

the matter, in 1873, and reported to the Senate the result of its labors. Hon. J. M. Bennett, a member of the commission heretofore mentioned, was Chairman of this Senate Committee. Its report appears in the appendix. We quote the following:

> 'The report of the debt commissioners hereinbefore referred to, shows that all State expenditures within this State, prior to January, 1861, amounted to $3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.
>
> 'The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions, as upon the receipts from Virginia.
>
> 'The committee have therefore assumed the foregoing sum of $3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the debt commissioners aforesaid.
>
> 'From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia from the counties included in this State during the same period." * * * * * *

(Extracted from pamphlet presenting West Virginia's claim for the refund of the U. S. Direct War Tax, pp. 5 and 6.)

NOTE—There were palpable errors in the *ex parte* statement of the account between the two States, contained in the reports referred to and approved in the above brief, in crediting West Virginia with items for which she could claim no credit under the Wheeling Ordinance under which those statements of that account were attempted to be made, and in failing to charge West Virginia with its "just proportion of the ordinary expenses of the State government" and other items of charge expressly required to be made by that Ordinance.

With these corrections made, the account would show as large a balance due from West Virginia as Virginia has now shown in this suit to be due by the new State.

APPENDIX IV.

Paper prepared by Professor T. S. Adams of the University of Wisconsin, defining what are the "ordinary expenses" of a State.

UNIVERSITY OF WISCONSIN.

MADISON.

DEPARTMENT OF POLITICAL ECONOMY.

T. S. ADAMS. Nov. 5, 1909.

Honorable Wm. A. Anderson,
Attorney General of Virginia,
Richmond, Virginia.

My dear Sir:

Some time ago Dr. Ely referred to me a letter from yourself concerning the question of ordinary and extraordinary expenditures. While I of course had some general knowledge of the distinction between these two terms, as used in the budget of various countries, my knowledge on the subject was not of that specific and certain character which your problem demands. It was necessary for me to do some reading and make some examinations of authorities before I could make the reply which I herewith enclose. It is very imperfect and I particularly regret that I have not had time to go through the material in our library containing the public accounts of the various States and cities of this country. I am doubtful also whether what I have written will be of any material assistance to you, but I enclose it, hoping that it may contain a suggestion or two.

Our collection of public documents in the University Library is particularly good; and if you can wait a month or so and will express the desire to have it, I will endeavor to get some student to run through this material with a view of collecting as large a

number as possible of illustrations bearing upon the use of the terms 'ordinary' and 'extraordinary' in American public accounting.

Very truly yours,

TSA/EB (Signed) T. S. ADAMS.

ORDINARY AND EXTRAORDINARY EXPENDITURES.

Ordinary expenditures are usual expenditures. What is usual in one country is not usual in another, and what is usual in a given country at one time may be unusual at another time. We should therefore expect to find, and, as a matter of fact, we do find, all sorts of expenditures included in the extraordinary budgets of various countries. Precedent can be found for almost anything. In France, for example, since 1833, the substance of the extraordinary budget has consisted of expenditures for the establishment of great public works, but prior to 1789 the costs of establishing and improving public works were carried in the ordinary budget.

The best treatment of this general subject is found in Wagner's 'Finanzwissenschaft,' Vol. 1, p. 135-142. Great authority is to be accorded to this treatment, inasmuch as Wagner bases what he has to say not only upon economic theory and study of the law, but upon the experience of the greater European nations. According to Wagner, there is a three-fold distinction between ordinary and extraordinary expenditures:

1. The first distinction turns upon the time at which the expenditure becomes necessary. Extraordinary expenditures from this viewpoint arise out of unexpected demands. Wagner notes, however, that in a great state the great number of trivial or small items of expense which are unforseen assume, in the aggregate, a certain regularity which makes it possible to provide for them by a contingent or reserve fund. Although Wagner refers to these items as 'diese kleinen Posten ausserordenlicher Ausgeben,' he really suggests that they should, in the aggregate, be regarded as regular or ordinary expenses; while the individual items are not forseeable, their aggregate is.

II. The second and most important distinction turns upon the durability or permanence of service for which the expenditure is made and rests upon a contract similar to that made in private economies between circulating and fixed capital.

Under ordinary expenses here, Wagner mentions interest on the public debt and his language suggests that payments on the principal of the public debt when made periodically or annually in accordance with the terms of the loan should also be included among the ordinary expenses (although he protests that there is no general economic principle which requires the regular payment of a public debt).

(It will be noted that under the first distinction which turns upon the certainty or accuracy with which an expense may be anticipated, interest payments are even more clearly and logically included among the ordinary expenses, becauses no expense is more certain or more specifically fixed with respect to time than that of interest payment.)

The extraordinary expenditures under this head are those regular or intermittent expenditures for things whose use or service extends over far more than one fiscal year or period. Wagner distinguishes three special groups here:

1. Capital outlays giving rise to a lasting use, either for—

(a) quasi-private industries and undertakings capable of yielding profit to the State (e. g., forests, railroads, mines, postal and telegraph systems;

(b) or for the establishment and betterment of what may be called the 'immaterial capital of the State' (e. g., expenditures for the introduction and execution of great public reforms such as the land cadastre, reconstruction of judicial system, enfranchisement of serfs, etc.)

2. Irregular productive and remedial expenditures to correct conditions which threaten the life and property of the State, (e. g., war, famine, floods, insurrection, etc.)

"The fact that Wagner nowhere mentions expenditures for hospitals, insane asylums, prisons, etc., is significant and indicates a belief on his part that they are 'ordinary' expenses."

III. The third distinction is the purely legal one and corresponds for the most part to the well-known difference between standing and annual appropriations.

Wagner mentions here as the most characteristic items of ordinary or standing expenses, payments of interest on the public debt, and the payments of such parts of the principal as are regularly retired in accordance with the terms of the loan. Legislative expenses (i. e., those necessary for the assembling and functioning of the legislature) furnish another characteristic item.

(It seems difficult to imagine how any claim can be made for the inclusion of interest payments among the extraordinary expenditures. Borrowing, with its necessary corrolary of regular interest payments, is the specific device by which irregular things are made regular, unbearably heavy burdens divided into those which may be borne with ease; and as surely as the principal of the loan is to be classed among extraordinary receipts, so, surely must the interest payments be classed among the ordinary expenditures. Interest is the instrument by which extraordinary difficulties are converted into ordinary problems. (‖See foot note.)

‖The last point is well brought out in the article entitled Budget sur Resources Extraordinaire des in Say's Dictionaire des Finances, Vol. I. p. 723:

'Ce n'est que de notre temps qu'il a ete institute une theorie pour la defense des Budgets Extraordinaires systematiques. Les budgets ordinaires sont, dit-on, les budgets de la vie normale et annuelle du pays, son compte industriel d'exploitation, et ont l'impot et les revenus des biens de l'Etat pour fonds d'entretien; les budgets extraordinaires repondent a leur compte industriel de premier establissement, indefiniment continue comme se continue indefiniment l'expansion de l'activite d'un peuple qui vit de siecles et non d'annes et son fonds de service est l'embrunt, dont le budget

ordinaire ne se ressent que par l'obligation ou il est d'en payer les interets pour la part de jouissance qui liu en revient.'

The country which has, perhaps, made the widest use of the extraordinary budget is France. The experience of France is discussed in a most illuminating way in Chapters 9 and 10 of Rene Stourm's 'Le Budget.' We find here a number of definitions of an official character. One of these definitions, made in 1862 and often quoted in French law and financial debate, is as follows:

'The credits of the ordinary budget ought to provide for the obligatory and permanent services of the State, assuring the payment of the debt, the execution of the laws, the administration of justice, collection of revenues, and the public defense,' p. 176.

The public debt included in the ordinary budget covers the consolidated, perpetual bonds and annuities, all kinds of terminable bonds and annuities, and 'la debt viagere' (Pensions, life annuities, etc.)

The definition of 'extraordinary' expenditures made by the same author in 1862 is as follows:

> (The extraordinary expenditures comprehend those for great public works, new constructions, abnormal military demands required for the protection of our exterior or foreign interests; in a word, all those expenditures corresponding to monetary needs and destined to disappear ought not to figure among the permanent charges.) Stourm, p. 196.

See foot note.*

*The comment of the then Minister of Finance, M. Magne, upon this definition is exceedingly illuminating, p. 196, Stourm.

> 'En general, on ne prend pas assez garde aux differents roles de L'Etat. En meme temps qu'il est tenu de solder, avec ses ressources ordinaires, ses depenses courantes . . . . en meme temps, il est proprietaire, il a un actif immobilier et obilier, qu'il est tenu, non seulement d'entretenir, mais de perfectionner, dans l'interest de tous et de chacun. Lorsque L'Etat se procure une ressource par voie extraordinaire, par

voie d'emprunts, et que cette ressource est appliquee a cette nature de depenses, il ne fait pu'un placement, qu'une transformation de valeur, il augments la fortune immobiliere et mobiliere de chacun. Ainsi donc, on a raison de ne pas confondre ces deux natures de depenses, les unes, qui sont fongibles, qui augmentent la fortune do l'Etat . . . . Corps legislatif, cells, au contraire, qui se consolident, qui s'incorporent au sol, qui augmentent la fortune de l'Etatt . . . . ' Corps legislatif, 6 avril 1869.

Finally it may be interesting to summarize the great French minister de Freycinet's discussion of this subject.

M. de Freycinet's divided extraordinary expenditures into three classes, Necessary, Optional, anl Illegitimate.

A. 'The necessary expenses are those which result from events which it is not within the power of nations to prevent or at least the financial consequences of which it is impossible to avoid, as, for example the war of 1870 and the enormous fiscal burdens which it has entailed upon the country."

B. "The optional expenses represent essentially expenses for public works. I characterize these expenses as optional because they do not inevitably impose themselves upon a country. The government is never forced absolutely to assume these expenses and especially is never obliged to assume them at any particular time."

C. "I call all those expenses illegitimate which ought to find no place at all in the extraordinary budget. When the extraordinary budget comes to be but a covert means of increasing the ordinary budget, I consider that the expenditure is badly placed and that the extraordinary budget ought to be abolished. The extraordinary budget should not serve as a revenue for those expenses that one does not wish or dare to classify in the ordinary budget but which by their nature belong there." Stourm, p. 204.

There have, for instance, been included in the extraordinary budget at times expenditures for books for the library, gratuities to the employees of the central administration, relief to widows,

expenditures for the celebration of July 14th, and for carpenter's work, subscriptions to telephone companies, provision of oil for light house, etc.

The preceding paragraph merely emphasizes my opening statement to the effect that precedent may be found for almost anything in this connection. But, while this is true, the great weight of usage favors the inclusion among the extraordinary expenditures, of the costs of war and public calamity (which, because of their size, have to be defrayed by public loans) and also the costs of introducing or establishing great public works of an industrial character. Capital outlays for hospitals, asylums, prisons, educational institutions, and the like, are exceedingly doubtful. But it may be said with certainty that according to the prevailing usage, only such (i. e., for hospitals, asylums and the like) capital outlays as necessitate public loans can be placed among extraordinary expenditures. Interest payments on the public debt, regular payments on the principal prescribed in advance either by law or contract, and pensions, belong, by the overwhelming mass of precedent, among ordinary expenditures.

I append a few scattering illustrations which may be of interest.

(1) The budget of the German Empire is regularly divided into ordinary and extraordinary receipts and expenditures. The ordinary expenditures are divided into permanent and temporary, The regular expenditures for industrial undertakings, (post, telegraph, railroads, government printing offices, etc.) as well as most of the expenditures for the public debt and for pensions, appear under the permanent ordinary expenditures.

(2) The budget of Algeria regularly contains the following captions: Depenses extraordinaires, subdivided into the two following heads: (a) Emploi des fonds d'empreunt, (b) Emploi de L'excedent des fondes de reserve. Among the other and presumably the "ordinary" heads, we find debt, public works, agriculture, colonization, and diverse works of benevolence and public utility (poor relief, etc.)

(3) The budgets of Austria and Hungary regularly contain the item extraordinary expenditures. Just what this covers I do not know, but it has been reduced to very small compass in recent years, particularly in Austria. Expenditure for public debt, however, including regular payments on the principal of the debt, is included in the ordinary budget.

(4) Payments of interest and the regular payments on the principal of the public debt are classified in the ordinary expenditures in Belgium.

(5) In Egypt, according to a brief resume of the budget given in Fenn "On the Funds," edition 1898, p. 323, the following expenditures appear in ordinary budget: pensions, tribute, debt payment, expenses of the army of occupation, expenditures for the "suppression of the corvee," and "unforseen expenditures."

(6) Accordingly to the same authority, the Russian budget includes under ordinary expenditures, payments on the State debt—interest and capital—payments on the railway debt—interest and capital—and also "unforseen expenditures."

(7) Professor F. R. Clow, an exceedingly able and careful writer in the Quarterly Journal of Economics, Vol. 10, pages 461-4, cites as instances of extraordinary expenditures payments for the purchase of land, for the construction of permanent works, and the redemption of public debt. Under the ordinary expenditures, he includes interest payments on the public debt. According to Profesor Clow, the accounts of the City of Cleveland, at the time he was writing, included under ordinary expenditures everything except repayment of loans, refunds, investments, and similar items."

APPENDIX V.

Claim against West Virginia computed from the Master's findings of March 17, 1910, under Wheeling Ordinance.

A.

Par. III. Expenditures in West Virginia counties, (page 83)	$2,811,559.98
" IV. Proportion of Ordinary Expenses on Population Basis, with slaves, (p. 140)	8,147,455.92
" VII. Money, Stock, Property, etc., received by West Virginia, (p. 193)..	500,828.00
	$11,459,843.90
" VI. Receipts from West Virginia counties, (p. 179)	6,105,884.75
	$ 5,353,959.15

B.

Par. III. Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" IV. Proportion of Ordinary Expenses on Popupation Basis *without* slaves, (p. 140)	11,452,862.66
" VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
	$14,765,250.64
" VI. Receipts from West Virginia counties, (p. 179)	6,105,884.75
	$ 8,659,365.89

C.

Par. III. Expenditures in West Virginia acounties, (page 83)	$ 2,811,559.98
" V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis June 20, 1863, *with* slaves, (p. 172)	6,078,367.96
" VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
	$ 9,390,755.94
" VI. Receipts from West Virginia counties, (p. 179)	6,105,884.75
	$ 3,284,871.19

D.

Par. III. Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis June 20, 1863, *without* slaves, (page 172	9,463,553.58
" VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
	$12,775,941.56
" VI. Receipts from West Virginia counties, (p. 179)	6,105,884.75
	$ 6,670,056.81

E.

Par. III. Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis Jan. 1, 1861, *with* slaves, (page 173)	6,805,289.57

Par. VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
	$10,117,677.55
" VI. Receipts from West Virginia counties, (p. 179)	6,105,884.75
	$ 4,011,792.80

F.

Par. III. Expenditures in West Virginia counties, (page 83)	$ 2,811,559.98
" V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis Jan. 1, 1861, *without* slaves, (page 173)	8,586,648.25
" VII. Money, Stock, Property, etc., received by West Virginia. (p. 193)	500,828.00
	$11,899,036.23
" VI. Receipts from West Virginia counties, (p. 179)	6,105,884.75
	$ 5,793,151.48

Note: See A. By using Proportion of Ordinary Expenses on Defendant's method of arriving at *Average Population with* slaves, the amount of claim as in A. is reduced by $644,967.61. (See page 141).

Note: See B. Same *without* slaves the amount of claim as in B. is reduced by $714,326.68. (See page 141).

The Master has adopted the plaintiff's method, so these figures are of comparative interest only.

Showing Results Under West Virginia's Construction and Application of Wheeling Ordinance.

RESULT OF WEST VIRGINIA'S ACCOUNTING UNDER THE WHEELING ORDINANCE.

	Using Total Population Basis for Division of Ordinary Expenses.	Using Population *without* Slaves for Division of Ordinary Expenses.	Using Fair Estimated Valuation of Real and Personal Property for Division of Ordinary Expenses.	Using Fair Estimated Valuation of Real and Personal Property on Gold Basis for Division of Ordinary Expenses.
Paragraph III of Decree Joint Exhibit "C" I—Page 1.				
Expenditures by Va. in W. Va. as computed by West Virginia	$1,251,288.92	$1,251,288.92	$1,251,288.92	$1,251,288.92
Paragraph IV of Decree Joint Exhibit "D" I—Page 1.				
Ordinary Expenses of Government, $18,207,684.29, as computed by West Virginia, Joint Exhibit "D" I—Page 4.	3,391,763.84	4,854,733.07		
Paragraph V of Decree Joint Exhibit "E" I.				
Defendant's method of determining Fair Estimated Valuation of Real and Personal Property, per Joint Exhibit "E" I—Page 4, including Slaves and Income as Personal Property.	.....	.....	2,499,987.88	
Defendant's Alterative Method Defendant's Exhibit "E" III—Page 3, using Gold Basis for Assessments, and including Slaves as Personal Property..	.....	.....	.....	3,773,269.45
Paragraph VII of Decree Defendant's Exhibit "G" I—Page 1.				
Value of Money, Stock, Property, and Credits acquired by West Virginia.	176,120.00	176,120.00	176,120.00	176,120.00
Paragraph VI of Decree Joint Exhibit "F" I.	$4,819,172.76	$6,282,141.99	$3,927,396.80	$5,200,678.37
All moneys paid into the Treasury of Virginia from West Virginia counties, West Virginia claim.	7,051,215.56	7,051,215.56	7,051,215.56	7,051,215.56
Excess of Receipts by Virginia over payments made by her as computed by West Virginia.	$2,232,042.80	$ 769,073.57	$3,123,818.76	$1,850,537.19

In the Supreme Court of the United States

Original, No. 3. October Term, 1910

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

FINAL REPLY BRIEF FOR THE COMPLAINANT.

In view of the elaborate discussion of the case in the Master's Report, in the briefs heretofore filed, and in the recent exhaustive oral arguments of the cause, a succinct reply to some of the points presented in the two latest briefs for the defendant will suffice.

I.

POINTS NOW RELIED ON FOR THE DEFENDANT WHICH DO NOT GO TO THE MERITS.

The contention of counsel for the defendant in this branch of their argument is,

That Virginia has no right to maintain this suit—

1. Because she has no such interest in the subject matter of the litigation as gives her a standing to maintain it, denying that she has any equity either for exoneration, or for contribution.

2. Because she sustains a dual relation to the controversy in that she asserts, as is alleged, several independent causes of action, and sues in a dual capacity, namely, both in her own right, and as trustee for the depositing creditors—that therefore her bill is *multifarious*.

3. Because any duty or liability of West Virginia to make a settlement or to pay anything is not to Virginia, but to the creditors of the undivided State.

4. Because Virginia has been guilty of "laches."

A brief response will dispose of each of these points:

(1)

The statement that Virginia has no interest in this suit in her own right is founded in a singular misapprehension of the facts.

(a) VIRGINIA'S EQUITY FOR EXONERATION

If a liability rests upon the Commonwealth to pay any part of the common public debt of the undivided State, that circumstance plainly entitles her to have West Virginia contribute to the payment of that common indebtedness to the extent of West Virginia's equitable liability therefor, in exoneration of Virginia.

The view of opposing counsel that no such liability rests upon Virginia is based upon a misapprehension of the meaning and effect of the Funding Act of March 30, 1871, under which over three-fourths of the common debt was funded. Virginia's liability under that Act is defined in the third section thereof.—I West Va's Compilation, pp. 14-15; R. pp. 17-19.

That the contention of counsel for West Virginia, that Virginia was released from all liability for the one-third of the $38,110,355.37 (including accrued interest capitalized and funded), of her old bonds, funded under that Act, by reason of the issue by her of the $12,703,451.79 of "Deferred Certificates" under the terms of the third section of that Act, is conclusively refuted by the decision of the Supreme Court of Virginia in the case of *Greenhow* v. *Vashon*, 81 Va. 342-343. In that case Judge Richardson, delivering the opinion of the court and quoting with approval the dictum of Judge Staples in *Antonio* v. *Wright*, 22 Gratt. 864-5, says:

"It is said that the creditor has released one-third of his debt. I do not so understand it, and I will hazard the assertion, the creditor does not so construe the law. If this was the intention of the framers of the act they have adopted an obscure and equivocal mode of expressing a plain and simple agreement. The creditor surrenders his bond and obtains a new one for two-thirds of his debt, and coupons for the interest. For the remaining one-third the bond is held in trust by the State, and a certificate is given him stating that payment will be provided for in accordance with such settlement as may be made with West Virginia. If that State is faithful to the obligations resting upon her, the creditor will receive the other third also. On the other hand, if she repudiates these obligations there is no agreement or understanding absolving the State from the payment of the whole debt as before the passage of the funding bill."

The following are the terms of the certificates issued under the Act of 1871:

"Copy of Certificate under Act of March 30, 1871.

"Commonwealth of Virginia.

"No. ———.

"Treasurer's Office, Richmond, Va.

"This is to certify that there is due unto ———— heirs, executors, administrators or assigns $———, being one-third of bond surrendered under the provisions of an Act approved March 30th, 1871, entitled, 'An Act to provide for the funding and payment of the public debt,' namely, Bond No. ———, with interest, amounting to $———. Payment of said one-third with interest thereon at the rate of six per cent. per annum will be provided for in accordance with such settlement as shall hereafter be had between the State of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and the State of Virginia holds said bonds so far as unfunded in trust for the holder hereof or his assigns."

"In testimony whereof this certificate has been signed by the Treasurer and countersigned by the Second Auditor, as provided by law.

"————————,

"Treasurer of the Commonwealth of Virginia.

"————————,

"Second Auditor of Virginia."

(R. 56-57; I West Va. Compilation 49.)

Nor is it true, as gravely contended by West Virginia's counsel, that the subsequent, more or less abortive and ineffectual Funding Acts of March 28, 1879 (R. 21-26; and I. West Va. Compilation 17-22), and of February 14, 1882 (R. 26-38; and I. West Va. Compilation 22-40), released Virginia from any obligation or liability resting upon her under the Act of 1871 in reference to the third of the antecedent debt of the Commonwealth represented by the bonds deposited with her under that Act and expressed in the third section of the Act of 1871, and in the certificates issued thereunder.

Nor did the Act of February 20, 1892 (R. 38-47); I. West Va. Compilation 32-40), under which a final adjustment of the two-thirds of the debt distinctly assumed by Virginia has been effected, release Virginia from any duty or obligations resting upon her in respect to the third of the bonds unfunded under the Act of 1871, or the certificates issued therefor.

It is true that each of said Funding Acts, subsequent to that of 1871, by its terms repealed the antecedent Funding Act or Acts: but while such repeal operated to stop any farther funding under such antecedent Acts, as it was designed to do, it could not, of course, operate to impair or affect the contract rights and obligations created by the Acts so repealed, or relieve Virginia from any contractual liability resting upon her under the provisions of those Acts. That such repeal could have any such effect is one of the extraordinary hallucinations into which defendant's counsel have fallen.

Neither the Acts of March 28, 1879, nor February 14, 1882, nor February 20, 1892, called for or required the surrender of any of the certificates issued under the Act of March 30, 1871; or for the substitution of other certificates therefor; or in the slightest degree modified or affected the status of those certificates of 1871, or any contract rights of the holders thereof, or any obligation or liability, contingent or otherwise, of Virginia in respect thereto.

It manifestly results from this, that Virginia has the right to invoke the equitable jurisdiction of this court for her exoneration from any liability resting upon her as to the portion of the common debt represented by the unfunded third of the bonds de-

posited with her under the Act of 1871, and evidenced by the certificates issued by her under that Act, to the extent of West Virginia's ratable equitable liability therefor.

(b) VIRGINIA HAS AN EQUITABLE CLAIM AGAINST WEST VIRGINIA FOR CONTRIBUTION—IN VIRGINIA'S OWN RIGHT.

If Virginia has paid any portion of the common debt resting upon both States, in full, she has an equity, in her own right, to reimbursement by West Virginia, to the extent of the ratable liability of the new State upon the obligations so paid off and redeemed by Virginia. This is the equity of contribution asserted in Paragraph XVI of the Bill (R. 13; I. West Va. Compilation 10.)

All the evidence in support of this claim has not been put into the cause any more than the evidence as to what the share of the recovery payable on any of the other obligations of the Commonwealth will be; and for the further reason that the court has not directed any such inquiry. There are, however, data, evidence and authentic statements in the record which show that Virginia, since January 1, 1861, has paid off or taken up obligations for interest and for principal existing prior to January 1, 1861, amounting to a very large sum.

For instance, in payment for the Blue Ridge Railroad $625,348.08, Special Master's Report, pp. 47 and 84, and the record returned therewith, p. 487; Appendix to that Record, p. 45, Section 14 of the Act of March 1, 1867. And it also appears from the record that Virginia acquired $118,518.12 of her bonds for her claims against the Winchester & Potomac Railroad, of which $45,000.00 was paid in old bonds, and $66,130.90 in new registered bonds issued for interest upon the old debt. Special Master's Report, pp. 64 and 84, Record, pp. 462 489, and Appendix p. 31.

In addition to this, the statement published as a part of Exhibit No. 3, filed with the bill, the Act of February 14, 1882, shows that Virginia paid on account of interest on old bonds held by the general public from January 1, 1861, to July 1, 1863, $3,662,434.55, and between July 1, 1863, and July 1, 1871, $3,594,289.11. The same public record shows that during the same period, and

before any funding of the share of the debt assumed by Virginia, she redeemed of the common debt dollar bonds to the amount of $3,710,449.67. R., pp. 27-32, I. W. Va. Compilation, pp. 23-26.

Summarized, the following payments were made by Virginia upon the whole undivided debt in the period mentioned, as shown by said Act of February 14, 1[illegible]:

Paid, on account of interest, from Jan. 1, 1861, to July 1, 1871, on bonds held by the general public	$ 7,255,723.66
Dollar bonds redeemed during same period	3,710,449.67
Total sums paid	$10,966,173.33

The statement here referred to was made for the purpose of justifying the readjustment of the State debt proposed by said Act of February 14, 1882. That attempted readjustment proved so unsuccessful and abortive, that, while it was accepted by some of the creditors, chiefly those classes who were given by that Act the largest percentage of their claims in the new bonds tendered, the great mass of the bondholders of the State refused to accede to its terms. To such a large extent was this true, that "not less than twenty-eight million dollars of the public debt" remained, on the 20th of February, 1892, "unfunded under said Act approved February fourteenth, eighteen hundred and eighty-two," as appears from the recitals in the Act of February 20th, 1892. R. 39, 1 West Va. Compilation 32.—See Act of February 20, 1892, printed as Exhibit No. 4 with the bill: R. 38, I. West Va. Compilation, p. 32.

In addition to the bonds issued under the Acts of February 14, 1882, and February 20, 1892, there were over $2,400,000 of bonds, held by certain educational corporations, which were recognized, assumed and provided for by the ancillary Acts of March 3, 1882, and February 23, 1892, and all of which obligations have since been redeemed and taken up by the Commonwealth, and the contracts represented thereby novated, by the issue of new obligations therefor, pursuant to the provisions of the Act approved February 23, 1892.

See copy of last mentioned Act and statement of bonds retired thereby in the Appendix to this brief.

The claim of Virginia, in her own right, for contribution, is not on account of any bonds issued by her after January 1, 1861, or on account of any bonds issued by her for the two-thirds of the original debt which she assumed, but on account of bonds outstanding prior to January 1, 1861, which were in the hands of the general public on that day, and interest thereon, which have been redeemed by Virginia and paid in full since January 1, 1861—obligations and interest thereon which constituted a part of the $33,897,073.82 of indebtedness ascertained by the Master to have been so outstanding on the 1st of January, 1861—Master's Rep. 17.

The evidence as to what part of the debt Virginia had so paid off and so held was not called for by the decree of the court; nor was it of any interest to West Virginia for the precise amount of Virginia's interest in her own right to be determined. If she had paid *any portion* of the original debt of the undivided State she would have an equity for contribution against West Virginia and to participation in any recovery ratably and equitably to the extent that she was entitled to such reimbursement from West Virginia.

The record shows that she has paid millions of dollars, not counting such of the bonds held by institutions of learning as were outstanding prior to January 1, 1861, and as she redeemed, or retired under the provisions of the Act of February 23, 1892.

Upon this state of facts the equity of Virginia, in her own right, to contribution is fully sustained

Either this or the associated equity of exoneration, would be sufficient to support the jurisdiction of the court. But in addition to these there is her right to invoke the equitable jurisdiction of the court for an accounting with West Virginia in order to such a settlement between them as the complainant has a right to have.

(2)

The contention of West Virginia's counsel, that Virginia cannot maintain this suit because her bill is multifarious in that she,

as they charge, asserts several independent causes of action, and sues in a dual capacity, namely both in her own right and as trustee, has been heretofore fully argued, and effectually disposed of by this court upon the demurrer.—See briefs and oral arguments for complainant, I. West Va. Compilation 233 to 236, 331 to 332 333 to 336, 393 to 396; and decision of this court, Idem 434.

In absolute rebuttal of any such defence of multifariousness as is asserted here, see the admirable statement of the rule as now well established in this country given by the distinguished counsel for West Virginia, Mr. Hogg, in his work on Equity Procedure, Vol. I, Sec. 136, quoted at pp. 395-6, I. West Va. Compilation.

The statement that Virginia is suing here in a dual capacity, namely, in her own right, and as trustee, is incorrect.

Virginia alone is the complainant. She sues distinctly and solely in her own right, and for her own relief and protection.

It is true that she also sustains a fiduciary relation to the bonds and evidences of the common indebtedness which have been confided to her by the creditors of the undivided State; but that circumstance was merely a proper, if not a necessary, incident of the contract she made with the common creditors for funding the two-thirds of their obligations which Virginia undertook to take care of.

It was an arrangement of convenience, if not of necessity, *which did not at all prejudice or affect any right of West Virginia.* Nor did it impair any right of Virginia.

To be sure the bill asks that all proper accounts may be taken to determine the balance due from the State of West Virginia to Virginia in her own right and as trustee: but such an accounting is not prejudicial to West Virginia. It would be merely incidental to an ascertainment of the amount which West Virginia owes.

It must be remembered that Virginia assumed the position of trustee as an essential part of the scheme for the settlement between the public creditors and herself. *She was not a mere volunteer, as were New Hampshire and New York in New Hampshire* v. *Louisiana, and New York* v. *Louisiana*, 108 U. S. 76. In those cases, neither New Hampshire nor New York had the remotest personal interest in the subject matter of the trust. The arrange-

ment in those cases was simply a device to evade the Eleventh Amendment to the Federal Constitution.

Here Virginia has a substantial personal interest in the trust subject. She is not only not a mere volunteer, but the creation of the fiduciary relation and her acceptance of it was a proper and essential part of the plan of settlement.

The trust devolved upon Virginia here was therefore not only a trust coupled with an interest, but a trust evolved from a common duty and a common obligation.

Virginia's position in this regard is radically different from that of the two plaintiff States in *New Hampshire* and *New York* v. *Louisiana*.

In the case of *United States* v. *Nashville, &c., Ry.* 118 U. S. 125, certain coupons were sued upon by the United States in its own name, the defense was interposed that they were held by the United States in trust for the Chickasaw nation of Indians, in pursuance of a treaty with them, and that the claim was barred by statute of limitations on account of the United States having no interest except as trustee, and that the suit therefore could not be maintained. The court held, however, "they (the coupons) were held by the United States for a public use in its highest sense," and the suit was sustained.

It is also essentially different and stronger than the position of South Dakota in *South Dakota* v. *North Carolina*, for Virginia did not here buy herself into, or voluntarily accept, a controversy against another State. She merely, as was her right, and her duty to do, for her own protection, and at the same time in discharge of her duty to the common creditors, as a proper and essential incident of the settlement with them, accepted the fiduciary relation defined in the Funding Act of 1871 in reference to the bonds confided to her under that Act.

Even if she had been, by the terms of that Act, released entirely by the common creditors, upon the condition that she would by suit or otherwise secure a settlement with West Virginia for their benefit and her exoneration, she would, we think, clearly have a standing to maintain this suit: but as she was not so released there can be no question as to her right to maintain it, even if she had no personal claim for contribution, or for an accounting, on other equitable grounds.

Each of the grounds discussed under the last two general headings were fully argued, and considered, upon substantially the same state of facts which is now presented, when the cause was heard upon the demurrer, and was then unanimously decided by the court, adversely to the contentions of the defendant. No reason has been shown for overruling that decision in these regards, and we confidently rely upon the same.

See decision of the court upon the demurrer.—R. 132-137; I. West Va. Compilation, 429-434.

(3)

THE DUTY AND OBLIGATION OF WEST VIRGINIA ARE TO MAKE A SETTLEMENT WITH VIRGINIA, AND NOT WITH THE BONDHOLDERS OF THE UNDIVIDED STATE.

So far, in all the acts and dealings of the two States upon this subject from the birth of West Virginia down to the filing, at the present term, of Parts I and II of the brief for the defendant, both States have acted upon the basis that any settlement would be, and would have to be, between the two States.

West Virginia, through her Governors, Debt Commissioners, and Legislature, has always heretofore recognized this. Her answer in this case, and her entire line of defence down to the present term has been distinctly upon this basis.

It is true that the preamble to the Virginia Funding Act of 1871 (R. 18; I. West Va. Compilation 14) acquiesces in a settlement between West Virginia and the bondholders, if West Virginia shall so prefer; but that suggestion was in direct conflict with Section 19, of Article X of the then Constitution of Virginia, which commanded that,

> "Sec. 19. The General Assembly shall provide by law for adjusting with the State of West Virginia, the proportion of the public debt of Virginia, proper to be borne by the State of Virginia and West Virginia, and shall provide that such sum as shall be received from West Virginia shall be applied to the payment of the public debt of the State."

This declaration of that preamble was also in conflict with and rendered nugatory by Section 3 of that very Act, which ex-

pressly contemplates and provides for a settlement between the two States (R. 19; I. West Va. Compilation 15.)

No such line of defence is relied on or suggested in the Defendant's Answer. On the contrary that answer assumes and recognizes that any such settlement must be between the two States.—See particularly Paragraphs VIII. and XI,—R. 148. 149 to 154, and II West Va. Compilation 8, 10 to 15.

The entire defence of West Virginia, from the institution of this suit to the filing of the latest brief by her counsel, has been conducted upon this basis, and it is too late for the defendant in the very last stage of the litigation to adopt a different and inconsistent line of defence.

Apart from other influential considerations the compact arising under Section 8 of Article VIII. of the first Constitution of West Virginia, and the Acts of the Legislature of Virginia and the United States Congress giving consent to the creation of the new State upon those terms, was a compact between the two States, which Virginia has the right to invoke the jurisdiction of this court to enforce.

(4)

This belated attempt to assert "laches" as a defence against Virginia is without merit.

It is based upon the singular assumption that Virginia is to blame, because she exhausted friendly negotiation before bringing her suit, and did not institute it until after her repeated overtures to West Virginia for an amicable adjustment had all been successively rejected.

Like other defences, unless disclosed by the bill, the defence of "laches" must be asserted in the answer or other defensive pleading.

Here it has never been set up by the answer, or other pleading, and is negatived by the allegations of the bill. It will not be allowed to be set up by amendment of answer long after the filing of same: or after the reference to a Master and the filing of his report.

Dixon v. *Dixon*, 1 Md. Ch. 171;
Thornton v. *Hantze*, 91 Ill. 199;
Webb v. *Fuller*, 83 Me. 405, 22 Atl. 384.
See also 16 Cyc. 176 and 177, and citations.

We ask leave, however, to briefly consider this defence as presented in defendant's brief, because of its relation to other equitable features of the cause.

The defence of "laches," in equity, is only permitted to defeat an acknowledged right on one or both of the following grounds:

(1) That it raises the presumption that the claim has been abandoned or satisfied.

(2) That the party pleading it has been seriously prejudiced by the culpable failure of the plaintiff to assert his claim.

Demuth v. *Old Town Bank*, 85 Md. 315, 37 Atl. 260, 268.
Coles v. *Ballard*, 78 Va. 139, 147;
Wisler v. *Craig's Adm'r*, 80 Va. 22, 30;
Cottrell v. *Watkins*, 89 Va. 101, 19 L. R. A. 754;
Johnson v. *Atlantic Gulf & West India Transit Co.*, 156 U. S. 618, 648;
Selbag v. *Abistbal*, 4 Maule & S., 462;
Morse v. *Seibold*, 147 Ill. 318, 35 N. E. 369, 371;
Hall v. *Otterson*, 52 N. J. Equity 522.

Not one of the grounds upon which such a defence must rest as shown by the authorities cited exists here.

(a) Any presumption of satisfaction of her share of the debt by West Virginia or of abandonment of her claim is absolutely rebutted by the proof that the new State has never paid, and has failed and refused to pay, a dollar on account of the Virginia debt, and that Virginia has persistently urged a settlement.

(b) Nor is there any evidence in the case showing, or tending to show that West Virginia has suffered prejudice from Virginia's forbearance to sue.

No evidence helpful to her has been lost. *The substantial proofs of the debt and of West Virginia's liability for it, are all matters of irrefutable record*, all of which have been kept and

preserved with wonderful accuracy and fidelity, so that the absolute verity of every item of the account and every entry upon those voluminous records, covering the transactions of forty years, has compelled the candid assent of the accountants and the counsel for West Virginia.

On the contrary West Virginia has profited enormously by her long delay in making a settlement with Virginia.

While Virginia has been struggling to meet her just obligations on account of this common debt, and has paid and assumed at least $75,000,000 as of the present year, most of her payments having been contributed years ago "from the scant resources of an impoverished people," West Virginia, husbanding her resources, and compounding her wealth, has not paid one cent.

Instead of her position and ability to pay having been impaired by this long delayed settlement, for the postponement of which she is largely responsible, she has profited so greatly by it, that her taxable resources have increased from a total assessed valuation of $126,060,743 in 1867, to $937,232,718.54 in 1908, an enhancement of 643 per cent.!—See Plaintiff's Exhibit E-3, R. 651.

It appears from this same authentic exhibit that the taxable resources of Virginia increased during the same period from $354,848,482.69 to $661,796,631, or only about 84 per cent.

That comparative schedule of taxable resources, fairly interpreted, demonstrates another thing, namely, that instead of being prejudiced by his lapse of time, West Virginia could, in her present prosperity and affluence—largely the result of the development of her territory by lines of railway which had their inception in the works which represent millions of dollars of Virginia's debt,—pay twenty million dollars today, with less inconvenience and less burden upon her people, than she could have paid two million dollars in 1867.

It may not be amiss to call attention to a somewhat conspicuous instance of laches, furnished by the defendant in this case, in this: That, although this litigation had been actively progressing and vigorously contested for five years before the cause was, in the spring of 1910, set down for a final hearing, during which long period every defence which the able and resourceful counsel for the defendant could suggest, was set up, no attempt was made

by them until this the very last stage of the litigation, when the issues had all been made up and the case submitted for decision to assert any one of several new and novel alleged grounds of defence which are presented for the first time in the brief filed and the oral arguments made for the defendant at the present term.

Moreover, the defense of laches cannot be interposed against a State. In *Armstrong* v. *The Morrill*, 14 Wal. 144-5, the court citing *Stoughton* v. *Baker*, 4 Mass. 526, holds that no laches can be imputed to the government and that time does not run against a State.

In *Metropolitan R.* v. *Dist. of Columbia*, 132 U. S. 11, the court through Mr. Justice Bradley says: "No restrictive laws apply to the sovereign unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect or laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch, or a republic, or a State. The principal applies to all sovereigns. The reason usually assigned for this prerogative is that the sovereign is not answerable for the delinquencies of his agents. But whatever the true reason may be such is the general law—such is the universal law, except where it is expressly waived." See also *Wever* v. *Commissioners*, 18 Wal. 70. In *Gibson* v, *Chouteau*, 13 Wal. 99. *Lindsay* v. *Miller*, 6 Peters 673. *United States* v. *Knight*, 14 Peters 315. *United States* v. *Thompson*, 98 U. S. 489. *Gaussen* v. *United States*, 97 U. S. 584. *United States* v. *Nashville, &c., Ry.*, 118 U. S. 125, *supra*.

It is submitted that the transactions referred to in the cases relied on by the defendant related to such transaction as the protest of negotiable paper, or some entirely private matter where there was no public interest or duty whatever involved.

In *Brannock County* v. *Bell*, 101 American State Reports, 152-3, Note 2, it is stated as a universal rule that statutes of limitation should not run against a State nor can laches be imputed to it, although private parties may be interested along with the State in the matter sued on. See authorities there cited.

In the opinion of the court on the demurrer in this cause (V. 1, p. 433 of West Virginia Compilation) the lapse of time is referred

to, but the demurrer is overruled and an order afterwards entered for an accounting upon the defendant's answer which in no manner refers to the matter. This of itself should preclude the question of laches.

II.

UPON THE MERITS.

BASIC PROPOSITIONS ON WHICH THE CASE OF VIRGINIA RESTS.

West Virginia is liable for an equitable proportion of the Virginia debt:

(1) Under the benign principles of Equity and International Law;

(2) Under the conventional agreements and enactments—the constating Acts of the two States, and the National Congress,—by virtue of which West Virginia came into being.

There is no essential conflict between these postulates. They have already been exhaustively discussed in their various aspects in the principal briefs, and the oral argument of the cause. So that we deem it sufficient to briefly notice some of the salient points upon this branch of the case.

(1)

Some of the authorities which support the view that West Virginia owes an equitable share of the Virginia Debt under the rules of Equity and Public Law are collated in Appendix No. 1 to the brief of Virginia, printed at pages 163 to 167, Vol II, West Virginia's Compilation. Others are cited in the briefs for complainant filed at the present term. For others we are indebted to Part III of defendant's brief—Mr. Spooner's contribution thereto. We will not undertake to review these authorities in detail.

An examination of them will show that they are not agreed as to the rule which should obtain in the case of the formation of a new State out of the territory of a pre-existing State. Some of the authorities sanction an apportionment of the antecedent public debt of the original State according to the relative population and areas of the two State. Others according to the taxable resources or revenues, or, what amounts to substantially the same thing, according to the taxable values of the two States.

In a case like this, it would, we respectfully submit, be fair to consider all of these as factors in the consideration and solution of

the problem. It would not be satisfactory to take total taxable values alone, for the reason that it is extremely difficulty to determine accurately the relative values of taxable property—particularly the value of personal property in the two Virginias in June, 1863. Land constituted then, and at all times perhaps, the most reliable, stable, and just measure of values. The record shows that both lands and personal property were very greatly depreciated in value in June, 1863, in "Confederate Virginia" and in "Confederate West Virginia;" and that there was by no means any such depreciation in what may be termed "Federal West Virginia."

The Master finds that the depreciation in the value of real estate in "Confederate Virginia" and "Confederate West Virginia" amounted to 50 per cent. as compared with its value in 1860 or 1861, before the war.—Master's Report, pp. 155-6.

The Master was led into the error of accepting the inflated Confederate assessments of personal property in Confederate Virginia. The proofs tended very strongly to show,—a proposition which is undoubtedly a historic truth,—that the personal property in Virginia, including slaves, had depreciated in value in the aggregate at least 50 per cent, as a minimum, as compared with the aggregate value of the personal property in the same territory in 1860 or 1861, before the War.

We will not repeat the argument upon these points presented at pp. 57 to 64 of our principal brief.

There are here referred to and relied upon by way of introduction to the following proposition, namely, that:

Under the circumstances of this case, a fair basis for determining the equitable proportion of the Virginia Debt to be borne by West Virginia, would be to combine territorial area, population, and assessed values of land.

It must be conceded that the circumstances here presented are exceptional.

This case is not only exceptional, but peculiar,—*sui generis*.

As stated in our principal brief: "History furnishes no counterpart, no precise parallel or precedent to guide us, by a clearly blazed path, to a correct conclusion."

Kingdoms, republics, and States have been divided—either by force, by violent revolution, or by conquest; or with their voluntary

consent. Never as here by a consent which rested upon a fiction legalized only by post-natal recognition.

Here, too, it is an unquestioned historic fact, alleged in the bill and not controverted in the answer, that very little of the public debt of Virginia would ever have been contracted, but for the votes in the General Assembly of Virginia of the representatives from the counties now constituting West Virginia, in favor of Acts creating that indebtedness.

Here, too, it appears that the debt was in large measure contracted in reliance, not upon the then existing, but upon the future enhanced values primarily of the lands in the Commonwealth. From the first active inauguration of her Internal Improvement System, it, and the public debt contracted in its furtherance, were mainly designed to develop primarily and chiefly the territory of the Commonwealth, but especially the vast mineral and timber resources then locked up in the mountain fastnesses of West Virginia.

The more important, and by far the most costly, of the turnpikes, canals, and railroads, munificently aided by the State, and which would never have been otherwise undertaken, all pointed towards, and were designed ultimately to penetrate, or to effectually serve West Virginia.

It is true that the completion and the extension into West Virginia of the most important and costly of these great projected channels of commerce, were prevented by the War; but by reason of the large sums already spent upon them by Virginia, and her subsequent generuos concessions of the works represented by those expenditures to the companies which afterwards extended the Chesapeake & Ohio and the Norfolk & Western Railways into and through West Virginia, large portions of central and southern West Virginia have been given an access to the Atlantic Seaboard and the markets of the country, without which great and rich sections of the opulent young State would, when this suit was brought, have been practically as inaccessible and as undeveloped, as when they were a primeval wilderness.

The schedule printed as Appendix No. 1, pp. 109-110 of our opening brief, affords a conclusive confirmation of the view here presented: for, directly or indirectly, the large expenditures there

stated, and which represents 29/33rds of the public debt of the Commonwealth, went into lines of transportation which now efficiently serve West Virginia, and over which her vast output of coal, lumber and oil moves in increasing volume to the ports and cities of the Atlantic Seaboard, and to the markets, furnaces and factories of the West, Northwest and the Southwest.

Under these circumstances, it is right that territorial areas—the very areas which have been so enormously enhanced in value, in a great part at least, by these internal improvements, which in their origin and development represent ultimately large portions of the Virginia debt—should be potential factors in the solution of the problem of West Virginia's share of that indebtedness.

And so, too, should population be: for there can be no productive development, without population; and in these States—particularly in such a State as West Virginia, with such a virile population as during the last one hundred years has inhabited the territory in her present limits—this is especially true.

If we could get fairly at the taxable resources of the two States in June, 1863, they too should be brought into the account: but, by reason of the confusion, destruction, and disturbance of values incident to the War, it is impossible to ascertain reliably or definitely the true taxable values in good money of the two States at that time.

By the terms of its decree the court seems to have wisely considered land as the most reliable, as it certainly is the most stable and uniform, subject of taxation, and form of property to be found in the two States at that or any other period. But, if the assessed value of land be taken by itself, it would leave out of the account population and extent of territory, both of which should, we submit, be considered under the circumstances existing here. Not only should population be considered because, under such conditions, it is an element, and a creator of economic values: but areas should come into the account. It is manifest from the great enhancement of values in West Virginia shown by Complainant's Exhibit E-3, R. 651, that the mineral and lumber resources—the products of the land of that State—are realizing the hopes and expectations of the projectors of the Internal Improvement System of Virginia, and that that enhancement has been far more

rapid, and far greater per square mile of territory in West Virginia, than it has been in Virginia.

Is it not right, therefore, that territorial areas should, under such circumstances, be brought into the account?

Now, stating the account accordingly, we have the following result:

West Virginia has 36.1843 per cent. of the total area of the undivided State, upon which basis she would be assigned the following amount of the Virginia debt.—See Master's Report, p. 37; Principal Brief for Virginia, p. 76	$12,265,418.88
West Virginia had, in June, 1863, 24.5145 per cent. of the total population of the undivided State, upon which basis she would be assigned (See Master's Report, p. 37, and Principal Brief for Virginia, p. 76)	8,309,698.16
The assessed value of the lands in West Virginia in June, 1863, was 21.7812 per cent. of the total assessed value of lands in undivided Virginia, on which basis, there would be assigned to the New State this amount of the common debt (see p. 37 of Master's Rep.; p. 76 of Principal Brief for Complainant)	7,383,189.44
Combining these and taking the average we have as the amount of the debt chargeable to West Virginia, as of January 1, 1861, the sum of	9,652,768.83

Such will be the result if the apportionment of the debt is made upon the basis thus stated, arrived at by combining the three bases as indicated.

Against any such adjustment of the debt, indeed against any assignment to West Virginia of any substantial part of it upon an accounting upon the principles of Equity and International Law, the present leading counsel for West Virginia has in the last ten days, in his oral argument and printed brief, for the first time presented a new international law theory, and a novel proposition in equity jurisprudence for the guidance of the court.

By the application of this newly discovered theory he proproses to relieve West Virginia from any appreciable burden on account of the public debt of the Commonwealth, if the court shall decide this case upon the principles of equity and public law.

The precedents indicated by Senator Spooner do not at all support the rule he advocates as applied to this case; as, for instance: Where a new State constituting or embracing a province or other integral political sub-division of the original State has been cut off from such original State.

The original State owed a debt which bound all of its parts alike. This was a general or national debt, which upon its partition into two States would have to be apportioned ratably among the new States into which it was subdivided.

But such original State, or some of its subordinate provinces, owed special or local debts contracted by such provinces or by the original State in behalf of such provinces; or the avails of which debt were distinctly expended within and for special exclusive and local benefit of such provinces respectively, by or on behalf of which the money represented by such special debt was borrowed.

Now, when such province, having charged upon it such a debt contractel distinctly for its several and separable benefit, is cut off from the original State, and formed into, or becomes part of an independent State, there can be no question that Mr. Spooner is right in the view, that, in such a case, such a debt would continue to be a charge upon such a seceding or withdrawing province; and that such a seceding or withdrawing province would not be liable for any of the special or local debts of the original State, which were similarly local to the provinces or subdivisions thereof which adhered to, or continued to be parts of the original State.

And so here, county or city debts due by, or contracted in the name and on behalf of, and which were specially charged upon, counties or cities which were and continued to be parts of Virginia after her dismemberment, could not, of course, bind West Virginia.

The distinction and classification which the learned counsel seeks to make finds no support in the facts of this case.

The only debt, of which West Virginia is here called upon to bear an equitable share, is the public debt of Virginia existing

prior to January 1, 1861, a debt as well known to the makers of West Virginia as it is to the counsel in this cause, and distinctly recognized in the fundamental constating acts to which West Virginia owes her existence.

The debt, a just and equitable portion of which the makers of West Virginia provided that the new State should assume, was the "public debt of the Commonwealth," statements of which were embraced in the Annual Reports of the Second Auditor of the Commonwealth; and the amount and character of which were known in approximate accuracy of detail to the representative citizens of West Virginia who framed those enactments, a number of whom had also been repeatedly members of the General Assembly, and officials of the unsevered Commonwealth. The learned Counsel, in order to maintain this new contention, in effect, classifies the whole public debt of Virginia as a special and local debt.

The indisputable fact is, that Virginia in 1861 did not owe one dollar of a special or local debt.

Opposing counsel treats the words "special" and "local" as synonymous, which is not true of them. A debt, as, for instance, one contracted for the building of a capitol, or a penitentiary, for the common use and benefit of all the people of an entire State may, by the terms of its creation, be a special debt, and yet it will be the debt of and binding upon all of the people in every part of such State.

The distinction, for it to avail anything for West Virginia, would have to be between a distinctly *local* and *general* debt. A local debt might not, and, under circumstances readily conceivable, would not bind a new State detached from the original Commonwealth, if such new State did not embrace the political sub-division or province of the original State upon which such local debt was charged.

The entire records of the Commonwealth from 1820 and prior thereto have been carefully scrutinized by accountants and counsel in this cause, and not one dollar of special, or local, debt has been discovered.

The only debt of Virginia which existed in 1860, or 1861, was what was then well known, and what was correctly defined in

the Wheeling ordinance and in Article VIII of the first West Virginia Constitution, both written and enacted by West Virginians, as "the public debt of the Commonwealth." It was a general debt, binding to the Commonwealth and every part of it alike and as a unit. To be sure, much of it was evidenced by bonds which recited the Acts by authority of which those bonds were issued; but they constituted none the less parts of the public debt of the Commonwealth because so ear-marked.

It was created in carrying out a great general public system of Internal Improvement, in part suggested by Washington, and by Chief Justice Marshall, but formally inaugurated by the creation of the Board of Public Works and the General Internal Improvement Fund in 1816, for the common benefit and general ultimate improvement and development of every portion of the State.

There were a large number of counties in Virginia, as now constituted, in which not a mile of railroad or canal had been built, and yet they shared, more or less remotely, and unequally, it may be, in common benefit to the whole State, and were bound along with the counties through which these public improvements passed for the debts contracted in their construction.

The Acts of the General Assembly of Virginia of March 26, 1853, "Establishing a Sinking Fund," and providing for the payment of the semi-annual interest on and redemption of the public debt, printed at pp. 200 to 205 of the appendix to the record, and chapter 44 of the Code of Virginia of 1860, Idem. pp. 196-199: and the statutes relating to the same subject, Idem. 188, and especially the Act of April 9, 1838 referred to by Mr. Spooner, Idem 191 to 195, show conclusively that the public debt of Virginia was a general, and in no sense a local, or a special debt.

Virginia's public debt was just as much the general debt of the whole Commonwealth, as is the debt of the United States the general debt of the nation. Nor can the burden of such a State debt be apportioned or distributed among the different counties or sections of the State in proportion to the benefits realized by each from the expenditure of the money borrowed any more than the burden of the National debt can be similarly apportioned among the different States and sections of the American Union.

We would not devote so much space to this artificial, and,

frankness compels us to say, fanciful classification, but for the confidence and earnestness with which an advocate for whose ability and candor we have the greatest respect, seriously pressed it upon the consideration of the court.

If the doctrine of International Law and Equity are applied to the determination of West Virginia's share of the Virginia debt, she will be required to pay her ratable proportion of the public debt of the Commonwealth as the same existed on the 31st of December, 1861, and was recognized in the VIII Article of her first Constitution, to be computed upon such basis as will place upon the new State a just and equitable share of that burden.

The consideration which should be potential in such determination have been already fully discussed, both orally and in the printed briefs.

(2)

WEST VIRGINIA IS LIABLE FOR A JUST AND EQUITABLE PART OF THE PUBLIC DEBT OF VIRGINIA UNDER THE ENACTMENTS OF THE TWO STATES AND OF THE NATIONAL CONGRESS BY VIRTUE OF WHICH THE NEW STATE CAME INTO BEING.

The views of counsel for Virginia as to the respective rights and obligations of the two States under the constating Acts pursuant to the terms of which the new State was ushered into being, if the settlement should be made thereunder, have been fully stated in their principal or opening brief filed at the present term, and will not be reiterated.

The principal consideration and arguments there presented in support of the positions taken have not been answered, if indeed they have been at all discussed, by opposing counsel.

There are, however, a few important points in connection with this alternative aspect of the case which it is of interest to consider.

The view of Virginia is, and has been, that the important thing in this case is, that the result which shall be attained by the final decision of the cause shall be a just, an equitable, and a righteous result.

The matter of the method, or process of reasoning, by which such a result shall be reached is, and has been, one of no moment.

While the Wheeling Ordinance, the West Virginiaa Constitution (under the provisions of which the consent of the Legislature of "Restored Virginia" and of the Congress was given to her existence as a State), the Acts giving that consent, and the Act of said Restored Legislature of February 3, 1863, transferring to the new State the property and rights of the old State therein defined, were all parts of one great transaction—the dismemberment of Virginia,—it is, and has always been, our view, that the rights and obligations of the two States in reference to the portion of the debt of undivided Virginia to be borne by West Virginia, and the method of its ascertainment, were absolutely controlled by the eighth section of Article VIII of that first West

Virginia Constitution, and the compact necessarily arising from Virginia's consent to her statehood upon those terms.

It is necessary corollary from this, that the proportion of the debt which West Virginia must pay, must be an equitable proportion, and that, if pursuing the method prescribed by the Wheeling Ordinance, an equitable result is reached, that method and that Ordinance must be discarded.

Now, a careful comparison of the results arrived at by fairly applying the method of the Wheeling Ordinance to the facts and figures admitted to be true, will show a remarkable agreement in the results reached by such a computation, with the results produced by an application of the standards, or measures, of West Virginia's liability sanctioned by Equity and Public Law.

After all it is a result which is equitable and just which we desire to attain, and it is of little concern by what process such a result shall be reached.

Now, applying the method prescribed by the Wheeling Ordinance to the facts of the case as the Master has done, but correcting the palpable error into which he was led in his exclusion of the expenditures made by the State in works in West Virginia territory built through the agency of public service corporations, which expenditures amounted to the agreed sum of $1,104,400.85, we have, taking the figures of the Master's Report in all other particulars, the following as the amount due by West Virginia under the Wheeling Ordinance fairly and equitably construed and applied:

(a) Stating the account on the basis of the Wheeling ordinance, apportioning the ordinary expenses of government on the basis of the white population,—(that is of the population excluding slaves, who did not then constitute a part of the body politic), as is shown at page 85 of our opening brief, we have as West Virginia's share of the debt on the 1st of January, 1861 ----------	$9,910,960.20
(b) Upon the same basis, stated under the Wheeling Ordinance, but following the suggestion	

made by Mr. Justice Harlan (II West Virginia Compilation, p. 227), and apportioning the ordinary expenses of the State government on the Federal basis, by which *three-fifths* of the slaves will be counted, we have as West Virginia's share of the debt on January 1, 1861 ---------- $7,620,087.59

(See pages 85, 86 and 87, of our opening brief.)

Counsel for both states were agreed that population is the fairest criterion for apportioning the ordinary expenses of the State government. (Brief for Defendant, II West Va. Compilation, p. 129: Oral argument for complainant, Idem, pp. 227, 228). The only difference between counsel is, that those for West Virginia insisted that the total population should be taken as the factor, while counsel for Virginia urged that the white population alone should be considered, for the reasons stated in the brief for Virginia (II. West Va. Compilation, pp. 157, 158), which seem to us to have great weight, and which we now quote and reaffirm:

"As to the criterion on which the apportionment of the expenses of government should be made, if this is to be the population, we respectfully submit that in this case it should be the free population—the citizenship—and not the total of the free and the slave population. The care and policing of the slaves cost the State little or nothing. Those matters were regulated by their masters on the plantations. Of course, none of them could vote; but upon the "mixed basis" of representation which was partially adopted in Virginia, they counted to some extent in fixing the basis of representation in the General Assembly; that is, five negroes counted as much as three white men, where the mixed basis prevailed.

"The debt was contracted solely by the votes of the white population or their representatives. It was expended by them or under laws of their enactment. The taxes were levied exclusive upon the property of the free population; and the revenues were appropriated and expended as they directed, and exclusively for their benefit.

"The negroes owed no part of the debt, did not constitute a part of the citizenship of the State during any part of the period when the debt was contracted, or the money

realized from it was expended: nor were they any part of the body politic.

"Under these circumstances we would submit as a just criterion for such apportionment the white population of the territory embraced in West Virginia, and of the territory still remaining to the Commonwealth, at the times when the expenditures to be apportioned were made."

Now, we beg leave, by way of comparison with the amounts thus arrived at under the method prescribed by the Wheeling Ordinance fairly and equitably construed and applied, to give the results reached, if, discarding the Ordinance, we state the account upon the principles of Equity and Public Law reasonably applied to the facts of the case.

Ascertained in accordance with the principles of Equity and Public Law, fairly applied to the facts of the case, we have, as we have already seen, as West Virginia's share of the debt on the 1st of January, 1861:

(a) Computing the same on the combined basis of territorial area, population, and assessed valuation of lands in the two States	$9,652,768.83
(b) On the basis of assessed valuation of the lands in the two States taken as the only factor	7,383,189.44

And per contra ascertained under the Wheeling Ordinance

(c) Apportioning ordinary expenses according to white population	$9,910,960.20
(d) Apportioning ordinary expenses according to the Federal basis, counting three-fifths of the slaves	7,620,087.59

The approximation of these results is something more than a coincidence, and goes far to show that an equitable result can and will be attained by pursuing either method, fairly applying the same to the facts of the case.

In view of the long lapse of time since the assumption by West Virginia by the terms of the 8th Section of Article VIII

of her first Constitution of an equitable proportion of the then debt of the Commonwealth and the stipulation thereby made for the payment of the accruing interest thereon, the matter of interest is obviously the most important item in the account between the two States.

That question is so fully considered, and Virginia's equitable right to a decree for interest is so conclusively shown in the treatment of that subject found at pages 94 to 107 of our opening brief upon the present hearing, that we are content to refer the court to that discussion as fairly presenting our views.

Part III of defendant's brief in its complete form was not received by counsel for Virginia until the 2nd and 3rd instant.

It would be impossible in the time permitted for filing this brief to reply to, or even to notice the numerous points made therein; nor is any such reply necessary, for the distinguished counsel has failed to meet the positions taken by the Master, supported as they are by reason and authority, or to answer the arguments submitted in our opening brief in any important particular.

Especially is this true as to the question of classifying the annual interest on the State debt as one of the ordinary expenses of the State.

Defendant's counsel claim that the weight of authority is against such classification.

The Master's report and the opening brief for complainant show that the uniform and practically universal rule of the national, State, city, town, and county governments in this country, and as is shown also to be the case as to the governments of Europe, so far as there is any information given on that subject, is to classify interest on a public debt as an ordinary governmental expense; and that this rule is sanctioned by publicists, political economists, and the courts.

Particularly should this rule control in this case, or else palpable inequity would be done; for the reason that under the Wheeling Ordinance West Virginia is to be credited with all the taxes which she must have paid into the State Treasury during the debt period on account of that interest. Being given this large credit it would be right that she should also be charged with her just proportion of the annually recurring interest paid out of those

very taxes, as the Master has done; and palpably unjust and inequitable to exonerate her from such a charge.

With this concise response to the elaborate briefs of the learned counsel for the defendant, we respectfully submit this cause to the consideration and judgment of the court.

SAMUEL W. WILLIAMS,
Attorney General of Virginia.

WILLIAM A. ANDERSON,
RANDOLPH HARRISON,
JOHN B. MOON,
Of Counsel for Virginia.

February 4, 1911.

APPENDIX TO FINAL REPLY BRIEF FOR VIRGINIA.

CHAP. 344.— An ACT for the retirement of bonds held by schools and colleges, and the issuing of registered certificates therefor, and providing for the payment of interest thereon.

Approved February 23, 1892.

Whereas, the friends of education have voluntarily contributed many millions of dollars for the establishment of schools and colleges in different parts of the State of Virginia, a large portion of which has been expended in the purchase of lands and the erection of suitable buildings thereon, and the residue held as permanent endowments, about two millions of which are in State bonds; and

Whereas, it appears from acts passed by the general assembly in eighteen hundred and sixty-seven, and at various other times since then, to be the settled policy of the State to encourage these efforts for the education of her citizens, and to co-operate with the generous donors of her bonds, by paying full interest thereon so long as they shall be held as endowments for educational purposes; and

Whereas, it is proper that all obligations of the State held by schools and colleges be of the same character, and on the same footing; therefore,

1. Be it enacted by the general assembly of Virginia, That the schools, colleges, and other educational organizations hereinafter named, shall, through their duly authorized officers or agents, on or before the first day of July, eighteen hundred and ninety-two, surrender to the second auditor all evidences of the State's indebtedness which they hold as endowments for educational purposes.

2. That said auditor shall make and keep a record of all bonds and other evidences of the State's indebtedness so surrendered to him, and shall, in the presence of the auditor of public accounts and treasurer, cancel all such evidences of debt, and issue to those by whom they have been surrendered registered certificates of debt for the respective amounts of the bonds and other evidences of debt surrendered by them.

3. That these certificates shall be non-transferable and redeemable at the pleasure of the State, and shall set forth that the State of Virginia is due the respective schools, colleges, and other educational organizations of learning to which they are issued the sums named therein, and that interest thereon shall be paid semi-annually at the rates and for the amounts now paid by the Commonwealth, as set forth in the report of the second auditor for the fiscal year ending September thirtieth, eighteen hundred and ninety-one, including in addition thereto interest on the amount herein named held by the Randolph-Macon woman's college, at the rates set forth in the bonds it holds, so long as they are held as endowments for educational purposes.

4. That the second auditor shall, upon the first day of January and July of each year, draw his warrant upon the auditor of public accounts in favor of the following holders of the said certificates for the respective amounts due them at the aforesaid rate of interest upon the following sums, to-wit:

Washington and Lee University, upon the sum of two hundred and thirty-six thousand seven hundred and fifty-eight dollars and twenty-three cents.

The Virginia Military Institute, upon the sum of twenty thousand dollars.

Emory and Henry College, upon the sum of six hundred dollars.

Leesburg Academy, upon the sum of two thousand and five hundred dollars.

New London academy, upon the sum of six thousand and five hundred dollars.

Randolph-Macon college upon the sum of nineteen thousand seven hundred and eight dollars.

University of Virginia, upon the sum of one hundred and forty-eight thousand and six hundred dollars.

Richmond College, upon the sum of forty-four thousand and seventeen dollars and nineteen cents.

Hall's free school, upon the sum of four thousand and eight hundred dollars.

Seminary and high school, Alexandria, Virginia, upon the sum of fifty-nine thousand and nine hundred dollars.

William and Mary college, upon the sum of thirty-five thousand and nine hundred dollars.

School commissioners of Prince William county, upon the sum of one thousand and four hundred dollars.

Hampden-Sidney college, upon the sum of ninety-six thousand and three hundred and fifty-three dollars and thirty-three cents.

Union theological seminary, upon the sum of one hundred and thirty-seven thousand and six hundred and ninety-five dollars.

Miller manual labor school, of Albemarle, upon the sum of one million and forty-four thousand and eight hundred and sixty-eight dollars and forty-nine cents.

Virginia agricultural and mechanical college upon the sum of three hundred and forty-four thousand and three hundred and twelve dollars.

Hampton normal and agricultural institute, upon the sum of one hundred and seventy-two thousand and one hundred and fifty six dollars.

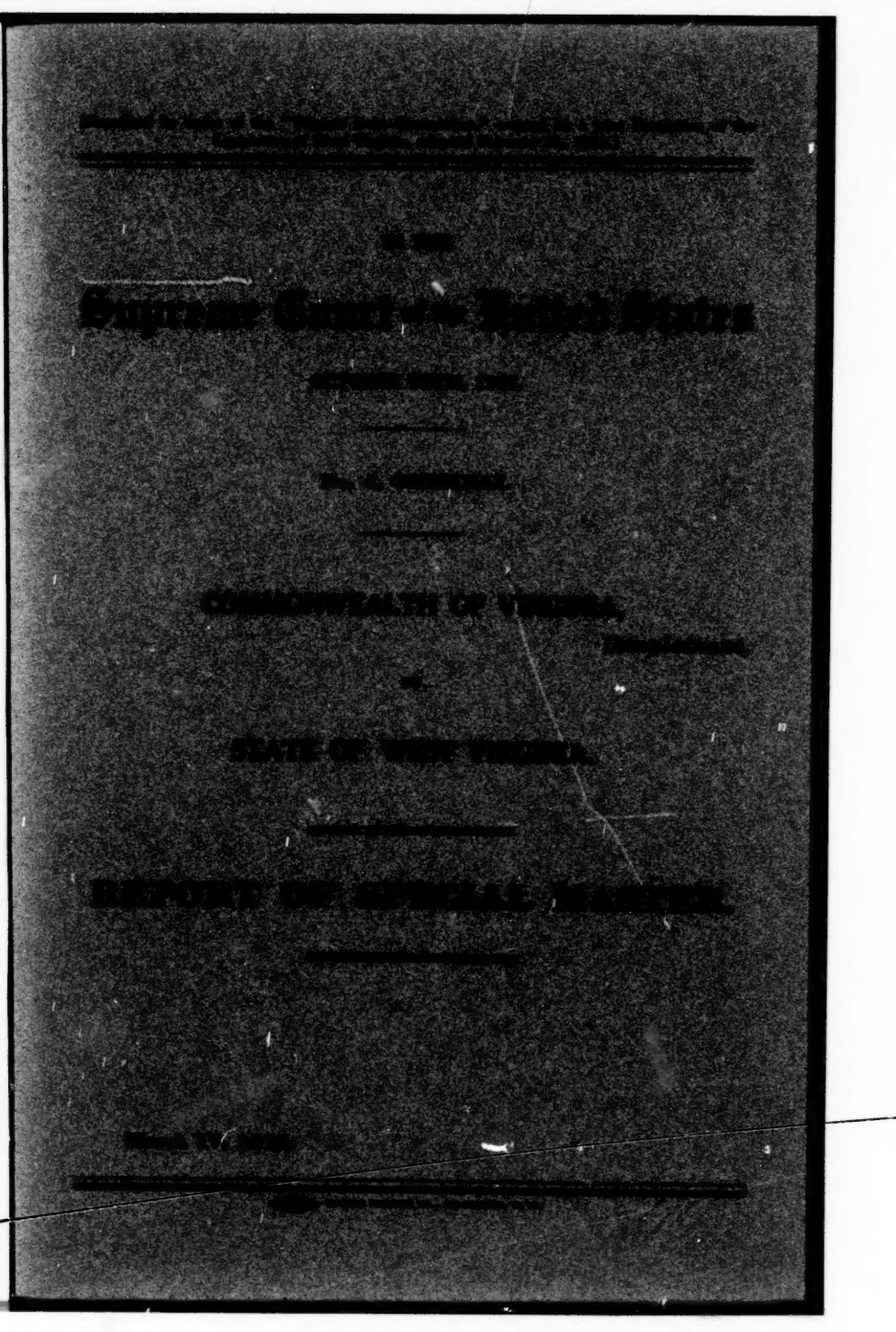
Randolph-Macon woman's college, upon the sum of forty-nine thousand and six hundred dollars.

The Dawson fund, thirty-four thousand one hundred and eighty-seven dollars and sixty-one cents.

5. This act shall be in force from its passage.

STATEMENT OF BONDS EMBRACED IN THE FOREGOING ACT.

Washington and Lee University, upon the sum of	$ 236,758.23
Virginia Military Institute, upon the sum of	20,000.00
Emory and Henry College, upon the sum of	600.00
Leesburg Academy, upon the sum of	2,500.00
New London Academy, upon the sum of	6,500.00
Randolph-Macon College, upon the sum of	19,708.00
University of Virginia, upon the sum of	148,600.00
Richmond College, upon the sum of	44,017.19
Hall's Free School, upon the sum of	4,800.00
Seminary and High School, Alexandria, Virginia, upon the sum of	59,900.00
William and Mary College, upon the sum of	35,900.00
School Commissioners of Prince William County, upon the sum of	1,400.00
Hampden-Sidney College, upon the sum of	96,353.33
Union Theological Seminary, upon the sum of	137,695.00
Miller Manual Labor School of Albemarle, upon the sum of	1,044,868.49
Virginia Agricultural and Mechanical College, upon the sum of	344,312.00
Hampton Normal and Agricultural College, upon the sum of	172,156.00
Randolph-Macon Woman's College, upon the sum of	49,600.00
The Dawson Fund, upon the sum of	34,187.61
	$2,459,855.85





IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 4, Original.

COMMONWEALTH OF VIRGINIA,
Complainant,

v.

STATE OF WEST VIRGINIA.

I, CHARLES E. LITTLEFIELD, SPECIAL MASTER APPOINTED UNDER AN ORDER MADE IN THE FOREGOING CASE, RESPECTFULLY SUBMIT THE FOLLOWING REPORT:

PARAGRAPH 1 OF DECREE.

1. THE AMOUNT OF THE PUBLIC DEBT OF THE COMMONWEALTH OF VIRGINIA ON THE FIRST DAY OF JANUARY, 1861, STATING SPECIFICALLY HOW AND IN WHAT FORM THE SAME WAS EVIDENCED, BY WHAT AUTHORITY OF LAW AND FOR WHAT PURPOSES THE SAME WAS CREATED, AND THE DATES AND NATURE OF THE BONDS OR OTHER EVIDENCE OF SAID INDEBTEDNESS.

The parties agree to the extent of $32,919,863.93 upon the amount of the public debt of the Com-

monwealth of Virginia on the 1st day of January, 1861 (Rec., p. 215). The plaintiff claimed at the time of making the joint schedule A-1, p. 1, that there should be added to this aggregate:

First—		
Unpaid and accrued interest from July 1st, 1860, to December 31, 1860, on the public debt		$ 977,209.89
Second—		
Bonds of the Commonwealth of Virginia, held by the Sinking Fund $1,329,557.20		
Unpaid and accrued interest as above..	39,686.72	
Total		1,369,243.92
Bonds of the Commonwealth held by the Board of Public Works .....$	146,500.00	
Unpaid and accrued interest as above..	4,395.00	
Total		150,895.00
Bonds of the Commonwealth held by the Literary Fund..	1,085,067.33	
Unpaid and accrued interest as above ..	31,776.02	
Total		1,116,843.35

(Rec., p. 215.)

These items were all in the first instance contested by the defendant. The item of $977,209.89, unpaid and accrued interest, is conceded by the defendant and I treat it as a part of the public debt.

It is conceded that the bonds held by the Board of Public Works were bonds of the Commonwealth placed in its hands for sale in connection with the prosecution of the works under its charge, but that the bonds referred to were never issued, and therefore never became a part of the public debt. For this reason this item has been withdrawn by the plaintiff.

There remains in controversy the bonds in the Sinking Fund and the Literary Fund. Whether the bonds of the State held by these two funds are within the meaning of the Decree, a part of "the public debt of the Commonwealth of Virginia" is the question. This involves a review of the constitutional and statutory provisions creating them.

Sinking Fund.

The Constitution of Virginia required the maintenance of a Sinking Fund to

> "be applied to the payment of the interest of the State debt and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the Sinking Fund, after the payment of such interest, shall be *invested in the bonds or certificates of debt* of this Commonwealth or of the United States or of some of the states of this Union, and applied to the payment of the state debt as it shall become redeemable."
>
> (Con. Va. Art. 4, Sec. 29, p. 47.)

The sum necessary was to "be set apart annually from the accruing revenues." (Con. Va., Art. IV., Sec. 29; Code Va. 1860, p. 47.) Proceeds of the "sale of the stocks held by the Commonwealth for internal improvement and other companies, if made before the payment of the public debt" were to "constitute a part of the Sinking Fund" (do. Sec. 30). The "Auditor of Public Accounts, Register and Secretary of the Commonwealth for the time being" were constituted a "corporate body under the style of 'The Commissioners of the Sinking Fund.' * * * For the purpose of managing, preserving and applying the Sinking Fund created by this Act." (Code of Va. 1860, Chap. 44, sec. 6, p. 261.) The Auditor of Public Accounts was required, "to pay into the Treasury of the Commonwealth [not the Treasury of the Commissioners of the Sinking Fund] annually thereafter out of the accruing revenues" the specified "portion of the sum set apart for the Sinking Fund". He was also required to "pay into the Treasury to the credit of said Fund" the amount of the semi-annual interest. (do. Chap. 44, sec. 4, p. 260). To provide for subsequent debts, he was also required to "pay in like manner into the Treasury", that is, of the Commonwealth, "to the credit of the Sinking Fund, one per centum, &c." and also "in like manner into the Treasury to the credit of the said fund * * * the amount of the semi-annual interest", and in case of coupon bonds, the "amount of the interest" was to be "set apart and paid into the Treasury to the credit of said fund" thirty days in advance of their becoming due. (do. Chap. 44, sec. 5, p. 261.) It was "their duty to apply the moneys appropriated out of the said Fund to the payment

of the interest and redemption of the principal of the State debt," &c., and to "invest any part of the appropriations * * * which cannot be so applied to the purchase of public stock" (do. Sec. 7, p. 261). Instalments of interest and sums for the redemption of any part of the principal of the debt were to be paid by special order of the Commissioners entered on their minutes authorizing "the second auditor to issue his warrants on the treasury". (do. Sec. 10, p. 261.) The second auditor was required to "keep the accounts of the Sinking Fund with the Treasury in such manner as to show distinctly at all times the amount of the transactions on account of each appropriate head of receipts and expenditures," (do. Sec. 13, p. 262).

> "All moneys belonging to the Sinking Fund shall be paid into the Treasury on the warrant of the second auditor and shall be paid out in like manner when authorized by the Commissioners of said Fund" (do. sec. 14, p. 262).
>
> "The Treasurer [State Treasurer], shall receive and pay the moneys belonging to the Sinking Fund as herein required. He shall keep a distinct account of the same and report to each session of the Legislature the aggregate receipts and disbursements on account thereof * * * " (do. sec. 15, p. 262).

The Treasurer of the Commonwealth was required to

> "keep separate accounts of the money *belonging to the Literary Fund*, to the Fund for Internal Improvement, *to the Sinking Fund* and to the Washington Monument Fund, showing the receipts and disbursements on account of each" (Chap. 45, Sec. 31, p. 270).

Semi-annual interest on the debt of 1839 was to "be paid out of the Public Treasury" but no part of it "out of the Sinking Fund," thus recognizing the Sinking Fund as being in the Public Treasury (Chap. 44, Sec. 19, p. 263).

Literary Fund.

By an Act passed March 3, 1819 (Rev. Code of Va., 1819, Vol. 1, page 82,) certain public officials were

> "constituted a body corporate and politic under the denomination of the President and Directors of the Literary Fund, with power to sue and be sued, plead and be impleaded, and to hold lands and tenements, goods and chattels, and the same to sell, dispose of or improve for the purposes hereafter mentioned" (Chap. 33, Sec. 6).

and

> "All sums of money which have accrued or may hereafter accrue to the Literary Fund in consequence of the appropriations thereto already, now or hereafter to be made,"

were vested in said persons (do. Sec. 6).

Actions were authorized to be brought "in the name of the said President and Directors" (do. sec. 7), and in an Act consisting of 22 sections an elaborate plan for the management of the Literary Fund was prescribed.

March 2, 1821, "An Act concerning the Literary Fund" was passed (Acts of Va., 1820-1821, p. 12). It repealed "all acts and parts of acts coming within the purview of this Act," (Sec. 13, p. 14). It changed the personnel of the Board (Sec. 1). It

did not vest in them the money which was vested in the original board. It provided "that all moneys accruing for the benefit of the Literary Fund" should "be paid into the public treasury and shall be kept by the Treasurer of the Commonwealth *ex officio* in the same manner that *other public moneys* are kept by him except only that there shall be a separate account raised therefor in the name and for the benefit of the Literary Fund" and that it should only "be checked or drawn for in his official capacity as such Treasurer" (Sec. 3, p. 13). The State Treasurer was to "be accountable for the moneys so paid into the Treasury" (Sec. 4). Dividends and interest upon stock belonging to the Fund and interest on moneys loaned were to be "paid into the Treasury" (Sec. 5). Sheriffs collecting executions were "to pay the same into the Treasury" (Sec. 6). "Money belonging to the Literary Fund" could "be paid out of the treasury" only on a "warrant from the auditor drawn in pursuance of an order of the president and directors" (Sec. 7). An accountant was provided for who was required,

> "to keep distinct accounts of all the stock and other property belonging to the Literary Fund and distinct accounts of all monies authorized to be paid into the Treasury and to be drawn therefrom on account of said Fund."

And he was to be furnished by the auditor with

> "statements of all warrants for the payment of money into the Treasury for the benefit of the Literary Fund" (Sec. 11, p. 14.)

"An Act to amend the several Acts concerning the Literary Fund" passed February 25, 1829, Acts of Va. 1828-9, page 13, provided for a detailed plan for the supervision of the Fund, and Section 13, vested in the second auditor, "The Superintendent of the Literary Fund, all the power heretofore vested in the president and directors of the Literary Fund," with certain exceptions not material, and created a board with certain supervising powers "to perpetuate the corporation heretofore established."

Referring to this corporation the Code of 1860, page 414, provides:

> "The Governor, Treasurer, two auditors and register of the land office shall be a corporation under the style of 'The Board of the Literary Fund' "

and be vested with all the rights and powers heretofore vested in the President and Directors of the Literary Fund (Chap. 78, sec. 1). There is no provision in the Code vesting this "corporation" with any title to the funds or property of the Literary Fund. "Any money which ought to be paid into the public Treasury to the credit of the Literary Fund" is to be recovered not by the Board but by the second auditor of the Treasury (do. Chap. 78, sec. 7—Chap. 72, sec. 1). The Board is authorized to

> "*invest* all the unappropriated capital and income of the Literary Fund in certificates of debt of the United States *or certificates of debt* of or guaranteed by this State or in stocks of banks incorporated by it" (do. sec. 8, p. 414).

It is provided that

> "All money belonging to the Literary Fund shall be received into and paid out of the *Public Treasury* upon the warrant of the second auditor."

The only control that the Board has over this fund is by virtue of a provision that,

> "no warrant for paying out such money shall be issued without the special authority of the Board" (do., sec. 13, p. 415).

The second auditor adjusts, settles and balances all accounts of persons "having accounts with the Literary Fund" (do. Sec. 14, p. 415). The board does not have the right to the possession of "securities for money belonging to the Literary Fund," as all such securities are to be deposited "with the second auditor for safe keping" (do. sec. 15, p. 415).

"Money, stocks or other property" are all referred to as belonging "to the Literary Fund" undoubtedly for convenience and identification. (Code Va. 1860, Chap. 79, sec. 1, p. 416.) As the money belonging to this Fund is in the Treasury of the Commonwealth as a part of its common assets kept in "a separate and distinct account," "the money, stocks or other property" would seem for the same reason to be the property of the State in the "Literary Fund."

The Courts of Virginia in a recent case have authoritatively construed legislation of a similar character relating to the Eastern State Hospital, which in its character is more indicative of constituting the Board in question a separate legal entity or a corporation independent of the State

than is the legislation relating to the Sinking Fund or the Literary Fund.

By an Act passed March 6, 1841 (Acts of Va. 1840-1841, Chap. 15, page 38), the

> "present Directors of the Hospital in the City of Williamsburg"

were constituted

> "a body politic and corporate to have perpetual succession by the name of the 'Directors of the Eastern Asylum for the maintenance and cure of insane persons,'' and by that name may sue and be sued and may and shall have and use a common seal and are enabled to take and hold any estate real or personal given or to be given to the said Asylum or to themselves for the use thereof'' (do. sec. 1).

By the Code of Virginia, 1860, Chap. 85, sec. 2, page 435, it is provided that

> "The directors for the Asylums at Williamsburg and Staunton shall respectively continue to be corporations,''

the first being known as the "Eastern Lunatic Asylum."

The name of the hospital at Williamsburg was changed to the "Eastern State Hospital" and it was provided that its directors should continue to be a corporation (Va. Code, annotated, Sec. 1661). Neither of the Codes appear to have changed the powers vested in the corporation. The directors of this hospital are provided for by the Constitution (Art. XI, Sec. 149-150, p. 248). The Board has the "management of the Hospital for

which it is appointed" (sec. 1662). Its funds are to be deposited in a "solvent bank" designated by the Board and Commissioners (sec. 1665). Unlike the Sinking and Literary Fund its funds are not to be deposited in the State Treasury. They are "disbursed by checks drawn by the Superintendent of the Hospital and approved and countersigned by the Chairman of said special board" (sec. 1666). This separates the fund of the Hospital from the general fund of the State and the Treasury of the State. The directors have power to release claims for the "removal, maintenance or care of an insane person" (sec. 1708). In addition to the general corporate right to sue originally granted to the board, it has the right to sue "in the name of the hospital or of the Commonwealth" (sec. 1709).

While in this Code the State Treasurer is required to keep separate accounts of the money belonging to the Literary Fund, Interest on the Public Debt and the Sinking Fund, and the Miller Fund, the Hospital Fund is not recognized as being in his hands and he is not required to keep any account thereof (sec. 781).

Eastern State Hospital v. *Graves*, 105 Va. 151, was a suit brought by the hospital to recover sums due for board and medical services and the question was whether the Statute of Limitations could be pleaded in the suit, it being contended on the part of the plaintiff that the hospital was in effect the State and the Statute of Limitations did not run against the State, and therefore it could not be pleaded; and in holding that the Statute of Limitations could not be pleaded, the Court said that the

> "hospital was created and exists for purely Governmental purposes—is a public corpora-

> tion, governed and controlled by the State and acts exclusively as an agency of the State * * * that it has no stockholders, no members even except directors having no interest in it or its affairs, who are appointed by the Governor and with the consent of the Senate and are in fact public, rather than corporate officials endued with corporate being for a more convenient administration of the duties imposed upon them by law * * * if not collected the loss falls wholly upon the State, and if there is a recovery it will be for the benefit of the State and the State alone—not for the benefit of the directors nor for the benefit of any subordinate division of the State but for the whole people—the State at large" (p. 153).

The same doctrine in substance had been previously announced in *Kaia* v. *Eastern State Hospital* 97 Va., 507. The case of *Eastern State Hospital* v. *Graves*, expressly overrules the case of *McClanahan* v. *Western Lunatic Asylum*, 88 Va., 466, which holds that a plea of the Statute of Limitations was good on the ground that the asylum

> "is a corporation—an authorized legal entity—a personality in law with power to sue and be sued" (p. 468.)

The McClanahan case seemed to turn almost wholly upon the fact that the Asylum had the power to sue and be sued. It is not only expressly overruled on that point by *Eastern State Hospital* v. *Graves*, but inasmuch as neither the Commissioners of the "Sinking Fund" or the "Literary Fund" have the power to sue and be sued, it would not be in point as to those funds in establishing that the respective boards were organized legal entities and personalities in law as distin-

guished from mere public agencies. This construction given to a state statute by the Supreme Court of Virginia having now become the well settled law of Virginia, will be held to be the authoritative construction of that statute by the Federal Courts as no Federal question is involved.

> Soper *v.* Lawrence Bros., 201 U. S., 359-370.
> N. Y. Cent. R. R. Co. *v.* Miller, 202 U. S., 584, 595.

On the authority of that case and by reason of the fact that they have neither stockholders or assets or control over assets and its officers are public, rather than corporate officials, invested with corporate capacity for convenient administration, and the funds are kept in the State Treasurer subject to the control of its Treasurer, he being responsible therefor, in separate and distinct accounts for the the purpose of convenience in maintaining the identity of and keeping the accounts of its Treasurer with each, I find that these funds are the property of the State.

Bonds purchased by and for either of these funds were bonds purchased by and for and on account of and with the funds of and became the property of the Commonwealth of Virginia, kept for convenience in the accounts to which they respectively belonged.

The remaining question is what was the legal effect upon the "public debt" of Virginia of the purchase of its bonds for each of these funds by the Commonwealth itself.

The plaintiff contends that they have remained after such purchase in the respective funds a part of the "public debt" of the State.

My attention has been called to the case of *State ex rel. Heller* v. *Young,* 18 Wash., 21, as sustaining the contention of the plaintiff. In that case the Court held that under an Act authorizing the State Treasurer "to invest all money now in his hands * * * belonging to the Tide Land Fund * * * in the general fund warrants of the state" (p. 23) that the authority conferred was "to *purchase* and not to pay" (p. 25) the general fund warrants. In the majority opinion the case turned upon the question as to whether the act contemplated "the payment and extinguishment of the warrants" or only authorized "the purchase for the benefit of the tide land fund of such warrants" (p. 24). Three of the Court held that the act contemplated a purchase and that the State could not compel the holder of a warrant to sell it to the State, the case seeming to turn largely upon the question of the power to compel the holder of a warrant to sell it to the State. While inferentially the reasoning indicates the continued existence of the warrant as a part of the debt of the State, its character in that respect is not discussed in the opinion. Two of the Court dissent and Chief Justice Scott in his dissenting opinion says:

> "It is immaterial whether the transaction contemplated an investment, a payment or a purchase. By it the State would become the holder of its own paper to a considerable amount. The original holder would be paid for it would undoubtedly be a payment to him. It might still be an investment upon the part of the State for the benefit of a particular fund. This could make no difference with the prior holder. The warrants would be *in effect discharged,* for they could not be reissued without express legislative

> authority reviving them and directing it. The State might preserve them as *evidence of the amounts* due a particular fund, which it might at some time desire to replace. * * * The word 'invest' was probably used through a desire to preserve the particular fund as a distinctive one, but these questions are not in this case and do not concern the relator in any way" (p. 32).

thus indicating clearly that the legal effect of the transaction as to whether it did or did not affect the character of the warrant as a continuing indebtedness was not involved in the case, and also clearly indicating that in the opinion of the Chief Justice the purchase of a warrant under such circumstances extinguished it as an indebtedness of the State.

The case of *State ex rel. Stull Bros.* v. *Bartley*, 41 Nebr., 277, is cited by the majority in *State* v. *Young*. In that case the Court held that the Constitution had created a trust fund known as the Permanent School Fund, and that an Act providing for the payment of a warrant drawn on the general fund by the Treasurer and also that the Treasurer "shall hold said warrant as an investment of said permanent school fund" was void, as "said Act provides in substance for a transfer to the general fund of the permanent school fund" (p. 283). In the opinion the Court said:

> "We shall not argue to prove that an Act which provides for the defraying of current expenses of the State, and the enforced payment of outstanding general fund warrants from the permanent school fund is a transfer of that fund. The fact that such a transaction is by the legislature denominated an investment is wholly immaterial" (p. 284).

In defining "investment" they said:

> "It implies the contractural relation of purchaser and seller or borrower and lender, and in that sense it is employed in the Constitution" (p. 284),

undoubtedly having in mind the relation between the State and the holder of the warrant proposed to be credited by the Act rather than the specific relation of the State itself to its own warrant thus purchased, as they immediately proceed to say:

> "It follows that the State in its relation as Trustee can no more require the holder of State warrants to part with them than it can enforce the sale by a citizen of any other species of property" (p. 284).

While the case is not put upon that ground, it seems to involve the necessary conclusion that the warrants as "State securities" ceased to exist after such payment and although denominated an "investment," by the Act they were not after such purchase a debt or liability of the State, as if they were the "permanent school fund" would still have existed untransferred but invested in the warrants.

In *In re State Warrants*, 25 Nebr., 659, the Court held that "State warrants drawing interest" were "State securities" within the meaning of the Constitutional provision, authorizing the investment of the school funds in "United States or State Securities" but did not discuss the question as to what the effect of such a purchase would be upon such warrants as a continuing indebtedness of the State.

In *State* v. *Stuefer*, 66 Nebr., 381, the opinion of the Commissioner, who was appointed by the Court, seems to treat the proceeding contemplated by the Statute being construed by the Court in *In re State Warrants (supra)*, as a guarantee by the State of the integrity and security of the "permanent school fund," and did not discuss the question as to the effect upon a State security, as a continuing indebtedness after its purchase by the State.

These cases, while in some respects analogous, are not in point upon the contention of the plaintiff.

In *Commissioners* v. *Walker*, 7 Miss. (6. How), 143, upon the ground that "There was a legal conveyance of the Sinking Fund to persons capable of holding it for the use and benefit of the State in the extinguishment of a certain debt" (p. 187); the Court held that the Commissioners were Trustees of the Sinking Fund; and as such could maintain the suit to recover money loaned by them from the Sinking Fund "for the use of the party beneficially interested" (p. 188); and did not discuss the question involved here.

The case of *Elser* v. *City of Fort Worth*, 27 S. W., 739, is closely in point for the plaintiff. In that case the Court said:

> "The next contention of appellant is that if the City can invest these funds otherwise than in paying off and cancelling the bonds themselves it cannot invest them in the purchase of its own outstanding bonds of another series because a purchase by a debtor of a debt against himself *ipso facto* works a cancellation thereof. It must be conceded that this is a correct statement of the law in its application to ordinary cases in which the

purchase is made by the debtor in the same capacity in which he owes the debt; * * *

But, be this as it may, it will hardly be contended that if the purchase be made in a different capacity than that in which the debt is owed (for instance, if A as Trustee should with a trust fund purchase a debt which he owes as an individual), the rule would apply; and we are of opinion that as to those funds set apart for special purposes both by the law and the ordinances passed by the City Council as in this case, the City must be regarded as a Trustee purchasing with the trust fund a debt which it owes as an individual and that the debt so purchased is not canceled but is kept alive for all purposes and becomes the property of the *cestui que trust* —the special fund—just as the house and lot taken from a defaulting collector was said by our Supreme Court in the case of *City of Sherman* v. *Williams,* 84 Tex., 421, 19 S. W. 606, to become the property of such a fund. We think this view receives striking illustration in numerous provisions of our constitution and laws authorizing the investment of special funds such as the university and public school funds held by the State in its own bonds and by the different counties in their own obligations. We believe it has never been contended that a purchase of this kind cancelled the bonds thus acquired" (p. 740).

The Court distinguishes 102 N. Y., 313, and 102 N. Y., 410, upon the ground that they turn upon statutes "quite dissimilar to the provisions contained in the Charter of this City." The Charter provided:

"The City Council shall have power to invest the sinking fund * * * in bonds of the City of Fort Worth" (p. 741).

An examination of the essential and substantial features of the legislation construed in the New York cases will, I think, show their substantial identity with this provision in the Charter of the City of Fort Worth. The opinion of the Court seems to be mainly predicated upon the analogy of the collector's house and proceeds upon an apparent misconception of the legal situation. The house had physical existence and could be impressed with a trust in connection with the fund without any reference to its ownership or any contractual relations to or interests therein. There is no parallel between such a piece of physical property and the bonds in question. A bond is merely the evidence of an indebtedness and entitles the holder to recover of the maker the amount evidenced by its terms. Independent of establishing the right of such recovery the bond has no value. To assume that it is in all respects parallel to a piece of physical property for the purpose of demonstrating that it still has valid existence as an evidence of indebtedness after its purchase by the maker, is to beg the question and assume its continued existence as a debt. The bond is a promise to pay and the real question is whether the obligation which the City assumed to pay, the sum stipulated in the bond, to the payee, still remains an obligation when the City makes the purchase itself and becomes by virtue thereof the other party to the contract. On the theory of a trust relied on by the Court the debt may well have been extinguished, as a debt, and the proceeds in the hands of the City be impressed with a trust in favor of the fund in which the debt had merged.

This was a decision of an intermediate Court. It does not appear to have gone to the Supreme Court, and I do not find that it has ever been cited with approval.

There are a number of authorities which clearly sustain the contention of the defendants, some of which are directly in point.

In *Young* v. *Hughes*, 20 Miss. (12 S. & M.), 93, the State subscribed for stock in the Planter's Bank and paid for the subscription in bonds and provided that the surplus of the dividends on the stock after the payment of the interest of the bonds was to "constitute a Sinking Fund * * * for the redemption of the said bonds" (p. 96) and a State Commissioner was afterwards provided for with power to "manage, collect and receive the Sinking Fund" (p. 98)and authorized to coerce by suit or otherwise payments of all debts due that fund. The fund was held to be the property of the State.

In *Miss.* v. *Dickinson*, 20 Miss. (12 S. & M.), 579, the State Treasurer was required to set off the indebtedness of the State to the defendant against the amount the defendant owed the Sinking Fund, notwithstanding the fact that the Sinking Fund was in a sense a trust fund because "an indebtedness to the sinking fund is therefore, an indebtedness to the State of Mississippi, the latter being the sole owner of that fund" (p. 583).

In *Comr. of Baltimore Co.* vs. *Board of Managers of the Maryland Hospital for the Insane*, 62 Md. 127, the Board of Managers of the Hospital held the title by deed of "all the real estate and other property belonging to said trust" (p. 130). They were "a body politic and corporate" might "sue and be sued" (p. 131). They had no

"power to mortgage or pledge any of the property real or personal of said hospital" (p. 130). The hospital was "declared to have been built and established on its said site by the authority and direction of this State" and the hospital was "to be a public agency of this State for the administration of one of the charities thereof" (p. 131). The Court held that the hospital was the property of the State and not subject to an assessment for the construction of a public roadway and that the "corporate form was adopted by the State only more conveniently and efficiently to administer the affairs of the Institution" (p. 132).

In *New England Life Ins. Co.* v. *Phillips*, 141 Mass., 535, the Court was deciding the effect of a purchase by trustees of a Sinking Fund, of railroad bonds, which the fund was created to buy, and under the provisions of the Statute they held that it was the duty of the Trustees to cancel the certificates of the road's indebtedness when purchased by them with the Sinking Fund. They said,

> "Now if it were a plain misuse of the term to say 'invested' when preservation for the purpose of collecting income is not intended, there would be some force in the argument. But the word 'invest' has no such absolute and universal meaning. It is not uncommon to hear it said that the best investment of money is in the payment of one's debts" (p. 540).
>
> "but as has already been seen the word 'invest' does not necessarily imply a permanent keeping for income (p. 543). * * * But in the view which we take of the proper construction of the Statute it might reasonably be anticipated that the Trustees though having the liberty to invest in other securities

would give the preference to the certificates of indebtedness if these could be obtained at a fair price as compared with the other authorized securities for the purpose of reducing the debt as fast as possible" (p. 544).

While the point is not emphasized, this last remark of the Court indicates that it understood the purchase of securities under such circumstances to result in a reduction of the debt.

In *Brooke et al.* v. *Phila.* 162 Pa. St.,123, 24 L. R. A., 781, in considering the debt limit fixed by the Constitution and the relation thereto of the bonds of the city held in its Sinking Fund, the Court said:

"When used in the purchase of the debt, there is a release of the pledge and a discharge of the obligation to the amount of the purchase.

It is not important in determining the actual debt that the Commissioners have not authority immediately on purchase to cancel or destroy the city certificate; it is paid for by the money of the obligor; put into the fund for that very purpose; *as an outstanding unpaid obligation, it can as to the obligor have no real effective existence after it is purchased and paid for with the city's* money" (p. 131). * * * It "ceases to be longer a part of the actual debt of the city. That much of the debt the City is no longer bound to pay because practically it is paid. We are speaking now of the actual obligation of the city as affected by these certificates in the fund but not yet canceled" (p. 131) * * * "The City owes now just what it is bound to pay; not one cent more. If it has through the Sinking Fund purchased its own certificates, placed them uncancelled in the fund and *even pays interest on them annually it can-*

not pay them again. The payment of annual interest is only a method or device for the annual appropriation to the fund" (p. 132).

The Sinking Fund Act provided for the "extinguishment of the bonds and funded debt" and that "said bonds when purchased shall be conspicuously stamped to show that they were purchased for the Sinking Fund of said City and the *interest on said bonds* shall be collected and used in like manner with the taxes collected for said Sinking Fund" (Laws Pa., 1874, page 234, Chap. 452, sec. 11), clearly treating the bonds as an existing investment with interest accruing thereon. This case is followed on this point in *Bruce et al.* v. *Pittsburg et al.*, 166 Pa. St., 152, and in *Houston* v. *Lancaster*, 191 Pa. St., 143.

In *Kelly* v. *Minneapolis*, 63 Minn., 125, the Court said:

> "This Board [Sinking Fund Commissioners] with the consent of the council may invest the fund in the bonds of the city or in certain other designated bonds. If it is *invested in the bonds of the city* they are not to be *canceled* but the *interest thereon is to be collected* and added to the fund; and when the principal of any city bonds becomes due, such of the bonds in the Sinking Fund as may be necessary are to be sold with the consent of the council and the matured bonds paid" (p. 134).

> "It appears from the record in this case that all of the bonds held by the Sinking Fund are the bonds of the City, hence the amount of the bonds and the money in the fund necessarily represent an equal amount of the out-

> standing and uncanceled bonds and indebtedness of the city which has already been realized from taxation to pay the bonds, and to ascertain the further amount to be raised by taxation in order to extinguish the entire indebtedness of the city it necessarily follows that the amount of the Sinking Fund is to be deducted from the entire amount of the apparent indebtedness of the City. *The balance is its actual debt.* The debt limit of the statute has reference to an actual indebtedness for the payment of which a tax must be levied, not to an *uncanceled apparent liability*" (p. 135).

In *Stone* v. *Chicago,* 207 Ill., 492, it was held that the sum reported as due the Sinking Fund was

> "not a debt of the city but the amount in the hands of the City Treasurer belonging to the Sinking Fund should be deducted from the amount of the city's bonded indebtedness * * * *" (p. 510).

Citing with approval *Kelly* v. *Minneapolis (supra).* It does not appear from this case whether or not the Sinking Fund was invested in whole or in part in the City bonds.

In *Savings Bank* v. *Grace,* 102 N. Y., 313, the Court said:

> "Re-purchase of notes or other evidences of debt by the issuer from the holder is redemption, and is equivalent to and has the force of payment" (p. 319).

Under the law being construed the Commissioners of the Sinking Fund were required to

> " 'invest the moneys which shall constitute the Sinking Fund for the redemption of the

> city debt * * * in the purchase of stocks created by the corporation of the City of New York.'" (p. 321).

The stock was not to be cancelled by them until the final redemption of the stock and all interest accruing thereon was to be regularly carried to the said Sinking Fund for the redemption of the debt, and provision was made for its sale. The Court said:

> "From the time of its inception then to its final redemption it is the subject of sale; at all times the basis of interest, and, in the hands of all owners save the Commissioners, a part of the apparent indebtedness of the city." (p. 323).

Commenting upon a Statute authorizing the Commissioners to cancel the stock they said:

> "Its actual cancellation deprived it of no efficacy, for by redemption it was already for all practical purposes extinguished" (p. 324).

> "But the object of every Sinking Fund is to diminish the debt whose existence warranted its foundation" (p. 325).

In holding that stock thus invested in was not a debt, they said:

> "It satisfies also the intent of the Constitutional prohibition. That is aimed at an actual, not a theoretical indebtedness—at a substantial liability which can be discharged only by the enforcement of a tax or an assessment which when levied will be a charge upon the tax payer and a burden for him to remove—not a formal obligation which may remain as evidence of a *once existing debt*,

> but which can in no way be regarded as a *present debt to be enforced,* and which, if not before cancelled in the discretion of the Commissioners, becomes waste paper by the mere efflux of time" (pp. 325, 326).

> "It is *by force of the ordinance* that interest is to be credited, *not by reason of the contract* or the terms upon which the stock was issued. Nor could that interest or other money be applied in payment of the stock held by the commissioners. That was paid by the purchase, yet if the argument of the respondent should prevail, it must be paid again before its extinguishment" (p. 326).

In applying similar principles to a railroad bond, the Court in *Wilds* v. *St. Louis, A. & T. H. R. R. Co.*, 102 N. Y., 410, held that conceding the bonds themselves immediately upon their purchase ceased to constitute any part of the corporate debt and were practically extinguished, and "that the provision for interest payments was only a mode for measuring and determining the amount of prescribed contributions to the Sinking Fund; those contributions at least are directed to be made so long as interest accrues upon the bonds treated as valid obligations" (p. 413).

The case of *Savings Bank* v. *Grace (supra)* was expressly approved in the recent and thoroughly considered case of *Levy* v. *McClellan*, 196 N. Y., 178, where the Court of Appeals of New York, said:

> "City stocks or bonds so held are not debts which it can be called upon to pay within the meaning of the Constitutional prohibition. * * * * 'The object of every sinking fund, it was said, is to diminish the debt whose ex-

istence warrants its foundation,' and the amount 'required to pay off the city debt if it all came presently to maturity' would be a sum 'equal to its bonds or stock not including that held by the Sinking Fund.' " (p. 197).

The amount of the "public debt" is to be ascertained for the purpose of determining the proportion to be paid by West Virginia. The Sinking Fund by which the bonds in that fund were purchased came from the current revenues raised by taxation in Virginia, while West Virginia was a part thereof, and to those current revenues she contributed her proportion. If the bonds thus purchased by the Fund to which she contributed are to be treated as a part of the existing debt, she will be required to contribute again her proportion in payment thereof and will therefore in effect pay that proportion twice. The bonds in the Literary Fund were purchased by assets that were the common property of the whole State in which West Virginia owned her proportion. The common assets having been used for the purchase of the bonds now in the Fund, if the bonds are still treated as a part of the public debt and in the final adjustment made a charge upon West Virginia, West Virginia will be compelled to pay her proportion of the bonds and lose entirely the benefit of her share of the assets thus used in making the investment therein.

Inasmuch as both the Sinking Fund and the Literary Fund under the provisions of the Statute regulating their conduct and management are very clearly the property of the State and only kept in separate and distinct accounts for the convenience of the State, it is difficult to see how a

purchase by the State for either of these funds of its own obligation, does not extinguish the bond as a debt of the State. The State can hardly be debtor and creditor at the same time.

I am satisfied that the great weight of reason and authority is against the contention of the plaintiff, and I therefore find that the Sinking Fund with interest and the Literary Fund with interest, within the meaning of the decree, were not a part of the "public debt" of the Commonwealth of Virginia on the first day of January, 1861, and that the amount of the public debt was the sum of Thirty-two million, nine hundred and nineteen thousand, eight hundred and sixty-three 93/100 dollars ($32,919,863.93) plus the unpaid and accrued interest thereon amounting to Nine hundred and seventy-seven thousand two hundred and nine 89/100 dollars ($977,209.89) in all $33,-897,073.82.

I state as a "special circumstance" that I consider of importance that on the first day of January, 1861, there was held by the Commonwealth of Virginia in its Sinking Fund, bonds of the Commonwealth of Virginia that had been purchased by its funds and were its property in the amount of One million, three hundred and twenty-nine thousand five hundred and fifty-seven 20/100 dollars ($1,329,557.20), and that the unpaid and accrued interest thereon up to December 31, 1860 was Thirty-nine thousand six hundred and eighty-six 72/100 dollars ($39,686.72), aggregating one million three hundred and sixty-nine thousand two hundred and forty-three and 92/100 dollars ($1,-369,243.92), and that the Commonwealth of Virginia held in its Literary Fund bonds of the Commonwealth of Virginia that had been purchased

by its funds and were its property, one million eighty-five thousand and sixty-seven 33/100 dollars ($1,085,067.33) with unpaid and accrued interest thereon up to December 31, 1860 of Thirty-one thousand seven hundred and seventy-six 2/100 dollars ($31,776.02) total One million, one hundred and sixteen thousand eight hundred and forty-three 35/100 dollars ($1,116,843.35).

I further state that the Commonwealth of Virginia was liable under a guaranty made in 1847 upon the bonds of the Chesapeake & Ohio Canal Co. for the "punctual payment of the interest and ultimate redemption of the principal sum of money appearing due" in the sum of Three hundred thousand dollars. That of this sum, bonds aggregating Thirteen thousand dollars ($13,000) were redeemed by the Commonwealth of Virginia April 11, 1903, in her settlement with the United States for Virginia bonds held by the Secretary of the Interior for the benefit of certain Indian tribes and that the State now holds the same as a claim against the Chesapeake & Ohio Canal Company. The sum of Thirteen thousand dollars ($13,000) does not enter in any way into the aggregate of the indebtedness as above stated (Rec., p. 289).

The schedules hereto annexed and marked Paragraph 1, Ex. 1, Paragraph 1, Ex. 2 and Paragraph 1, Ex. 3, show by what authority of law, and for what purposes the same was created, and the dates and nature of the bonds being the evidence of said indebtedness.

SUMMARY.

Amount of the Public Debt of the Commonwealth of Virginia January 1, 1861, $33,897,073.82.

Stated as a Special Circumstance:

Amount of bonds of Commonwealth held by Sinking Fund, $1,369,243.92.

Amount of bonds of Commonwealth held by Literary Fund $1,116,843.35.

Amount of Bonds Chesapeake & Ohio Canal Co. guaranteed by Virginia in 1847 $300,000.

NOTE.—The word "REGULAR" in Maturity Column below means that the bonds are irredeemable for twenty (20) years, and then at the pleasure of the General Assembly.

NOTE.—The amount of $350,000.00 was not evidenced by any form of certificate of debt prior to January 1st, 1861, but is the principal amount required to produce annually at 6% interest, the sum of $21,000.00 guaranteed forever to the stockholders of the James River Company, by the Act of March 23rd, 1860.

It was later actually funded on this basis under the Acs of 1871 and 1872 known as the "Consol" and "Peeler" Acts.

For What Purpose Created.	By Authority of Acts of	Number of Loan.	Maturity.	Total.		Held by the Sinking Fund. Not admitted by Defendant as forming any part of Public Debt.		Held by the Board of Public Works. Not admitted by Defendant as forming any part of Public Debt.	Held by the Literary Fund. Not admitted by Defendant as forming any part of Public Debt.		Held by Individuals, Firms, Corporations, and others.	
				5%	6%	5%	6%	6%	5%	6%	5%	6%
Alleghany & Huntersville Road	March 13, 1849	82	Regular.		$ 5,000.00					$ 2,300.00		$ 2,700.00
Alexandria Canal Co.	" 1, 1847	41	"		234,200.00		1,800.00					232,400.00
Berryville Turnpike Co.	March 30, 1839; April 8, 1839; February 4, 1847	39	"		8,000.00					8,000.00		
Berryville & Charlestown Turnpike Co.	April 8, 1839; March 12, 1849	76	"		6,400.00							6,400.00
Beverly & Fairmont Road	April 8, 1839; January 14, 1848	47	"		16,600.00							16,600.00
Blue Ridge Railroad Co.	March 5, 1849	79	"		32,200.00							32,200.00
City Point Railroad Co.	April 6, 1839	24	"		50,000.00					400.00		49,600.00
Charleston & Point Pleasant Turnpike Co.	January 23, 1835; March 7, 1838; January 25, 1839; April 8, 1839	17	"		20,800.00							20,800.00
do	March 15, 1849	62	"		5,800.00							5,800.00
Cacapon & North Branch Turnpike Co.	April 3, 1838; April 8, 1839	29	"		11,000.00							11,000.00
Cumberland Gap Road	March 21, 1837; April 2, 1839; March 8, 1842	8	"		67,600.00		6,000.00					61,600.00
Clarksburg & Buckhannon T'pke Co.	March 9, 1848; March 29, 1848	61	"		9,000.00					1,000.00		8,000.00
Coal River Navigation Co.	April 8, 1839; March 17, 1849	72	"		4,000.00							4,000.00
Dismal Swamp Canal Co.	February 17, 1837	7	"		16,500.00							16,500.00
Dragon Swamp Navigation Co.	April 3, 1838; April 8, 1839	27	"		1,464.00							1,464.00
Exchange Bank of Virginia & Northwestern Bank of Virginia	March 19, 1839; April 8, 1839				447,407.00		7,150.00					440,257.00
Giles, Fayette & Kanawha T'pke Co.	February 1, 1847; March 15, 1849	42	"		13,400.00					4,400.00		9,000.00
Goose Creek & Little River Nav. Co.	March 27, 1848; March 29, 1848	73	"		7,000.00							7,000.00
Holliday's Cove Turnpike Co.	March 2, 1838; March 26, 1839; April 8, 1839	28	"		4,700.00							4,700.00
Huntersville & Warm Springs Turnpike Co.	March 20, 1832; April 8, 1839	32	"		300.00					300.00		
Hardy & Winchester Turnpike Co.	April 8, 1839; March 8, 1847; February 22, 1848; March 15, 1849	50	"		19,300.00					3,800.00		15,500.00
Howardsville & Rockfish T'pke Co.	March 9, 1848; March 29, 1848	59	"		9,000.00					4,000.00		5,000.00
Hampshire & Morgan Turnpike Co.	" 15, 1849	80	"		4,600.00							4,600.00
Ice's Ferry Road	" 30, 1837	31	"		1,358.00							1,358.00
Bank of Virginia	" 18, 1840		"		99,000.00		400.00			800.00		97,800.00
James River Co.	February 24, 1823	2	"		149,083.33					149,083.33		
do	" 16, 1825	4	"	$ 29,000.00					$ 29,000.00			
do	March 1, 1826	5	"		170,050.00					170,050.00		
do	January 30, 1829	6	"	37,000.00	13,000.00				37,000.00	13,000.00		
do	February 28, 1829	7	"	4,000.00	3,500.00				4,000.00	3,500.00		
do	December 18, 1829	8	"	8,000.00					8,000.00			
do	March 31, 1831	9	"	15,000.00					15,000.00			
do	February 20, 1833	10	"	4,000.00					4,000.00			
do	March 11, 1834	11	"	10,000.00					10,000.00			
do	" 23, 1860		Perpetual. (See note above)		350,000.00			$ 142,000.00		112,500.00		95,500.00
James River & Kanawha Co.	" 21, 1837	11	Regular.		1,925,683.59		66,152.00			86,100.00		1,773,431.59
do	" 25, 1842	36	"		250,000.00		766.00			20,200.00		229,034.00
do	" 1, 1847	43	Irredeemable for 25 years, and then at the pleasure of the General Assembly.		1,216,950.00		11,850.00					1,205,100.00
Carried forward				$ 107,000.00	$ 5,172,895.92		$ 94,118.00	$ 142,000.00	$ 107,000.00	$ 579,433.33		$ 4,357,344.59

For What Purpose Created.	By Authority of	Number of Loan.	Maturity.	Total		Held by the Sinking Fund. Not admitted by Defendant as forming any part of Public Debt.		Held by the Board of Public Works. Not admitted by Defendant as forming any part of Public Debt.	Held by the Literary Fund. Not admitted by Defendant as forming any part of Public Debt.		Held by Individuals, Firms, Corporations, and others.	
				5%	6%	5%	6%	6%	5%	6%	5%	6%
Brought forward				$ 107,000.00	$ 5,172,895.92		$ 94,118.00	$ 142,000.00	$ 107,000.00	$ 579,433.33		$ 4,357,344.59
James River & Kanawha Co.	January 25, 1850	89	Irredeemable for 25 years, and then at the pleasure of the General Assembly.		110,000.00		3,650.00					106,350.00
do (See Note below.)	March 23, 1860		Irredeemable for 34 years, and then to be redeemed.		2,520,000.00			4,500.00		23,100.00		2,492,400.00
Jordans Furnace & Rockbridge Turnpike Co.	March 7, 1848 / March 29, 1848	58	Regular.		3,600.00					3,600.00		
Louisa Railroad Co.	February 25, 1837 / March 27, 1838	6	"		171,750.00					5,600.00		166,150.00
do.	March 8, 1847	45	"		131,687.00		4,400.00			300.00		126,987.00
do.	March 5, 1849	70	"		12,900.00							12,900.00
Lewisburg & Blue Sulphur Springs Turnpike Co.	March 30, 1837 / April 8, 1839	33	"		1,000.00							1,000.00
Lafayette & English Ferry Turnpike Co.	January 25, 1839 / April 8, 1839	34	"		2,550.00							2,550.00
Lynchburg & Buffalo Springs Turnpike Co.	March 14, 1839 / April 8, 1839	37	"		8,500.00							8,500.00
Little Stone Gap Road	March 7, 1848 / March 29, 1848	56	"		3,000.00							3,000.00
Marshall & Ohio Turnpike Co.	February 11, 1848	65	"		9,000.00							9,000.00
Moorefield & North Branch Turnpike Co.	April 8, 1839 / March 10, 1848	67	"		12,900.00		200.00			2,000.00		10,700.00
Morgantown & Bridgeport Turnpike Co.	March 15, 1849	85	"		1,940.00					900.00		1,040.00
Moorefield & Alleghany Turnpike Co.	March 7, 1849	83	"		3,600.00							3,600.00
Morgantown & Beverly Road (2 Acts)	March 29, 1848	57	"		3,000.00					3,000.00		
Natural Bridge Turnpike Co.	February 28, 1837 / April 8, 1839	26	"		6,100.00							6,100.00
North Carolina & Wytheville Road	January 17, 1848 / March 29, 1848	53	"		100.00							100.00
North Western Turnpike Road	February 29, 1848 / March 17, 1849	51	"		65,850.00					12,000.00		53,850.00
do	March 19, 1831	1	Irredeemable for 20 years, and then at the pleasure of the General Assembly, within a period not exceeding 15 years.	5,000.00					5,000.00			
do	February 6, 1834	2	Regular.	12,200.00	16,600.00				12,200.00	10,000.00		6,600.00
do	March 30, 1837	3	"		2,000.00							2,000.00
do	April 9, 1838 / January 26, 1839 / January 15, 1840	5	"		12,484.00					12,484.00		
do	January 15, 1840	6	"		9,354.73					3,450.00		5,904.73
do	March 14, 1840 / March 19, 1840	7	"		5,100.00					3,000.00		2,100.00
Newmarket & Sperryville Turnpike Co.	March 19, 1849	75	"		9,100.00							9,100.00
Ohio River & Maryland Line Road	February 14, 1838	18	"		12,000.00							12,000.00
do	March 15, 1836	20	"		2,000.00					2,000.00		
do	March 30, 1839 / January 13, 1848 / March 29, 1848	86	"		6,600.00							6,600.00
Orange & Alexandria Railroad Co.	March 27, 1848 / March 6, 1849	64	"		108,900.00					700.00		108,200.00
Petersburg Railroad Co.	March 29, 1838	13	"		150,000.00		420.00			2,000.00		147,580.00
Portsmouth & Roanoke Railroad Co.	January 20, 1834 / March 14, 1837 / March 20, 1839	3	"	104,000.00	64,950.00						$ 104,000.00	64,950.00
do	March 31, 1838	14	"	100,000.00	50,000.00						100,000.00	50,000.00
Pittsylvania, Franklin & Botetourt Turnpike Co.	April 2, 1839	25	"		9,090.10							9,090.10
Richmond, Fredericksburg & Potomac R. R. Co.	January 23, 1835	4	"	121,000.00		$ 40,000.00			31,000.00		50,000.00	
Richmond & Petersburg Railroad Co.	January 17, 1837	5	"		176,400.00		500.00					175,900.00
do	March 30, 1838	21	"		50,000.00		300.00					49,700.00
Rappahannock Co.	March 4, 1836 / March 1, 1838	12	"		13,350.00					450.00		12,900.00
do	February 3, 1848	48	Irredeemable for 25 years, and then at the pleasure of the General Assembly.		97,100.00		2,100.00					95,000.00
Red & Blue Sulphur Springs Turnpike Co.	March 28, 1838 / March 23, 1839	23	Regular.		4,900.00							4,900.00
Carried forward				$ 449,200.00	$ 9,040,301.75	$ 40,000.00	$ 105,688.00	$ 146,500.00	$ 155,200.00	$ 664,017.33	$ 254,000.00	$ 8,124,096.42

NOTE.—Of this total, viz., $2,520,000.00, certificates of the Commonwealth amounting to $1,982,125.00 had been issued prior to January 1st, 1861.

The balance, viz., $537,875.00, was in the form of certificates of the James River & Kanawha Company, guaranteed by the Commonwealth and actually assumed by it in accordance with the Act of March 23rd, 1860.

For What Purpose Created.	By Authority of Acts of	of Loan. Number	Maturity.	Total.		Held by the Sinking Fund. Not admitted by Defendant as forming any part of Public Debt.		Held by the Board of Public Works. Not admitted by Defendant as forming any part of Public Debt.	Held by the Literary Fund. Not admitted by Defendant as forming any part of Public Debt.		Held by Individuals, Firms, Corporations, and others.	
				5%	6%	5%	6%	6%	5%	6%	5%	6%
Brought forward				$ 449,200.00	$ 9,040,301.75	$ 40,000.00	$ 105,688.00	$ 146,500.00	$ 155,200.00	$ 664,017.33	$ 254,000.00	$ 8,124,096.42
Rivanna Navigation Co.	March 27, 1837 / April 4, 1838	19	Regular.		6,300.00		300.00					6,000.00
Richmond & Danville Railroad Co.	March 9, 1847	46	"		380,090.00					2,000.00		378,090.00
Richlands to Kentucky Line Road	March 8, 1847	44	"		3,520.00							3,520.00
Rocky Mount Turnpike Co.	April 8, 1839 / March 18, 1847 / February 19, 1848	60	"		10,000.00					200.00		9,800.00
Rich Patch Turnpike Co.	March 14, 1849	87	"		1,100.00							1,100.00
Staunton & Parkersburg Road	March 16, 1838 / April 8, 1839 / February 19, 1845	16	Irredeemable for 20 years, and then to be redeemed.		125,393.27		880.02			17,800.00		106,713.25
do	February 2, 1848 / March 29, 1848	54	Regular.		4,500.00		200.00			2,400.00		1,900.00
do	April 8, 1839 / March 12, 1849	71	"		16,510.00							16,510.00
Salem & Peppers Ferry Turnpike Co.	March 25, 1839 / April 8, 1839	30	"		5,400.00		500.00					4,900.00
Salem & Newcastle Turnpike Co.	February 11, 1839 / April 8, 1839	38	"		3,875.00							3,875.00
South Western Turnpike Co.	January 24, 1848 / March 29, 1848	49	"		81,970.00					10,000.00		71,970.00
do	January 17, 1848	55	"		153,162.00					30,000.00		123,162.00
Smiths River Navigation Co.	March 16, 1849	84	"		2,600.00							2,600.00
Tazewell Court House & Fancy Gap Road	March 17, 1849	78	"		3,420.00							3,420.00
Upper Appomattox Co.	February 28, 1837 / January 25, 1839 / April 8, 1839	9	"		43,900.00					6,000.00		37,900.00
Valley Turnpike Co.	March 24, 1828 / February 14, 1839 / April 8, 1839	22	"		233,813.00					1,400.00		232,413.00
do	February 12, 1841	35	"		24,664.00		2,000.00					22,664.00
Virginia & Maryland Bridge Co.	March 17, 1849	63	"		10,000.00					1,800.00		8,200.00
Virginia & Tennessee Railroad Co.	March 6, 1849	81	"		66,800.00							66,800.00
Winchester & Potomac Railroad Co.	February 6, 1834 / March 10, 1834 / December 13, 1834	2	"		10,000.00					10,000.00		
do	February 13, 1838	15	"	8,000.00	133,935.00						8,000.00	133,935.00
Wheeling, West Liberty & Bethany Turnpike Co.	March 29, 1848	52	"		10,867.61					2,400.00		8,467.61
Weston & Fairmont Turnpike Co.	March 9, 1848	66	"		4,000.00							4,000.00
Weston & Gauley Bridge Turnpike Co.	March 25, 1848 / March 29, 1848	74	"		5,000.00							5,000.00
Wellsburg & Bethany Turnpike Co.	March 15, 1849	68	"		1,700.00							1,700.00
Williamsport Turnpike Co.	March 15, 1849	77	"		1,250.00					450.00		800.00
Registered Bonds	March 22, 1850	88	Irredeemable for 25 years, and then at the pleasure of the General Assembly.		2,340,648.00		19,800.00			48,500.00		2,272,348.00
Sterling Coupon Bonds	March 29, 1851	90	Redeemable in 35 years.	1,815,204.50							1,815,204.50	
Coupon Bonds	March 29, 1851	90	do.		13,082,500.00							13,082,500.00
Registered Bonds (coupon attached)	March 29, 1851 / May 25, 1852	90	Redeemable in 34 years.		3,050,464.33		445,289.18			107,000.00		2,498,175.15
Registered Bonds issued for the redemption of outstanding Warrants	March 17, 1856	91	Irredeemable for 34 years, and then to be redeemed.		2,761,100.00		43,700.00			18,700.00		2,698,700.00
Registered Bonds issued in exchange for Coupon Bonds	March 18, 1856	92	Redeemable in 35 years.		1,059,500.00		546,000.00			1,000.00		512,500.00
Registered Bonds	March 18, 1858	93	Irredeemable for 34 years, and then to be redeemed.		530,300.00		125,200.00			6,200.00		398,900.00
Total				$ 2,272,404.50	$33,208,583.96	$ 40,000.00	$ 1,289,557.20	$ 146,500.00	$ 155,200.00	$ 929,867.33	$ 2,077,204.50	$ 30,842,659.43

PARAGRAPH II OF DECREE.

2. "THE EXTENT AND ASSESSED VALUATION OF THE TERRITORY OF VIRGINIA AND OF WEST VIRGINIA JUNE 20, 1863, AND THE POPULATION THEREOF, WITH AND WITHOUT SLAVES, SEPARATELY."

"The extent and assessed valuation of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof with and without slaves, separately," is as follows (Rec., p. 347):

1. EXTENT:

Land Area:

Virginia	40,262	Square Miles	= 62.6314%
West Virginia	24,022	do.	= 37.3686%
Total	64,284	do.	= 100%

Total Area:

Virginia	42,627	Square Miles	= 63.8157%
West Virginia	24,170	do.	= 36.1843%
Total	66,797	do.	= 100%

ASSESSED VALUATION:

Real Estate:

Virginia	$296,085,460.31	= 78.2188%
West Virginia	82,449,252.04	= 21.7812%
Total	378,534,712.35	= 100%

3. POPULATION:

With Slaves:

Virginia	1,221,319	= 75.4855%
West Virginia	396,633	= 24.5145%
Total	1,617,952	= 100%

Without Slaves:

Virginia	748,171	= 66.4769%
West Virginia	377,289	= 33.5231%
Total	1,125,460	= 100%

ALTERNATIVE FINDING.

At the request of defendants, I make an alternative finding that the population of the counties now forming the State of Virginia, as shown by

the census of the United States for 1860, is as follows:

Without slaves,	747,136=67.5864%
With slaves,	1,219,630=76.4027%

And for the counties now forming the State of West Virginia:

Without slaves,	358,317=32.4136%
With slaves,	376,688=23.5973%

The assessed valuation of the territory of Virginia for 1860 was: $293,105,895.55

The assessed valuation of the territory of West Virginia for 1860 was: $83,814,355.61

"Supplemental Ex. 7."

PARAGRAPH III OF DECREE.

3. "ALL EXPENDITURES MADE BY THE COMMONWEALTH OF VIRGINIA WITHIN THE TERRITORY NOW CONSTITUTING THE STATE OF WEST VIRGINIA SINCE ANY PART OF THE DEBT WAS CONTRACTED."

This paragraph is clearly based upon the Wheeling Ordinance, which so far as material, reads as follows:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof and a just proportion of the ordinary expenses of the State Government since any part of said debt was contracted and deducting therefrom the moneys paid into the Treasury of the Commonwealth from the counties included within the said new State during the same period" (Appendix to Rec. p. 122).

The Wheeling Ordinance is not predicated upon the *amount* of the public debt. Upon the assumption that West Virginia would be liable for "a just proportion of the public debt" in case of separation, the Ordinance prescribes an arbitrary method by which that "just proportion" shall be ascertained. It treats the question as an equation involving three factors: first "by charging to it all State expenditures within the limits thereof; second, "and a just proportion of the ordinary expenses of the State Government since any part of said debt was contracted"; and third, "and deducting therefrom all moneys paid into the Treasury of the Commonwealth from the coun-

ties included within the said new State during the same period."

The result of this equation was to be a "just proportion" without any reference to the amount of the debt itself. The assumed liability was the occasion of the arbitrary equation, and whether, standing alone, it would result in a just proportion of the public debt" is so far as the ordinance is concerned entirely immaterial. The ordinance declares that the result thus "ascertained" is "a just proportion." If the ordinance is contractural in its character, it is the agreed method between the States of ascertaining "a just proporof the public debt." In such case the States would be bound thereby as in case of any other contract.

Next in the order of events comes the Constitution of West Virginia, which upon this point provides:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, in the year one thousand eight hundred and sixty -one, shall be assumed by this State" (App., p. 125).

The Court has held that this section is to be read in *pari materia* with the ordinance. The rules of construction seem to be well settled by the following authorities:

> "The rule is familiar and well settled that in case of obscure and doubtful words or phraseology, the intention of the law makers is to be resorted to if discoverable from the context, in order to fix and control their meaning so as to reconcile it if possible with the general policy of the law" (p. 677).
>
> *Wilson* v. *Rousseau,* 4. How. U. S. 646.

"It seems all sufficiently plain, and in such case there is a well-settled rule which we must observe. The object of construction applied to a Constitution is to give effect to the intent of its framers and of the people in adopting it. This intent is to be found in the instrument itself, and when the text of a constitutional provision is not ambiguous, the Courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. * * *.

So also where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction" (pp. 670, 671).

Lake Co. Com. v. *Rollins,* 130 U. S., 662.

"The general rule is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions, the Court may look into prior and contemporaneous acts the reasons which induce the act in question, the mischiefs intended to be remedied, the extraneous circumstances and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face and when standing alone it is fairly susceptible of but one construction, that construction must be given to it" (p. 419).

Hamilton v. *Rathbone,* 175 U. S. 414.

"Consequently if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated requiring that the subsequent should be incorporated into

the foregoing act is a direction to Courts in expounding the provisions of the law" (p. 8).

Alexander v. *Mayor*, 5 Cranch., 1.

"And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute they will amount to a legislative declaration of its meaning and will govern the construction of the first statute" (p. 565).

U. S. v. *Freeman*, 3 How., 556.

"In cases of *doubt ar uncertainty* acts *in pari materia* passed either before or after, and whether repealed or still in force may be referred to in order to discern the intent of the legislature in the use of particular terms, or in the enactment of particular provisions" (p. 235).

Vane v. *Newcomb*, 132 U. S., 220.

The only question that can arise here is as to the application of these rules to the Ordinance and the Constitutional provision read together. I understand a proper application of these rules, at bar, to be that where there is any doubtful uncertain or ambiguous word, phrase or sentence, which is susceptible of two constructions, one of which would operate equitably and one inequitably, that the "equitable" purpose declared by the Constitutional provision requires a construction that would produce the equitable result. Where, on the other hand, the language is clear and unambiguous there is no room for construction, and the clear and obvious meaning is to be adopted. If it is to be held that by reason of the Constitu-

tional provision equitable results should be reached in every instance, notwithstanding the plain provisions of the Ordinance may operate inequitably, the Constitutional provision would in such case in effect eliminate each or every factor in the equation stated in the Ordinance. This would substitute the Constitutional provision for, rather than read it with, the Ordinance. They are to stand and to be read together, the Constitutional provision being invoked only when it is needed for the purpose of interpreting and making certain what is uncertain and ambiguous.

Bearing upon the equitable construction, it is to be observed that both the Ordinance and the Constitutional provision proceed upon the assumption that by the act of separation, West Virginia became liable for a portion of the "public debt of Virginia," which if liquidated before the separation, would have been borne by the citizens of the whole State upon some equal basis. So far as the liability of the State can be predicated upon the citizens constituting the State as distinguished from the State itself, it can be predicated upon either population, territory or property or upon a combination of two or more or all of them. In either case the same proportional liability would rest upon population, territory or property wherever it might be situated. The unit of liability ascertained, each unit would be liable for its *pro rata* share of the whole debt wherever the unit might be. It would be so liable no matter how the debt might have been incurred or in what section its proceeds might have been expended, or what particular benefit or advantage any particular unit or set of units might have received therefrom. The relation of the

units to each other would be joint and indivisible, the debt, a common debt and its proceeds expended from a common fund. Each unit was bound by the action of the lawful majority in incurring the debt and expending the proceeds. Any construction that tends to relieve any of these units from their *pro rata* share of such common liability for the whole public debt would to that extent be inequitable as it must necessarily result in increasing the liability of the remaining units.

The amount claimed under this paragraph by Virginia is $5,639,302.66

(Rec., p. 371, c. 1, p. 1.)

The amount conceded by West Virginia is $1,251,288.92

(Rec., p. 371, c. 1, p. 1.)

The items in controversy are as follows:

Item 2 (Rec., p. 373, c. 1, p. 2)—Covington & Ohio Railroad, $1,146,460.42.

By an Act passed February 15, 1853, the Board of Public Works were made "a body politic under the name of the Covington and Ohio Railroad Company" (App., p. 33). This Company had no capital stock or stockholders or officers except as the Board of Public Works acted as its officers.

By Section 3 it was provided that

> "The Board of Public Works shall commence and continue the construction of said road," etc.

By Section 4, the same Board was

> "authorized to borrow on the credit of the Commonwealth * * * the money necessary to construct and equip said road."

March 13, 1856, the same Board were

> "authorized and directed to borrow from time to time * * * the sum of Five hundred thousand dollars, to be appropriated to the construction of the Covington and Ohio Railroad" (App., p. 34)

A specific provision was made for the manner in which the money was to be expended. March 20, 1858, they were again authorized to borrow for the same purpose under the same restrictions, Eight hundred thousand dollars. (App., p. 34), and on February 29, 1860, the sum of Two and one-half millions. Under these various Acts, it is conceded that prior to January 1, 1861, the sum above mentioned had been expended within the limits of West Virginia.

I find that the sum thus expended was an expenditure by the Commonwealth of Virginia within the territory now constituting the State of West Virginia prior to January 1, 1861.

Alternative Finding.

At the request of the defendant I find in the alternative that it appears that on February 26, 1866, the Commonwealth of Virginia passed an Act incorporating the "Covington and Ohio Railroad Company" (App., p. 35) and on March 1, 1866, West Virginia (App., p. 37) passed an Act incorporating the same Company. By these Acts

upon the performance of the conditions therein specified, the Company was to

> "have all the rights, interests and privileges of whatsoever kind in and to the Covington and Ohio Railroad and appurtenances thereto belonging, now the property"

of either state (Sec. 2, of each Act).

On February 26, 1867 (App., p. 40) additional legislation to enable the completion of the road and authorizing its consolidation with four other railroads was passed by West Virginia. An Act for the same purpose and with substantially the same provisions, with some immaterial variations, was passed by Virginia March 1, 1867 (App., p. 43). The name of the road was changed by both Acts to the Chesapeake & Ohio Railroad Company. By section 14, of the latter Act, the Railroad was given the

> "right * * * to purchase the stock held by the State in said company * * * to pay any debt which it may owe the State * * * by surrendering * * * bonds for an amount equal to the debt proposed to be paid, and may also purchase the right of the State in and to the Blue Ridge Railroad by the surrender of State bonds to an amount equal to the value of said road, etc." (App., p. 45).

Nothing appears in the Record to show whether any such purchase of stock of the State by the Road was made, nor does anything appear to show whether any debt of the Road to the State was paid. It does appear and I find as a fact that the State of Virginia received in 1870 for the

Blue Ridge Railroad from said Chesapeake and Ohio R. R. Co., $625,348.08 (Rec., p. 487).

I find as a fact that the State of Virginia was relieved by the Chesapeake & Ohio Railroad Company of a guarantee of the bonds of the Virginia Central Railroad, amounting to One hundred thousand dollars (Rec., p. 487).

Item 3.—Winchester & Potomac Railroad, $170,532.00.

This item results from an item of $270,000 which consists of $120,000 paid for stock subscribed, and paid for by the State, and $150,000 loaned by the State to the Railroad Company (Rec., p. 489).

It raises the question as to whether the subscribing and paying for stock in an internal improvement company, whose improvements were located within the limits of West Virginia was "an expenditure made by the Commonwealth of Virginia within the territory now constituting the state of West Virginia," etc.

It is contended upon the part of the plaintiff that the various improvement companies were merely the method or machinery adopted by the State for the purpose of creating internal improvements, and that as declared by its Board of Public Works,

> "It was not the original purpose of the legislature in creating the fund for internal improvement that the aid to be extended to joint stock companies should be afforded upon the principle of mere money making" (Rep. Bd. of Public Works, Vol. 6, p. 10).

and

> "It must be remembered that these improvements were not fostered by the legislature through contributions in subscriptions and loans merely as investments of so much money in profitable stocks but that they were actuated by a higher consideration, that of promoting the prosperity of the State at large by contracting to build up the local prosperity of its different sections" (Same Vol. 12, p. 8).

and that this being the dominating and controlling purpose these were, within a proper construction of the decree, "expenditures made by the Commonwealth of Virginia," &c., &c.

I have no doubt that the purpose thus declared by the Board of Public Works was the controlling purpose that led the State to engage in these public improvements through the method adopted of organizing joint stock companies and the State becoming a stockholder therein. It is at the same time clear that the element of investment and an expected return therefrom and a belief in the value of the investment was an important element from the beginning. In giving the reasons for adopting this method, the same Board said:

> "Private wealth will of itself take the direction which personal interest prompts."
> * * *
>
> "But it can never be to its [the State] interest, for many reasons, to become the sole proprietor of all the public works within its territory.
>
> Experience testifies that they will be more economically improved and better repaired if the management be left to the individuals who subscribe to their stock, with a view to

private gain, than if confined to public officers or agents. The Commonwealth should subscribe to so much of their stock and upon such terms as will suffice to elicit individual wealth for public improvement" * * * (Rep. Bd. Pub. Works Vol. I, p. 48).

For the purpose of inducing subscriptions they suggest,

> "By yielding to the individual subscribers the profit of the State on its shares of the stock of any company where required to secure such individuals against temporary loss, a much smaller subscription of the public money will suffice to draw forth private enterprise."

On page 81, they say, after having discussed the failure of the stock of some of the companies to yield an immediate income, that the foundation had been laid that would

> "assure to the Commonwealth a speedy return for such sums as the General Assembly may authorize the Board of Public Works to subscribe out of the funds for internal improvement."

and referred to the method adopted to

> "arouse the enterprise and patriotism of their fellow citizens in general to embark their private fortunes in the career of internal improvement."

A report of this Board for 1818 shows that returns were expected from the James River project of Thirty-five thousand dollars per year, and the report for 1819 shows that the stock of the Dismal

Swamp Company and Roanoke Navigation Company were above par, and the Swift Run Gap Turnpike Company had paid from five to ten per cent dividends for several years. In the report for 1831, referring to the completion of the James River Improvement they say that

> "A revenue not only sufficient to pay the interest upon the amount of the expenditure but that a surplus greatly beyond it will be realized."

It was the expectation of these profits that justified the Act of 1820 (App., p. 50) under which the State practically took over the property of the James River Company and guaranteed its stockholders 12 per cent. dividend for twelve years and 15 per cent. "forever thereafter."

Substantially all of the Acts, both general and special in their character, authorizing the Board of Public Works to subscribe for stock of the various improvement companies, contemplated the receipt of dividends on the stock of the State and made specific provision for its disposal and use, recognizing the value of the stock.

Under the Act of 1817, Sec. 32 (App., p. 16) a general provision was made giving the state the prior right to purchase the stock of other stockholders and prohibiting its offer to others until it was offered to the State. In order to induce the investment of private capital in the stock of the companies it suspended its right to dividends upon its own stock until the stock of other subscribers had "netted to them six per cent. per annum" (App., p. 6). Under a Statute passed in 1816 private subscription to 3/5 of the stock was required before the subscriptions were made on

behalf of the Commonwealth (App., p. 5). The privilege as to suspending dividends for the benefit of the other stockholders was repealed in 1828 (App., p. 10). While the proportion of stock taken by the Commonwealth was at first 2/5 of the capital, this proportion was changed in 1848, so that in most, if not all of the instances thereafter, the State was authorized to subscribe 3/5 of the capital. (See Acts of 1848, Chap. 196, sec. 3, p. 220.)

The Act of April 9, 1838 (Acts of Va., 1838, Chap. 12, Sec. 3, p. 24), provided for the payment of the interest and final redemption of the principal sum borrowed for the payment of stock subscriptions. It also provided that

> "the stock of any joint stock company subscribed for or purchased with the money so borrowed, together with the dividends and other net income which may accrue therefrom to the Commonwealth or to the fund for internal improvement, shall be and the same are hereby appropriated and pledged," &c.,

for the payment of such loans, thus holding out the stock of the Commonwealth with its expected dividends as a security of value as an inducement to investors.

The Constitution of Virginia of 1851 recognized these stocks as the property of the Commonwealth by the following provisions:

> "The General Assembly may at any time direct the sale of the stocks held by the Commonwealth in internal improvement and other companies, but the proceeds of such sale, if made before the payment of the public

debt, shall constitute a part of the Sinking Fund and be applied in like manner."

Art. IV, Sec. 30, Code of Va., 1860, page 47.)

The Board of Public Works was authorized

"when in their opinion the public interest will be promoted thereby, to transfer and convey the State's interest in any turnpike or plank road or any part thereof in the County or Counties in which said road may lie."

(Code Va., 1860, Ch. 61, Sec. 52, p. 365) (App., p. 20);

thus clearly treating the stock as the property of the State. That its interest as a stockholder was the interest referred to appears from the next section, which provides for a transfer of the

"interests of the stockholders other than the State."

Section 54 prohibits the transfer of any road that can in their opinion

"be made productive or self-sustaining,"

and the Act shall not take effect

"until the stockholders other than the State shall have transferred their interest to said County,"

evidently contemplating that the State was the owner of certain stocks at least that were its property and were of value as assets.

By an Act passed by the Pierpont or Restored Government, Feb. 3rd, 1863, a formal transfer of

> "all stocks of any other company or corporation the principal office or place of business whereof is located within the said boundaries standing in the name of this State or of the said President or Directors or of the said Board of Public Works or of any person or persons for the use of this State"

purports to have been made to West Virginia (App. 128).

The plaintiff in paragraph 8 of its bill of complaint (Rec., p. 8) referred to and recited this portion of the Act of 1863 and alleged:

> "that the property which was by the operation of this Act appropriated and transferred to the State of West Virginia aggregates"

several millions of dollars, and

> "that of the bank stocks alone which were transferred under the operation of this Act,"

defendant received

> "from the sale thereof about Six hundred thousand dollars."

The record does not disclose the existence of any stocks other than those in controversy, upon which the Constitutional provision or the Act of 1863 or the allegations of the plaintiff's bill can apparently be predicated.

That the State early appreciated that its legal relation to these various companies was that of a stockholder only, seems clear.

The Act authorizing the subscription to the stock of the Shepherdstown and Smithfield Turnpike Company by the Board of Public Works, passed February 20, 1826 (Acts of Va. 1825-26, p. 66), contains this proviso:

> "Provided that the money hereby authorized to be advanced to said company by taking part of the stock thereof shall be applied exclusively to the completion of said road should any part of it be unfinished when the aforesaid sums of money shall respectively become payable."

A similar act relating to the Petersburg Railroad Company, passed March 22, 1831 (Acts of Va. 1830-31, p. 205), contains a similar proviso:

> "Provided that no part of the stock herein authorized to be subscribed shall be payable until said three-fifths shall have been fully paid and expended by the said company in the construction of the road aforesaid unless at the option of the said Board."

The General Act of February 11, 1832, contains this provision:

> "When the Board of Public Works having made any subscription to the stock of any company shall have good cause to believe * * * that the funds of the company are misapplied or will probably be misapplied, it shall be the duty of the said Board to withhold payment of their subscriptions until proper legal measures can be taken to secure * * * the faithful application of the funds of the company" (App., Sec. 4, p. 18).

The conditions thus imposed by the Commonwealth to enable it to thus indirectly control or dispose of the funds of the corporation is clearly inconsistent with the idea that it had any right to control the assets other than that of an ordinary stockholder, as, if they were within its control, such legislation would have been unnecessary.

The act to amend the Charter of the James River and Kanawha Company, passed March, 1860, clearly recognized the distinction between the rights of the State as a stockholder and a creditor of the Company (App., p. 108).

Code of Virginia, 1860, Chapter 67, Sec. 28, p. 391, authorized the Board of Public Works to purchase

> "any work of any internal improvement in which the State is a stockholder, or otherwise interested,"

at a sale

> "by virtue of mortgage, judgment or other lien, * * * on the part and for the use of the Commonwealth" (p. 391).

That the state fully recognized these stocks as investments of value and that its rights were those of a stockholder only, seems clear.

The case of U. S. *v.* Stanford, 161 U. S., 412, is relied upon as sustaining the contention of the plaintiff. The only question involved in that case was whether a stockholder of the Central Pacific Railroad Company, the California Company, was personally liable as such stockholder for the bonds of the United States "loaned to railroad companies for the purposes indicated in the Act of

1862" (p. 428). The Statutes of California made such stockholders liable for all of the road's "debts and liabilities" (p. 414) the Union Pacific Railroad chartered by Congress and enjoying on the same terms with the Central Pacific Railroad Company the benefit of the bonds, not being so liable. It is true that in the opinion, the Court said:

> "These ends were to be attained through the agency of a corporation created by Congress and of certain corporations organized under State laws which Congress selected as instruments to be employed in accomplishing the public objects specified in its legislation" (p. 427).

I do not understand that by the use of this language the Court intended to be understood as holding that the relation of principal and agent existed between the United States and the corporations in question, or that their property or assets and the right to control the same was in any way changed or affected by reason of their having been selected as such "agency" or "instrument," or that by reason of their having been so selected the United States acquired any control of or interest in the assets of such companies. They were agencies and instrumentalities in the same sense that all public service corporations are instrumentalities and agencies of the State, and only in that sense did Congress extend its aid to these particular corporations to accomplish the objects desired. The opinion in effect so states:

> "The Supreme end sought to be attained was by means of private capital and Governmental aid to secure the construction of the

> whole line, for the benefit primarily of the United States and for the use of all the people" (p. 430).

The companies "private capital" was building the road and the Government was simply rendering aid to an "agency" selected by it for that purpose and in that sense only was the road in question the agent of, or instrumentality of, the Government. That the assets of these companies were their own and not the property of the United States was expressly held in the *Sinking Fund cases,* 99 U. S., 700, where the Court said:

> "It is a matter of no consequence that the Secretary of the Treasury is made the Sinking Fund agent and the Treasury of the United States the depository or that the investment is to be made in the public funds of the United States. This does not make the deposit a payment of the debt due the United States (p. 725),"

because as the Court said:

> "While the money is retained it is only that it may be put into the fund which, although kept in the Treasury, is owned by the Company" (p. 726).

and

> "Under the circumstances the retaining of the money in the Treasury as a part of the Sinking Fund is in law a payment to the company' (p. 726).

There is no intimation in the opinion that there was any financial relation existing between the United States and the companies other than that

of creditor and debtor or that the money that the companies expended in constructing the road was in any sense, either directly or indirectly, money of the United States or an expenditure by the United States.

I find nothing in the case that justifies the inference that these corporations were agents to apply money put into their hands by the Government to construct the road and were therefore expending the money of the Government therefor.

In *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall., 566, the Court stated the conditions under which joint stock associations will be held to be a corporation within the scope of a Statute which "permits it to exercise its corporate function in that State on the condition of payment of a specific tax," and for the purpose of suits and in some other particulars, such associations have been recognized by the Courts as corporations.

See also

Fargo v. *L. N. & Chic. R. R.,* 6 F. R., 787.
Edgeworth v. *Wood,* 58 N. J. L., 463.

The following well considered authorities seem to establish clearly the distinction between the State as a stockholder and the corporation as a legal entity.

In *Bank of U. S.* v. *Planters Bank of Ga.,* 9 Wheat., 904 the State of Georgia was a stockholder in the Planters Bank. The point was raised that the State was a "party defendant." In overrul-

ing this contention Mr. Chief Justice Marshall said:

> "A suit against the Planters Bank of Georgia is no more a suit against the State of Georgia than against any other individual corporator (p. 906). * * *
>
> The state does not by becoming a corporator identify itself with the corporation. The Planters Bank of Georgia is not the State of Georgia, although the State holds an interest in it.
>
> It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself so far as concerns the transactions of that company of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates, and to the business which is to be transacted (p. 907). * * * As a member of a corporation a Government never exercises its sovereignty. It acts merely as a corporator and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act * * * and exercises no power or privilege which is not derived from the Charter" (p. 908).

This case has been frequently approved on this point. (See Rose's Notes.)

In *Bank of Kentucky* v. *Weister,* 2 Peters, 318, where the State owned the whole of the stock of the Bank, a case much stronger than the case presented at bar, the Court said:

> "it was insisted that the suit was virtually against a sovereign state," (p. 322).

In affirming 9 Wheat., 904, and holding against the contention, the Court said:

> "But this Court is of the opinion that the question is no longer open here" (p. 322).

In *Briscoe* v. *Bank of Kentucky*, 11 Pet., 257, the question was whether the notes of the Bank were bills of credit issued by the State. The State was the sole owner of the stock of the Bank and all private interest was expressly excluded. Its officers were chosen by the Legislature. It was contended that the Bank was the "mere agent of the State." In holding the contrary, the Court said, answering the following question in the negative:

> "The State of Kentucky is the exclusive stockholder in the Bank of the Commonwealth, but does this fact change the character of the corporation? Does it make the Bank identical with the State? And are the operations of the Bank the operations of the State? Is the Bank the mere instrument of the sovereignty to effectuate its designs and is the State responsible for its acts?" (p. 323)

and again:

> "If the Bank of the Commonwealth is not the State nor the agent of the State, if it possesses no more power than is given to it in the act of incorporation and precisely the same as if the stock were owned by private individuals, how can it be contended that the notes of the Bank can be called bills of credit in contradistinction from the notes of other banks?" (p. 326).

See Rose's Notes for approving citations and also *Curren* v. *Arkansas*, 15 How., 304.

This question seems to have been clearly settled by the Courts of Virginia.

The case of *James River & Kanawha Co.* v. *Early*, 13 Gratt., 541, was an action to recover for the negligence of the corporation. In discussing the question of the liability of the Company, the Court said:

> "It is not a *public corporation* representing the *public* and *administering public funds* for the benefit of *the public*, but it is a joint stock company which has undertaken the construction of a work, useful to the public certainly, but *intended for the private emolument* of the stockholders in dividends of the profits" (p. 552).
>
> "That the State owned a large interest in the stock of the company will not vary the case * * * a mere interest taken by the Commonwealth in the stock would not be sufficient to bring an action against the company for neglect of its corporate duty within the influence of the decision in the case of *Sayre* v. *The Northwestern Turnpike Road*, 10 Leigh, 454 * * *" (p. 553).

This case is clearly in line with the decisions of the United States Supreme Court upon the relation of the State to a corporation. These corporations were not "*administering public funds* for the benefit of the public."

It seems to me clear that the relation of principal and agent did not exist between the State and these corporations in which it was a stockholder. While in a popular general sense they may be termed the machinery, instrumentality or agency through which the State operated in making the particular disbursement, they were such agency, machinery and instrumentality in the

same sense that they were the agency, machinery or instrumentality of the other stockholders, or perhaps, in the added sense in which every public service corporation is the agency, machinery or instrumentality of the State. The State held two-fifths or three-fifths of the stock, but had no more control over the funds of the company, or any more title to the assets of the company, than any other stockholder holding a like amount of the stock. Like other stockholders it was an investor with the same rights and privileges. It may be said that as a matter of public policy, in a general way, the State was in this manner, indirectly, at least, making an expenditure, and no investment can be made without an expenditure. This case must be determined, however, by well-recognized legal rules. The language of the decree is plain and unambiguous. To hold these subscriptions thus made for investment to be expenditures by the State "within the territory" it would be necessary to read into the decree the words "either directly or indirectly" which I do not feel at liberty to do.

I find therefore that the sums in question in case of the joint stock companies in which the State was a stockholder were expenditures made by the respective companies from their own funds and not by the State. I therefore disallow the sum of $120,000, subscribed and paid for stock in the Winchester & Potomac Railroad Company by virtue of the Acts of 1832 and 1833 (App., pp. 28 and 29).

By an Act passed February 13, 1838 (App., p. 29), the Board of Public Works were

> "directed to loan on behalf of the Commonwealth * * * to the Winchester & Poto-

> mac Railroad Company * * * upon the condition that the salaries of the officers and servants of the said company shall not be directly or indirectly increased during the existence of this debt,"

and upon

> "a mortgage upon the whole property, real and personal, and upon the net income of all their tolls and receipts"

the sum of $150,000. Specific provision as to security was made. Acceptance of the loan gave the Legislature "a right to tax the stock, property and profits" of said Company, and the Company was required to pay off all prior liens so as to make the mortgage of the State a first lien (App., p. 30).

This is clearly a loan with specific and careful provision made to secure its repayment, and was so intended by each party thereto. I therefore disallow the item.

Alternative Finding.

At the request of the plaintiff under this item, I make the alternative finding:

First.—That $120,000 was subscribed and paid by the Commonwealth for stock in the Winchester and Potomac Railroad under the Act of 1832, and

Second.—That the sum of One hundred and fifty thousand dollars, with specific provision to secure its repayment with interest thereon was loaned by the Commonwealth to said Railroad

under the Act of 1838, and that the portion of the road in West Virginia was 63.16%.

As a special circumstance that I consider of importance, I also find that an Act was passed February 24, 1846 (App., p. 30), providing for an annuity of $5,000 in lieu of interest upon the debt due by said Company to the Commonwealth, and all dividends upon the stock of the Commonwealth in said company. So long as the annuity was paid, "the payment of the principal of said debt shall be so long postponed" (App., Sec. 2, p. 31). If default were made in payment "the whole of said debt and interest due" are to be collected (Sec. 3) and the lien for the whole debt and interest was fully retained (Sec. 4).

February 22, 1866, the Company was authorized "to pay into the Treasury of the Commonwealth" $83,333.33 (Sec. 1, App., p. 31). Payment could be made in State bonds at their par value, and when made the "claim of the State against said Company shall be lifted and discharged." Under this Act there was paid into the Treasury of the State in bonds and interest in 1866, $118,518.12 (Rec., p. 462).

Item 6.—Berryville & Charlestown Turnpike Company, $11,932.52.

This sum was paid upon a stock subscription and is therefore disallowed.

Alternative Finding.

I find in the alternative at the request of the plaintiff that the Commonwealth subscribed and paid for stock in said road under Acts of 1849

and 1850 $20,455.74, and that 58 1/3% of the road was in West Virginia.

Items 10, 11, 12, 13 and 14 all relate to the Kanawha Turnpike and the Kanawha River Improvements.

An Act was passed February 17, 1820, relating to the James River Company (App., p. 50). In its preamble it declared that that company was willing to consent to such modification of its charter as would enable the company

> "as an *agent* acting and holding *in trust* for the benefit of this Commonwealth to undertake and carry the said improvements into effect in such manner as the General Assembly shall from time to time direct and require, and under the direction and superintendence of such agent or agents as may from time to time be appointed for that purpose by appropriating to these objects such sums of money as they may borrow," &c.,

upon the condition that the company would consent to applying its surplus tolls and income

> "to the payment of the interest on the money which they may so borrow,"

except so much as might be necessary to pay a dividend on the present stock of the company of twelve per cent. for twelve years and fifteen per cent. forever thereafter. It was stipulated

> "that the General Assembly shall provide for making good any deficiency in the payment of the interest on any money so borrowed which may remain to be provided for after

> applying the surplus tolls and other income of the said company with the exceptions aforesaid to the payment of interest as aforesaid'' App., p. 51).

It was provided that upon its acceptance by the Company, the Act should be

> ''considered a compact between this Commonwealth and the said company''

and while subject to change and modification, no such change and modification, should be made

> ''as will take from the James River Company their right to the dividends or any part of the dividends upon their stock allowed to them by this Act'' (App., p. 51).

The improvements contemplated were to be ''prescribed by the Legislature'' and should from time to time be made under the superintendence of the Commissioner or Commissioners, agent or agents as the General Assembly should from time to time appoint. It was provided that the works of the Company

> ''shall forever thereafter be esteemed and taken as public highways for the transportation of all goods, commodities and produce whatsoever * * * and the road, canals, locks, dams and other works when perfected with all tolls, and other profits and emoluments arising therefrom shall be and the same are hereby vested in the said company as *agents in trust* for this Commonwealth'' (App., p. 53);

and in Section 10 the company was referred to as, after giving their assent,

"holding as an *agent in trust* for the benefit of the Commonwealth."

Repairs were to be

"contracted for and made by the Company from time to time under the control, direction and superintendence of the Commissioners on the part of the Commonwealth" (App. p. 56).

Commissioners were provided for, and no contracts were to be made by the Company for the improvement of the Kanawha River and Road until the same should be submitted to and approved in writing by the Commissioners, named to superintend the works on such River and Road (do. p. 56). All contracts for making any improvements on the James and Jackson River were to be

"submitted to and approved in writing by the Commissioners" (do. p. 56).

The Treasurer of the State was made *ex officio* the Treasurer of the Company. Money was to be borrowed "as the General Assembly shall hereafter direct" (do. p. 57). Certificates issued for money borrowed were

"to be redeemed only at the pleasure of the General Assembly."

The surplus of such tolls and other incomes after the

"payment of the expenses, dividends and interest as aforesaid shall from time to time be paid into the Treasury of this Commonwealth to the credit of the fund for Internal

> Improvement, to be disposed of as may from time to time be directed by law" (do. p. 58).

By an Act passed February 24, 1823 (App., p. 64), a much more pronounced change in the character of the legal relation was made. All of the powers and duties of the existing President and Directors were "superseded and annulled." Certain officials of the State were made *ex officio* the President and Directors of the Company and they succeeded to and possessed

> "all the rights, powers, duties and privileges of the existing President and Directors" (do., p. 64),

except so far as may be otherwise directed by the provisions of the act. All of the moneys were to be

> "kept in the public treasury separate from other public moneys" (do., p. 65).

The funds raised and used were to be paid into and disbursed from the Public Treasury (do., pp. 65, 66 and 67). Commissioners were created with powers to carry into effect the provisions of the Act (do., pp. 67 and 68). They were to appoint such "engineers, managers or agents" as they might think necessary and remove them at their pleasure. Provision was made for carrying out the contracts made by the Company "as if the powers of the said company had continued" (do., p. 69). Its superintendents and officers were to continue until

> "superseded by appointments under this Act or their offices annulled by the provisions thereof" (do., p. 69).

These and numerous provisions show that the State by virtue of these two acts had in effect acquired title to all the property of the company. The Acts were so construed in the case of *Higginbotham Exr.* v. *The Commonwealth,* 25 Grattan, 627, where the Court said, in describing the relation of the State to the Company:

> "Here then we have a solemn 'compact' between the State and the Company. * * * Such was the solemn obligation assumed by the State as the price of the stockholders' property" (p. 628),

and referring to the Act of March 16, 1832:

> "On that day, however, a new company with greatly extended powers was chartered called the James River and Kanawha Company, to which all the interest of the State in the old James River Company was transferred" (p. 628).

The record does not disclose when, and what for, or how, these items were paid. In order to supply the deficiency of proof in this regard, I have had recourse to the notes of the accountants and report as a part of the case so much of their notes, agreed to by them, as relates to these items as "Supplemental Exhibit I."

I find by these notes that of Item 10, $152,130.54, the sum of $149,491.90 was expended by the State "within the Territory" after March 19, 1823, and before March 16, 1832, on the Kanawha Turnpike Road. There is nothing in the record to show when the actual transfer by the State was made under the provisions of the Act of March 16, 1832. I find that the sum of $2,638.64

was expended by the Commonwealth after March 16, 1832, but was an actual expenditure, not an investment or a loan, and I therefore allow the whole sum of $152,130.54 as an expenditure.

I find that Item 11, $2,593.92 was expended by the Commonwealth "within the territory" upon the Kanawha after December 31, 1834, and that it was an actual expenditure by the State and not an investment or a loan, and I therefore allow it as an expenditure.

I find that Item 12, $7,189.65 was also expended by the Commonwealth "within the territory" upon the Kanawha Turnpike after December 31, 1834, and was an expenditure and not an investment or a loan and I therefore allow the item.

I find that under Item 13, the Commonwealth expended after March 13, 1823, and prior to March 16, 1832, "within the territory" upon the Kanawha Turnpike, $3,202.53 and that the State expended "within the Territory" upon the same turnpike, the sum of $77,752.75, after March 16, 1832 ($49,935 of which was on account of contracts made and services rendered prior to March 16, 1832); that the whole sum was an expenditure by the State and not an investment or a loan and I therefore allow the whole sum.

As to item 14, I find that the amount of $59,572.36 was all expended by the Commonwealth within the territory after March 19, 1823, and prior to March 19, 1832, and I therefore allow the same.

Alternative Finding.

As an alternative finding at the request of the defendant I find that the State was to transfer

> "her whole interest in the works and property of the present James River Company to the James River and Kanawha Company in payment for its subscription for 10,000 shares of stock" (App. p. 87).

There is nothing in the record to show whether this transfer was actually made. It does not appear whether there was a general meeting of the stockholders upon which the transfer was to be made.

Item 15—Kanawha Board bonds, $60,000.

I find that this was a loan of $60,000 in bonds to the James River and Kanawha Company under the provisions of the Act of March 23, 1860, sec. 9 (App. p. 110) which authorized a loan for $300,000 to the James River and Kanawha Company upon a "deed of trust or mortgage upon the works, property and net revenue to the Commonwealth for the payment of the principal and interest of said $300,000." It was also provided that such lien

> "shall take precedence over any lien created by said company to secure their bonds authorized to be issued by this Act."

Under this Act, $60,000 was loaned (Rec., p. 490).

There is nothing in the record to show whether it has or not been repaid, although counsel for West Virginia stated at the argument that he did not think it had been repaid.

This was a clear loan with careful provisions made to secure and a reasonable expectation of

its repayment, and I therefore disallow it as an expenditure.

ALTERNATIVE FINDING.

I find, as an alternative finding at the request of the plaintiff that the sum of $60,000 was loaned to the James River and Kanawha Company by virtue of the provisions of the Act of March 23, 1860, sec. 9 (App., p. 110), and that the loan has not been paid.

Item 17, $7,882.92 was withdrawn by the plaintiff upon the ground that the portion of the road charged for was wholly in the State of Maryland.

Item 25—,Brandonville, Kingwood and Evansville Road—$10,595.73.

Item 28, Clarksburg & Buchanan Turnpike, $19,259.36.

Item 35. Kingwood and West Union Turnpike, $18,140.61,

are all for macadamizing (Rec., p. 451).

In the case of the Brandonville, Kingwood and Evansville Road, the State although a small stockholder therein, paid out the sum independent of its interest as a stockholder (Rec., p. 480).

By an Act passed March 18, 1853, the Board of Public Works were directed

> "to have such parts of the Clarksburg and Buchannon Turnpike Road macadamized or planked as they may think stand in need of such improvement" (App., p. 140).

By an Act passed February 28, 1853, $28,000 was appropriated for the purpose of macadamizing the Kingwood and West Union Turnpike and the Board of Public Works was authorized

> "to pay the said appropriation as is provided by law" (App. p. 143).

These were not investments or loans. They were sums directly expended by the State upon the public improvements owned by these companies to be sure, and while the expenditure no doubt increased the value of the properties the expenditure was in my judgment made by the State, for the sole purpose of promoting the public convenience, and were not intended, so far as anything disclosed in the record shows, as gratuities to the companies involved. I therefore think they come fairly within the scope of an expenditure and allow them as such.

Item 53—Harpers Ferry Raid—$189,718.59—

I think that "an expenditure within the territory" in question means expenditures that are local in their character; that are localized by the subjects upon, or for, which they are expended, and the benefits which inure from such expenditures are benefits that the territory in question received the benefit of, it remaining therein, as distinguished from the rest of the State outside of that territory, the result of which in case of physical property remained within the territory after the expenditure had been made, not expenditures the benefit of which were common to all of the people of the State irrespective of the locali-

ties in which they resided. These expenses do not appear to me to come within the scope of such an expenditure. The only benefit the "territory" derived therefrom was the same benefit that it derived in common with the rest of the State. It was not an expenditure made for the benefit of that particular "territory." The money was appropriated and paid "for the Defense of the Commonwealth" (App., p. 149) not for any particular part of the Commonwealth. I therefore disallow this item as a direct expenditure.

ALTERNATIVE FINDING.

At the request of the plaintiff I find that the Commonwealth paid on account of the Harpers Ferry Raid that occurred "within the territory" of West Virginia, the sum of $189,718.50.

Item 54—School Commissioners—$830,865.37.

This amount is claimed by the plaintiff as an expenditure "within the territory" out of a total of expenditure for like purpose in the whole Commonwealth of $3,056,239.84 (Rec., p. 538-H).

The Constitution of Virginia directed that

> "One equal moiety of the capitation tax upon white persons shall be applied to the purposes of education in primary and free schools" (Con. Va. Art. VI. Sec. 24—Code Va. 1860, p. 46).

February 21, 1818, an annual appropriation of $45,000 for the education of poor children was made.

This was increased to $70,000; and in 1851 to $75,000 and to $80,000 in 1853-4 (Code Va. 1860,

p. 417, note). The sum expended by Virginia for primary schools was a regular, current, annual and permanent charge upon the State by virtue of Constitutional and Statutory provisions. Being thus a permanent requirement of its fundamental law it was an expenditure that the State was bound to make annually and was a part of "ordinary expenses of the Government." It was an expenditure general in its character, not confined to or appropriated to any particular district and as much a general charge as the expense of the Judicial or Executive branches or the Board of Public Works which are treated by both parties as ordinary expenses; I therefore disallow the item as an expenditure.

ALTERNATIVE FINDING.

At the request of the plaintiff I find that the sum paid the School Commissioners "within the territory of West Virginia" was $830,865.37.

Item 55, Surveys—$106,416.14.

This Item comes from an aggregate of $250,206.56. An analysis of this sum shows by a statement agreed to by the accountants, which is reported as a part of the case and marked "Supplemental Ex. 2," that the sum of $106,983.67 was for expenditures that were general in their character (such as a salary paid by the State to the Chief Engineer $30,809.73, &c.), and the proportion charged to West Virginia of that sum was reached by a percentage based upon the sum that was actually charged upon the books in the different sections, so that the general charge would

be in proportion thereto. This left $143,222.89 that was actually charged upon the books of the State and could be traced into each section; the sum that was thus charged and was thus traceable that was expended in the territory of West Virginia was $60,873.19. While it is a narrow and close question, I think the general charge should be deducted from this item and charged under ordinary expenses as they were regular, ordinary and current expenses of a branch of the State Government and general in their character, not allocated to, or apportioned to, any particular territory. It is suggested that many of these surveys were not productive of result, no roads being built. It might also be said that the roads, if built, proving worthless, might have been abandoned. None the less the money would have been expended. No road could be built without the preliminary survey, and if the initial expense, disclosed the unwisdom of proceeding further, it seems to me it was no less an expense properly incurred whether the survey was or not followed by construction and does not affect the fact that the money was expended in that locality for a legitimate purpose. A direct expenditure for the work is treated by both parties as an "expenditure" and for the same reason the survey preliminary to and, if constructed, a necessary part of, the work is also an expenditure. The sum which this branch of the Government actually expended "within the limits of the territory of West Virginia," $60,873.19 I allow as an "expenditure."

Item 56, Trans-Allegheny Lunatic Asylum, $27,000.

It was conceded that on January 1, 1861, this sum was in the hands of the Treasurer of the Asylum unexpended. The record, p. 452, should read "and had not been expended." It was to be used in completing its building. (Rec., p. 471) It was on deposit with the Weston Branch of the Exchange Bank of Virginia and was taken therefrom by the so-called Pierpoint or Restored Government. (Wheeling Acts, Extra Session, July 1, 1861) (App., p. 135) On that date $5,316.98 was "placed at the disposal of the Board of Directors January 14, 1862, the sum of $21,684 (making with of the Lunatic Asylum," and by an Act passed the previous sum $.98 more than the $27,000) was appropriated to the Lunatic Asylum to be expended in

> "completing the South wing of said building being the balance of the amount taken from the branch of the Exchange Bank of Virginia at Weston" (App., p. 136).

Under the authority of Eastern State Hospital *v.* Graves (*supra*), this money thus in the hands of the Treasurer of the Asylum, prior to its being taken by the Restored Government, was the property of the Commonwealth, and while it was intended to be used in the completion of the buildings, it had not been so used, and had not therefore been expended on January 1, 1861. I therefor disallow this item.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that $27,000 was in the hands of the Treasurer of the Asylum the property of the

Commonwealth on or before January 1st, 1861, for the purpose of being expended in the completion of its buildings and that it was afterwards taken therefrom by the Restored State of Virginia, and returned to the Asylum—$5,316.98 July 1, 1866, and $21,684 January 14, 1862.

Items 57 to 65 inclusive.

These are all for sums paid by the Commonwealth on account of stock subscriptions in Bridge Companies, aggregating $78,412.50, and are disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that $78,412.50 was actually paid by the Commonwealth on account of its subscriptions to the stock of the various Bridge Companies mentioned in said items, and that all of the bridges were located "within the territory now constituting the State of West Virginia."

Items 66 to 69 inclusive.

These are all for sums paid by the Commonwealth on account of stock subscriptions in navigation companies aggregating $210,500, and are disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that $210,500 was actually paid by the Commonwealth on account of its subscriptions to

the stock of the various navigation companies mentioned therein and that the property of all of the companies was located within the territory now constituting the State of West Virginia.

Items 70 to 147 inclusive.

These are all for sums paid by the Commonwealth on account of its stock subscriptions to the various turnpike companies mentioned therein, aggregating $803,555.83, and are disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that $803,555.83 was actually paid by the Commonwealth on account of its subscription to the stock of the various turnpike companies mentioned therein.

The property of all of these companies except those mentioned in items 70 to 80 inclusive is "within the territory now constituting West Virginia" and aggregates $700,103.49. A portion of the property of the companies mentioned in items 70 to 80 inclusive is in part within those limits. Apportioning the total amount paid to the amount within those limits would give the sum of $103,452.34.

Items 148 and 149, $391,800.

These are for sums paid by the Commonwealth on account of its stock subscriptions to the banks mentioned therein, and are disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that $391,800 was actually paid by the Commonwealth on account of its subscription to the stock of the banks therein mentioned, and that they were located "within the limits of the territory now constituting West Virginia."

Item 150—Loan to the Town of Bath, $2,500.

March 8, 1847, an Act was passed,

> "to provide for the construction of a road from Bath in Morgan County to the mouth of the St. John's run on the Potomac."

The Board of Public Works was authorized

> "to pay from time to time out of the fund for Internal improvement a sum or sums of money not exceeding $2,500 to the Treasurer of the Trustees of the Town of Bath * * * for the purpose of constructing a road from the town of Bath to the mouth of St. John's run on the Potomac."

The Treasurer was to

> "pay or deliver such sums as may be required from time to time"

and he was to be liable for any defaults therein "as for other defaults upon his official bond," anticipating the question that might be raised that in the relation thus created the money received by him would not be the town's money and he be liable therefor as its Treasurer (App., p. 155, Sec. 1). The Act provided that the Trustees were to

have "the disposition of the money" and to exercise the same powers as the "president and directors of turnpike companies." The Board of Public Works were to prescribe the tolls "such tolls to be applied to the necessary expenses and repairs of the road" (do., Sec. 2). The surplus af ter the payment of the

> "necessary expenses and repairs of the road"

was

> "to be applied in payment of the interest on the sum paid on the part of the Commonwealth for the construction of said road"

and

> "Any deficiency of the net surplus of tolls to pay said interest may be paid from the receipts on account of bathing at the medicinal springs belonging to the Commonwealth in said Town of Bath" (do., sec. 2.)

In Section 3, it was provided that no part of the appropriation should be advanced

> "until the said Trustees shall have given bond with good security payable to the said Board [not to the Town of Bath] and approved by them for the punctual payment of interest annually on the sum advanced by the Commonwealth for the construction of said Road."

Except for the provisions of Section 3, it is not perceived how the Town of Bath or its trustees would have assumed any responsibility or liability of any kind in connection with the sums used for the construction of the road, except their faith

ful disbursement. It had no power to fix the tolls. The trustees were not responsible to the city for the expenditure of the money. It was not the money of the city. There is no intimation in the Act that the Town of Bath or its trustees was to return the amount the State expended or any part of it, or that indicates that the State ever expected it to be returned. In every instance where the State made a loan to which my attention has been called, specific and detailed provisions for security and repayment have been made. The Act must be read as a whole, and so reading it, the only liability assumed by the Town of Bath was to make good any deficit in interest that might exist, after exhausting for each payment, first the surplus of tolls after the payment of the "necessary expenses and repairs of the road" and second, "the receipts on account of bathing at the medicinal springs belonging to the commonwealth in the Town of Bath." That this has not been a very great burden appears from the fact that while nearly 13 years had elapsed the town had paid during that time for that deficit the sum of $750, less than 3% per annum.

It is earnestly insisted that the fact that the auditor of Virginia described this as a loan in his report, that both accountants so described it in their joint schedules and that the act is printed in the appendix under the heading "Loan to the Trustees of the Town of Bath," should be given determining weight in establishing its character as a loan. It is believed that the Act itself and not the manner in which some one has characterized, or described it, must control. It is difficult to conceive of a loan in which the sum loaned is not under some contingency to be returned, an

essential element wanting in this instance. It is also difficult to conceive of the beneficial ownership of a public work the use of which the owner has no right to control. This was not an investment or a loan and comes fairly within the scope of an expenditure "within the territory now constituting the State of West Virginia" and is allowed as such.

SUMMARY.

I find that the expenditures made by the Commonwealth of Virginia within the territory now constituting West Virginia are as follows:

1.	Amount agreed upon by both parties	$1,251,288.92
2.	Covington & Ohio R. R.	$1,146,460.42
10.	Kanawha Turnpike	$ 152,130.54
11.	" "	$ 2,593.92
12.	" "	$ 7,189.65
13.	" "	$ 80,955.28
14.	Kanawha River Improvements.	$ 59,572.36
		$302,902.15
25.	Brandonville, Kingwood & Evansville Road	$ 10,595.73
28.	Clarksburg & Buchanan Turnpike (Macadamizing)	$ 19,259.36
35.	Kingwood & West Union Turnpike	$ 18,140.61
55.	Surveys—expended directly within the territory	$ 60,873.19
150.	Road from Bath to St. Johns River	$ 2,500.00
	Total	$2,811,559.98

ALTERNATIVE FINDINGS:

At the request of defendant.

The Commonwealth received on account of the Blue Ridge Railroad bonds and interest..... $625,348.08

and was relieved from a contingent liability upon a guarantee of .. $100,000.00

3. At the request of the plaintiff, the Commonwealth subscribed and paid for capital stock of the Winchester & Potomac Railroad Company, to the extent of. $120,000.00

The Commonwealth loaned to the said company $150,000.00

Upon the basis of mileage, the proportion of these sums that would be chargeable to West Virginia, is $170,532.00

I state as a special circumstance important to be taken into account that as a result of legislation predicated upon both the stock and loan that the Commonwealth had in this Road, there was paid into the Commonwealth in 1886, the sum of $118,518.12

6. At the request of the plaintiff, that the Commonwealth subscribed and paid for stock in the Berryville and Charlestown Turnpike Co. and upon the mileage basis of 58 1/3 per cent. the amount chargeable to West Virginia would be $11,932.52

15. At the request of the plaintiff, that the Commonwealth loaned to the Kanawha Board of its bonds ..... $60,000.

56. At the request of the plaintiff, that $27,000
was in the hands of the Treasurer of the Trans-Allegheny Lunatic Asylum, deposited in the Weston Branch of the Exchange Bank of Virginia, unexpended, January 1, 1861, which was afterwards taken from the Bank by the Restored Government of Virginia and subsequently returned to the Asylum.

At the request of the plaintiff, that in the various bridge companies, located in West Virginia, Items 57 to 65, inclusive, the Commonwealth subscribed and paid for stock $78,412.50

That in the various navigation companies located in West Virginia Items 66 to 69, inclusive, the Commonwealth subscribed and paid for stock $210,500.00

That in the various Turnpike companies, Items 70 to 147, inclusive, all of which were in the territory now constituting West Virginia, the Commonwealth subscribed and paid for stock.. $803,555.83

700,103.49 of which was wholly in Virginia and $103,452.34 was West Virginia's portion in case of companies partly within her limits.

That in the two banks mentioned in Items 148 and 149, within the territory now constituting the State of West Virginia the State subscribed and paid for stock $391,800.00

At the request of the defendant, I find that the sum of $2,500 was invested under circumstances where the trustees of the Town of Bath assumed a contingent liability, only, of paying the interest upon the sum expended by the State, after the tolls remaining from the operation of the road after the payment of "necessary expenses and repairs" and profits received from the operation of a spring, were applied thereto, and that this was the only liability that the trustees of the Town of Bath assumed in connection with this expenditure of ..... $2,500.

PARAGRAPH IV OF DECREE.

4. "SUCH PROPORTION OF THE ORDINARY EXPENSES OF THE GOVERNMENT OF VIRGINIA SINCE ANY OF SAID DEBT WAS CONTRACTED, AS WAS PROPERLY ASSIGNABLE TO THE COUNTIES WHICH WERE CREATED INTO THE STATE OF WEST VIRGINIA ON THE BASIS OF THE AVERAGE TOTAL POPULATION OF VIRGINIA, WITH AND WITHOUT SLAVES, AS SHOWN BY THE CENSUS OF THE UNITED STATES."

This paragraph involves the determination of the question as to what expenses are to be included within the term "ordinary expenses of the Government of Virginia.

The defendant contends that the language should receive a construction that would make "ordinary" synonymous with "necessary" or "essential" used in the sense of indispensable expenses,—expenses which if not paid the wheels of Government will cease to revolve, without the payment of which the State Government cannot be administered.

Whenever I use the term "essential" in the discussion, I shall use it in the sense of being indispensable. I have made an exhaustive examination of the cases where state or municipal expenditures have been under consideration or in which reference has been made to them. I find there are very few cases that attempt to define the term "ordinary expenses." The term does not appear to have been used with much precision unless it is to be held to be in fact synonymous with "current" or "necessary." There are many cases that use the terms "ordinary" and "current" interchangeably as though they were synonymous and at-

tention does not appear to have been called to the question as to whether or not there is any distinction between them. They are here cited:

State ex rel. v. Mayor Kansas City, 58 Mo. App., 124-129.

Com. v. Commissioners, 1 Wharton (Pa.), 1-3.

Ward v. Piper, 69 Kan. 773-775.

Iowa R. R. Land Co. v. Co. of Sac, 39 Iowa, 124, 134-135.

Grant v. Davenport, 36 Iowa, 396, 401.

French v. Burlington, 42 Iowa, 614, 618.

Council Bluffs v. Stewart, 51 Iowa, 385, 396.

Windsor v. DesMoines, 110 Iowa, 175, 190.

Cedar Rapids v. Betchel, 110 Iowa, 196-198.

Swanson v. Ottumwa, 118 Ia., 161-172-179.

Kent v. U. S., 113 F. R., 232, 238-9.

Dawson v. Water Works Co., 106 Ga., 696, 717.

Walla Walla v. Walla Walla Water Co., 172 U. S., 1-20-21.

Smith v. Dedham, 144 Mass., 177-180.

Watkins v. Macon County Court, 68 Mo., 29-42.

Security Co. v. Baker, 33 Ore., 338, 350.

Sherman v. Smith, 12 Texas Civil App. 580-583.

State v. Sheldon, 53 Neb., 365-6.

Valparaso v. Gardiner, 97 Ind., 1-12.
Corpus Christi v. Woessner, 58 Texas, 462-7.
Wichita Falls v. Skeen, et al., 18 Tex. Civ. App., 632-3.
McNeill v. Waco, 33 S. W. R., 322-3.
Luther v. Wheeler, 4 L. R. A., N. S., 746-749.
Arnold v. Hawkins, 95 Mo., 569-571.
Cyc, Vol. 28, p. 688.
In re State Warrants, 6 S. D., 518-521.
Lumber Co. v. Munising, 123 Mich., 138-141-2.
Book v. Earl, 87 Mo., 246-255.

The term "ordinary" has frequently been used in the discussion of expenses of this character, as synonymous with "necessary."

The cases that use these terms interchangeably are as follows:

Coffin v. Davenport, 26 Iowa, 515-20.
South Bend v. Reynolds, 155 Ind., 70-73.
Voss v. Waterloo Water Co., 163 Ind., 69-84.
Laycock v. Baton Rouge, 35 La. Ann., 475-480.
Lumber Co. v. Munising, 123 Mich., 138-141.
In re Lim. Taxation, 3 S. D., 456-8.

There are a number of cases that use the term "ordinary expenses" alone, such as the following:

Williamsport v. Com. 90 Pa. St., 498-503.
Polk v. Winett, 37 Iowa, 34-5.
Cleveland v. U. S., 111 F. R., 341-346.
Law v. People, 87 Ill., 385-409.
Water Works v. Carterville, 153 Mo., 128-134.
California v. McCauley, 15 Cal., 429-455.
Livingston v. Pippin, 31 Ala., 542-550.
Scott v. Peterborough, 19 U. C., Q. B., 469-472.
Cross v. Ottawa, 23 U. C., Q. B., 288-291.
Com. v. Gregg & ano., 161 Pa. St., 582-7-8.
Brown v. Corry, 175 Pa. St., 528-31-32.
Nougues v. Douglas, 7 Cal., 65-7-8.
Lehigh Coal Nav. Co. Appeal, 112 Pa. St., 360-9.
Stetson v. Kempton, 13 Mass., 271-8.
Mills v. Richland, 72 Mich., 100.
Marathon v. Oregon, 8 Mich., 372-382.
Quincy v. Jackson, 113 U. S., 332-6.
Clark v. Davenport, 14 Iowa, 494-501.
Sherman v. Carr, 8 R. I., 431.

There are other cases that refer to such expenses as "current expenses" like the following:

White v. Mayor & Council of Decatur, 119 Ala., 476-80.

Pettibone v. West Chicago Park Comrs., 215 Ill., 304, 322.
Anniston v. Hurt, 140 Ala., 394-9.
E. St. Louis v. U. S., 110 U. S., 321-4.
Sibley v. Mobile, 3 Woods (U. S. C. C.), 535-41.
Foland v. Frankton, 142 Ind., 546-50.
Spilman v. Parkersburg, 35 W. Va., 605-618.
Valpariso v. Gardiner, 97 Ind., 1-13.
Humphrey v. Mercantile Association, 50 Iowa, 607-611.
Comrs. Leake Co. v. Keene Savings Bank, 108 F. R., 505-514.
Brashear v. Madison, 142 Ind., 685-690.
Laporte v. Gamewell and Fire Alarm Tel. Co., 146 Ind., 466-470.
State v. City of Helena, 24 Mont., 521-30.
E. St. Louis v. Flannigan, 26 Ill. App., 449, 463.
E. St. Louis v. People, 6 Ill., App., 76-9.
Fowler v. Austin Mfg. Co., 5 Ind. App., 489-490.
Amer. & Eng. Ency. of Law, Vol. 20, p. 1176.
Denison v. Foster, 37 S. W., 167.
Weinstein v. Newbern, 71 N. C., 535-6.
State ex rel. v. Graham, 23 La., 402-407.
City of Erie, 91 Pa. St., 398-402.
C. & A. R. R. v. People, 77 Ill., 91-3.

Under the authorities heretofore cited it would seem to be clear that the courts treat the terms

"ordinary" and "current" when applied to the expenditures of a state or a municipality, as synonymous.

The great question in this case is whether interest on the public debt is an "ordinary expense."

The defendant relies upon the line of cases where judgment creditors seeking to recover payments from the revenues of the municipality have been postponed to ordinary, current or necessary expenses, which are made a primary charge upon revenues. The cases clearly establish the general doctrine. From some of them it might perhaps be inferred that interest was not a primary charge or an ordinary, current or necessary expense. I find none of them however where the specific question as to whether interest is or not an "ordinary expense" is discussed. It is very clear that all essential expenses are also "ordinary expenses," but it does not by any means follow that all "ordinary expenses" are essential expenses, that there may not be "ordinary expenses" which are not essential expenses. If it were true that judgment creditors were postponed only to essential or indispensable expenses, the cases might be entitled to considerable significance. On the contrary, however, the postponing of judgment creditors is not confined to essential or indispensable expenses, as expenses which do not come within that class, are often held to be primary in their character and to precede judgment creditors as a charge upon the current revenues.

The following cases show that such current or ordinary expenses as light, water and fire protection, none of which are essential to the revolution of the wheels of government, have been held to

be ordinary or current expenses that will be made a charge upon the revenues prior to the claims of judgment creditors thus demonstrating that the essential character of the expenditure is not the test of an "ordinary expense"

Foland v. Frankton, 142 Ind., 546, 550.
Valpariso v. Gardiner, 97 Ind. 1.
Cleveland v. U. S., 111 F. R. 341-346.
White v. Mayor and Council of Decatur, 119 Ala., 476,

where the Court thinks that while

> "the support and maintenance of public schools is not an essential municipal function" (p. 482),

they would treat it as a "current expense of administering the municipal government" (p. 482).

Leporte v. Gamewell, 146 Ind., 466-70.
Sherman v. Smith, 12 Tex. Civ. App. 580-582-3.
Laycock v. Baton Rouge, 35 La. 475-81.

In *Sherman* v. *Smith* (*supra*) the Court recognized the fact that expenses for fire, water and lights were not essential but held that they were a part of the current expenses and preferred to judgment creditors.

> "we may consider that they could be dispensed with and an efficient City Government conducted without them" (p. 583).

Expenses for fire, water, lights and repairs and construction of bridges, are held in the following cases to be ordinary or current expenses:

Valpariso v. Gardiner, 97 Ind. 1.
Brown v. Corry, 175 Pa. St. 528-32.
Voss v. Waterloo Water Co., 163 Ind. 69-88.
Brodnax v. Groom, 64 N. C. 244-9.
Satterthwaite v. Beaufort, 76 N. C. 153.
Evans v. Com., 89 N. C. 154-9.
McKethan v. Com. Cumberland, 92 N. C. 243.
Livingston v. Pippin, 31 Ala. 542-50.

It would seem that the term "necessary town charges" was at least as exclusive and restrictive as "ordinary expenses," and yet it has been frequently held that under that designation, many expenses can be properly incurred, that cannot be held to be essential, or indispensable, to the operations of the government.

The Statues of Maine authorize, after specifying a variety of purposes for which funds can be raised, the raising of taxes for "other necessary town charges."

In *Gale* v. *South Berwick,* 51 Maine, 174-6-7 in defining that provision the Court said:

> "They embrace all incidental expenses arising directly or indirectly in the due and legitimate exercise of the powers conferred upon towns. Accordingly they have ever received liberal construction."

Clocks, repair of fire engines, construction of reservoirs to supply water, building a market

house and town halls were cited as illustrations of the proper exercise of the power. In answering an inquiry from the Governor and Council the Court defined this clause as follows:

> "The words 'other necessary town charges' * * * embrace all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by statute."
>
> Opinion of Justices, 52 Me. 598.

In Massachusetts, under a Statute authorizing a tax for "other necessary charges," the Court held that

> "towns might raise such sums as should be necessary to meet the ordinary expenses of the year"

and that the

> "erection of public buildings for the accommodation of the inhabitants, such as town houses to assemble in, and market houses for the sale of provisions may also be a proper town charge and may come within the fair meaning of the term necessary; for these may be essential to the *comfort and convenience of the citizens.*"
>
> *Stetson* v. *Kempton*, 13 Mass. 271-8.

Under this clause towns can indemnify officers in the *bona fide* discharge of their duties.

> *Bancroft v. Lynnfield*, 18 Pick, 566.

Make repairs on clocks,

> *Willard* v. *Newberryport*, 12 Pick. 227.

Invest in fire engines,

Allen v. *Taunton,* 19 Pick. 485.

Build a market house,

Spaulding v. *Corcall,* 23 Pick. 71.

A town house,

Friend v. Gilbert, 108 Mass. 408.

"Make contracts necessary and convenient for the exercise of their corporate powers,"

Agawam Nat. Bank v. *South Hadley,* 128 Mass. 503-5,

and build a public hall—

Wheelock v. Lowell, 196 Mass. 220.

These cases clearly extend the scope of necessary town charges beyond those which are absolutely essential or indispensable to the operations of government. Great stress was laid in the argument upon the part of the defendant upon the particular language of the decree which requires a finding of the "ordinary expenses of the Government". The Ordinance upon which the decree is predicated reads in this particular: "the ordinary expenses of the state government". The language of the decree so far as there is any distinction is less emphatic if regard is had to the technical language used, the word "state" being omitted, but it is improbable that any significance is to be attached to the omission, and very doubtful if the Court had in mind in making the decree the distinction contended for. The argument is

that the ordinary expenses are confined to the expenses of "*the state government*" or of "*the government*" as contradistinguished from what might be termed in a broader sense state or municipal expenses. The contention being that there are expenses which are proper expenses, on the part of the state that are not essential, or indispensable, to the operations of the Government, and that the language of the ordinance and the decree mean that the ordinary expenses "of the government" or "of the state government", are essential expenses, and thus limit the ordinary expenses, to such expenses, as are indispensable to the operations "of the state government."

I find that similar language has been frequently used in the opinions, without attributing to it the technical and restrictive meaning contended for by the defendant. It has quite clearly been used as synonymous with state or municipal expenses generally rather than as restricting the term to essential expenses.

In *White* v. *Mayor & Council of Decatur*, 119 Ala., 476, the court referred to current, legitimate municipal expenses and in the same paragraph referred to the same expenses as "*governmental expenditures*" (480) and "current expense of administering the municipal government" (p. 482) evidently meaning the same thing. The Court expressly held in that case that while the support and maintenance of public schools are not an essential, municipal function, they would treat it as a necessary "*governmental expenditure*" as that function was "vested in the Mayor and Council of Decatur" by statute and the "power and duty" were "in and upon them".

In *Anniston* v. *Hurt*, 140 Ala. 394, 400, the Court referred to "necessary expenses of *administrating the municipal government*" and "the object of corporation expenditures" and "expenses for *governmental purposes*" and "expenditure for *administration of governmental purposes*" and "necessary current expenditures" as apparently meaning one and the same thing. The question of what was or was not an "ordinary expense" did not arise in that case, and the Court discussed the question as to whether interest was or not a necessary current expenditure as a question depending upon the construction of the particular statutes being discussed.

In *City of Erie*, 91 Pa. St. 398, the Court referred to "ordinary expenses of the *City Government*" (p. 403) without indicating that they were confined to expenses indispensable to the operations of the government.

In *Corpus Christi* v. *Woessner* 58 Tex. 462-7, the Court referred to ordinary, "current expenses of *her local government*" in the same connection in which they speak of current and ordinary expenses, and without a suggestion of any distinction between governmental and current or ordinary expenses.

In *Nougues* v. *Douglas*, 7 Cal. 65-7-8, the Court referred to "ordinary expenses of the *state government*" and "ordinary expenses *of the state*" and "the expenses *of the state government*" and the necessary and "ordinary expenses *of the state*" and the "ordinary expenses of government," evidently meaning the same thing in each instance.

In *Weinstein* v. *Newburn*, 71 N. Y., 535, 536, the Court speak of "current expenses of the city *government*" and "the necessary current expenses" clearly meaning the same thing.

In *Sherman* v. *Smith*, 12 Tex. Civ. App., 580, 583, the court likewise referred to "her current and ordinary expenses" and then "for the payment of expenses of government," and "proper current expenses" (p. 584) all meaning the same thing. In Wilson *v.* Charlotte, 74 N. C., 748, 749, the Court referred to "the necessary expenses *of the government of a city*" (p. 759) clearly meaning "necessary expenses of the year," and with the same meaning the Court in Mills *v.* Richland, 72 Mich., 100, 107, said "necessary expenses incurred in administering *the government* of the township." So in Herman *v.* Oconto, 110 Wis., 666-678, the Court said "such as are necessary to carry on the *city government*."

The frequency with which this language has been used by the Court with its general signification would seem to indicate that the language of the decree is hardly entitled to the technical construction relied upon by the defendants.

Did the framers of the ordinance have in mind any distinction between "ordinary expenses of the state government" and ordinary expenses of the Commonwealth? What distinction is there between them in their relation to a "just proportion of the public debt"? Are they not each equally a common burden paid from a common fund for the common benefit? What reason is there that would require the inclusion of one that would justify the exclusion of the other?

Moreover, the defendants concede as ordinary expenses items which do not appear to be essential to the revolution of the wheels of government.

Board of Public Works, Salaries and Expenses	$134,108.03
Deaf, Dumb and Blind Institute	$384,161.09
Geological Survey	$42,480.61
Lunatic Hospitals	$1,635,583.36
Military Establishment	$1,030,694.11
Primary Schools	$655,908.73
University of Va.	$613,287.00
Virginia Military Institute	$207,084.87

(Defts.' original Ex. D1.)

There are very few cases undertaking to give anything like a definition of what "ordinary expenses" are, and perhaps with but one exception none of those are very closely in point on the question of interest, though a number of them give definitions broad enough to include interest.

In *East St. Louis* v. *U. S.*, 110 U. S. 321, the Court in discussing the general question of municipal expenses said:

> "That fund by the terms of the Charter of the City under which the bonds were issued is authorized for the purpose of paying the necessary, current expenses of administration *not including payments on account of the bonds of the municipal corporation*" (p. 324).

The fact that the Court found it necessary to exclude specifically from the scope of "necessary current expenses" bonds of the municipal corporation gives rise to some inference at least that they understood that without such exception such bonds would be fairly included within the

term "necessary current expenses." If payment on account of bonds was included interest on the bonds would also be included.

In *Wilson* v. *Charlotte,* 74 N. C., 748, the Court said:

> 'It would be difficult or impossible to draw a precise line between what are and what are not the necessary expenses *of the government* of a city. The analogy of the law of necessaries for infants is the only one that occurs to us. It is held, that if, considering the means and station in life of the infant, the articles sold to him *may* be necessaries under any circumstances, they come within a class for which the infant may be liable, and upon his refusal to pay, it is for a jury to determine whether under the actual circumstances they were necessary. If, however, the articles are merely ornamental, and such as cannot, under any circumstances be necessary to one of the means and station of the infant, a Court may, as a matter of law, declare that the infant is not liable. We do not undertake to say that this analogy will furnish a rule which will admit of a close application, but if treated merely as an analogy in the absence of other guides, it may be of some general use (p. 759).

In *Brown* v. *Corry,* 175 Pa. St., 528, the Court said:

> "The ordinary expenses, at least many of the ordinary expenses, must be incurred and paid or the city cannot exist. * * * And any expense that recurs with regularity and certainty and is necessary for the existence of the municipality, or for the health, comfort and perhaps convenience of the inhabitants may well be called an ordinary expense" (p. 531).

In *Mills* v. *Richland*, 72 Mich., 100, the Court said:

> "What shall be deemed as the ordinary expenses of a township is a question which has never received any very satisfactory answer, and it would be difficult to glean one from what has been said in this Court. I think, however, it may well be said the answer can *never include less than the necessary expenses incurred in administering the Government* of the Township under the Statutes creating it and relating thereto, in such manner as will best promote the convenience, peace, health, prosperity and happiness of the people residing therein. This would, as has been held by this Court in *Marathon* v. *Oregon*, 8 Mich., 382, include the payment of the indebtedness to the Township of Mills" (pp. 106-7).

It seems that the Town of Richland had been set off from Mills and this was an action to recover a portion of the debt due from Richland to Mills. The opinion in *Marathon* v. *Oregon* above cited, proceeds upon the peculiar language of the statute being construed. It authorized the Township

> "to vote such sums as they may deem necessary for defraying *all proper charges and expenses arising in the Township*" (p. 381).

and the Court held that both charges and expenses were included in the term ordinary township expenses, saying

> "It is certainly no violation of terms to class the payment of debts ascertained among ordinary expenses" (p. 382).

In *Smith* v. *Dedham*, 144 Mass., 177, 180 the Court seemed to make annual payment the criterion as they held that an annual payment for water for a period of five years was "for a sum of money to be paid annually, among the *other* current expenses of the town."

In *Livingston* v. *Pippin*, 31 Ala., 542-50, the Court gave this definition, "Ordinary expenses are the expenses which are necessary to carry into effect the ordinary powers of the corporation. * * * Under the rule above laid down, the implied and incidental powers of corporations must be classed as ordinary powers."

In Herman *v.* Oconto, 110 Wis., 660, the Court said:

> "It cannot be said with any show of right that the building of a sewer system is a current expense. While it is not easy to accurately define what may be included under that head still it is plain that it must be limited to such as are necessary to carry on the city government—such as are usual and ordinary from year to year" (p. 678).

The case of *State* v. *Leaphart*, 11 S. C., 458, is very closely in point. All three of the judges wrote opinions, and all concurred in holding that interest was an ordinary expense. *C. J. Willard*, in his opinion, said:

> "Ordinary expenses include the current expenses of the government and debts to mature during the current fiscal year" (p. 469).

> "* * * to such purposes as properly fall within the description of 'ordinary expenses of the government,' that is to current expenses and debts maturing during the fiscal year" (p. 471).

He held that the Act being construed could only be regarded as a general annual tax levied for ordinary expenses, and ordered a mandamus to issue for the payment of the interest on the public debt out of the tax as an "ordinary expense." *Haskell, J.*, said:

> "When bonds have been issued to raise money to meet an 'extraordinary expenditure' they become a standing liability of the State, and the interest as it falls due becomes an 'ordinary expense' to be included within the 'estimated expenses,' to make up the amount to be levied annually and appropriated annually" (p. 477).

and again

> "The only difference between the interest on such bonds and any other annual expense is, that the interest is made by the Constitution, an obligatory expense, while many other expenses may be at the option of the legislature" (p. 477).
>
> "The tax is levied for the expenses of the current fiscal year. The objects to which the tax *must* be applied are the items contained in those estimated expenses. Expenses include the payment of recognized indebtedness as well as any outlay that the Legislature may deem proper to make during the year" (p. 478).

The case showed that

> "The Act of 1876-7 provides for the payment of the current expenses of the govern-

> ment and certain indebtedness matured or to mature. It is therefore clearly a general tax levied as such, entirely subject to the control of the legislature *provided* the purposes to which it is appropriated fall within the general class of 'ordinary expenses'" (p. 471).

The mandamus was prayed for among other things to secure the payment of interest falling due Jan. 1, 1879. McIver, Judge, who dissented upon one point held that the relator was entitled to a mandamus for the interest for that year.

This case was cited with approval in *State* v. *Derham*, 61 S. C. 258, 262. The plaintiff relies upon *In re Limitation Taxation*, 3 S. D. 456 where the Court said:

> "The 'ordinary expenses' of the state are practically defined in Section 2, Art. 12 of the Constitution and are the 'ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of the state institutions, interest on the public debt and for common schools'" (p. 460).

An examination of the Constitutional provision thus referred to discloses the fact that it does not purport to define "ordinary expenses" but simply provides that

> "The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the State, the current expenses of the state institutions, interest on the public debt, and for common schools" (Con. Art. 12, Sec. 2).

So far as this case has any weight, it tends to negative the contention of the plaintiff. Properly

considered it gives no definition and incorrectly states the effect of the constitutional provision. It is contended upon the part of the plaintiff that the term "ordinary expense" is flexible in its character and is to receive a construction in harmony with the circumstances and conditions under which it is used. It was urged in argument upon the part of the defendant that it was in a sense analogous to the term "necessaries," the analogy used by the Court in the case of *Wilson* v. *Charlotte (supra)*. If it be true that the analogy exists, it would clearly establish the flexible or varying character of the meaning of the term, as it is too clear for the citation of authorities that necessaries may include articles in connection with one individual that would be clearly excluded when applied to another individual. Ordinary expenses involves the payment of at least current indebtedness. There may be some parallel between an expense and a debt. It has been frequently held that the word debt "has no fixed legal signification, as has the word 'contract,' but is used in different statutes and constitutions in senses varying from a very restricted to a very general one."

McNeill v. *Waco*, 33 S. W. R., 323 *(supra)*.

Swanson v. *Ottumwa*, 118 Ia., 161-171 *(supra)*.

The case of *Union Pac. R. R.* v. *U. S.*, 99 U. S., 402, was relied upon by the defendant, so far as applicable. The Court were there discussing the question as to what would be the net earnings as distinguished from the gross earnings of a railroad company, and they said:

"As a general proposition net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses in keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent *enlargement and improvement* thereof. With regard to the last mentioned class of expenditures, however, namely, those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness" (pp. 420-1).

So far as this case has any significance it seems to establish the proposition that the term ordinary expense has no fixed and arbitrary significa-

tion; that it may include at one time what would be excluded at another time. The Court in that case adopted the broad construction, on the ground that it was the "wisest and most prudent method," and was what they called "a liberal application of the earnings to the improvement of the works."

If the case of *City* v. *Leaphart (supra)* is to be treated as an authority, the interest would clearly be an ordinary expense.

If current or ordinary expenses are the converse of current or ordinary revenue, then interest in this case would be an ordinary expense, as it was expressly provided for in the current or ordinary revenues, and made mandatory by the constitution.

In the classification adopted by the United States Treasury Department (Rep. Sec. Treas., 1874, pp. IV. and V, do. 1904, House Doc., 58th Cong., Vol. 31, p. 5), and by the United States Census Office (11th Census, Vol. 50, pt. II, pp. 418-19, 464-77, 516-553, 556-7), and the State of Ohio, Rep. Bureau Insp. and Sup. of Pub Off. of 1906, pp. 72-79, interest is classified as an "ordinary expense." It is so held by Bastable on Public Expenditures, pp. 130-3.

There are several important considerations to be taken into account in determining this question:

First.—The cases of judgment creditors seeking to secure payment out of the ordinary or current revenues of a municipality are certainly not directly in point. This is not a controversy between a judgment creditor and a municipality. It does not involve the question as to whether, if a

claim against the municipality were allowed, there would still remain sufficient current revenues for the payment of either the indispensable or the ordinary and current expenses of the state. It is a question between two parties who were jointly interested in the incurring of a joint liability and the question to be determined is what proportion of this joint liability is to be assumed by each. This is the question whether it be reached under the Wheeling Ordinance or under the general principles of International Law. There is therefore no warrant for applying the strict construction that would be applicable in the case of an action by a judgment creditor.

Second.—The Constitution of Virginia makes the interest upon the public debt a specific annual charge upon the revenues:

> "There shall be set apart annually from the accruing revenues a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand eight hundred and fifty-two. The sum thus set apart shall be called the Sinking Fund and shall be applied to the payment of the interest of said debt and the principal of such part as may be redeemable."
>
> (Con. of Va., Art. IV, Sec. 29, Code Va., 1860, p. 47.)

With this specific Constitutional provision requiring "the interest of said debt" to "be set apart annually from the accruing revenues," it may well be doubted whether if this were an action by a judgment creditor against the state, the Courts would not be required by the constitution

to postpone such creditor to the payment of interest on the ground that it was not only an ordinary expense, but was a specific constitutional security, annually to be set apart for the benefit of the state's creditors, which would be preserved inviolate for the benefit of the holders of the interest on its public debt.

Third.—Under the provisions of the Ordinance, the defendants are to be charged with the amounts expended within the limits of West Virginia. In order to make these expenditures Virginia hired the money and has paid the interest thereon. If interest is not an ordinary expense, West Virginia would be charged with the principal sum thus hired and expended, but would not be charged with the sums thus paid by Virginia for the use of the money thus hired and expended. If the money thus hired and expended is a proper charge it is upon the theory that Virginia should be reimbursed therefor, and no reason is perceived why she is not on general principles, as much entitled to be reimbursed the sums, that she has paid for the use of the principal sum, as she is to be reimbursed for the principal sum itself. No good reason has been suggested why, as a matter of equity, if liable for the principal sum, West Virginia is not also liable for interest thereon. Unless allowed as an ordinary expense, she will not pay any part of the interest, and the whole burden of the payment of interest, will be assumed by the State of Virginia, a result which would be clearly inequitable.

It is not an adequate answer to say that the Commonwealth has had the use of the improvements, because these improvements are local in

their character, and so far as the public use of them is concerned, that use has been confined to the limits of West Virginia. If allowed as an ordinary expense, the portion of the Commonwealth that has derived the local benefit from the use, would also assume the burden of paying its proportion, for the use of the money thus expended, otherwise, the remainder of the Commonwealth which has had no benefit from the use, would be paying for the use of all the money thus expended. If tolls were received by the Commonwealth from any of the public improvements, on account of which expenditures are charged, each portion of the Commonwealth has received its pro rata benefit therefrom. The disbursements made by the Commonwealth during this period came from three sources, loans, income and taxation. As the income increased or decreased, the sums raised by taxation necessarily decreased or increased, each section receiving in accordance with the proportion of the burden it was assuming, its proportional benefit of the income, thus received. Just how a "just proportion" of the ordinary expenses is to be ascertained does not appear, but in reaching the conclusion as to what an ordinary expense is, I must assume that it will be ascertained upon a proper basis, and that every legitimate consideration tending to determine the "just proportion" will be given due weight.

That the term "ordinary expense" is not fixed and definite, but is more or less flexible and varying in its meaning, is, I think, reasonably well settled by the authorities.

If, as used in the decree, it is of doubtful meaning, and is open to two constructions, one of which

would produce an equitable result, the reading, with the decree, of the constitutional provision requiring the assumption by the State of an equitable proportion of the debt, would require the doubt to be resolved in favor of the equitable result.

It seems to me upon reason and authority that the interest upon the public debt of the State of Virginia is "one of the ordinary expenses of the Government of Virginia" within the meaning of the language of the Wheeling ordinance and the decree predicated thereon.

Extraordinary Expenses.

The question as to what is an "extraordinary expense" seems to be well settled.

In *Supervisors* v. *U. S.*, 18 Wall, 71, 79, the Court referred to aid in the erection of buildings as "an extraordinary expenditure."

In *Union Pac. R. R.* v. *U. S.*, 99 U. S., 402, the Court referred to expenses for the "enlargement and improvement" as capital expenses.

In *South Bend* v. *Reynolds*, 155 Ind., 70, 73, the Court held that

> "While the rent for suitable offices for city officers is an ordinary and necessary expense, the erection of a city hall or a building for the use of the city officers is not in any sense an ordinary expense, but is an extraordinary one."

In *Voss* v. *Waterloo Water Co.*, 163 Ind., 69, 85, the Court held that the construction of water works or an electric light plant

> "is not in any sense an ordinary and necessary expense, but an extraordinary one."

because such an expense involved

> "municipal ownership of the water and light plant, the means of furnishing said water and light, and is an extraordinary expense."

In *Brown* v. *Corry*, 175 Pa. St., 528, 532, the Court said:

> "I can see a very clear distinction between 'a contract for the supply of water and one for the means of furnishing the supply.' The one may pertain to an ordinary expense, and the other, if it involves municipal purchase and ownership of the means of furnishing the supply, can only pertain to an extraordinary expense."

See also *Grant* v. *Davenport*, 36 *Ia.*, 396, 403.
In *Book* v. *Earl*, 87 Mo., 246, 256.

> "Remodeling and building three new additions to the Court House"

was held not to be an ordinary expense but an extraordinary expenditure.

In *Mills* v. *Richland*, 72 Mich., 100-6-7, the expenses of "establishing lost section corners" and "building a town hall" were held not to be included within the term "ordinary expenses."

In *Helena Water Co.* v. *Helena*, 31 Mont., 243, the Court held that the installation of a water plant was not a "current expense" as it was an expense that partakes of the nature of an investment, or such as are to be incurred in a substantial or permanent improvement.

It seems to be well established that the construction, enlargement and improvement" of a plant are a capital investment, an extraordinary expense, and that its maintenance and operation is an ordinary expense. It is not perceived that there is any substantial distinction between the increase of the size of the plant and amount of the investment and the original construction or the original investment. If it is construction, addition to plant, "enlargement and improvement;" an investment, and not maintenance or operation, then it is an extraordinary expense.

The parties agree upon items making up an aggregate of the ordinary expense of government of $18,207,684.29 (Rec., p. 515). They reach this amount by deducting from an aggregate of receipts, of $18,761,154.51, the sum of $553,470.22, This sum is the result of eight items. Deft. original Ex. D-1 p. 4.

Inspectors of Tobacco		$389,694.91
Less Expense of Commissioners	$33,698.36	
Refunds	203.46	
Paid for burnt Tobacco	2,669.13	
		36,570.95
Leaving a balance of		$353,123.96
Inspection of vessels		2,621.26
Land office Registration fees		177,115.05
Tax on private seal		2,090.60
Tax on Express Companies		2,199.71
Tax on Insurance Companies		6,533.99
Weighmaster of Live Stock	$8,493.32	
Less cost of scales	3,019.78	
		5,473.54

Miscellaneous	4,312.11
	$553,470.22

No. 1. Tobacco Receipts.

The seven items following the tobacco item are evidently of the same character and should be treated in the same manner, but for an admission of the plaintiff. The plaintiff admits them as credits, not because they are proper items of credit, but only for the purpose of reaching an agreement as to the amount of that schedule, and the propriety of treating the tobacco item as a credit, is not to be affected by that admission. If the tobacco item is not a proper credit, it is to be added as an ordinary expense to the sum of $18,207,684.29, agreed upon, as in reaching that sum it has already been deducted, and the charge will offset the credit. Virginia made elaborate provision for the inspection of tobacco. It contemplated first adequate protection to its great industry, and second, revenue. The law specifically provides that the salaries of the inspectors "are to be paid out of the receipts for inspection at such warehouse, and in no case is the state to be charged therewith, or with any other expense of such warehouse" (App. 157). The state in fact paid nothing on this account. The whole amount collected, $389,694.91, was reduced by the sum of $36,570.95 for expense of commissioners, refund, and paid for burnt tobacco and the balance, $353,123.96, was paid into the treasury. This sum was not an expense of any kind. It was a receipt, and was not predicated upon an expense. I have authority to state disbursements

only, not receipts. For the reasons above given I treat it as an ordinary expense, and add to the agreed sum, $353,123.96.

ALTERNATIVE FINDING.

At the request of the defendant, I find that the Commonwealth received during the period prescribed from tobacco receipts the sum of $353,123.96.

Item 2—Constitutional Conventions, $258,906.28.

The fact that the decree requires a finding of the "ordinary expenses of the Government of Virginia" raises the necessary inference that there are expenses other than ordinary. Such expenses are both legitimate and proper but do not come within the definition of ordinary. Ordinary is defined by the Century Dictionary as "of the usual order, usual, customary, common," and by Webster as "2. Common, customary, usual." Anderson's Law Dict.: "common, usual, reasonable." These definitions come fairly within such definitions as the Courts have given and to them may be added such as recur with regularity and certainty. The only question to be determined is whether the various items claimed by the plaintiff are usual, customary, common, recurrent, annual or regular in their character.

There have been two Constitutional Conventions during the period covered—one in 1829 and one in 1850 (App., pp. 159-160). That these conventions were a legitimate and proper exercise of a governmental function and that the expenses at-

tendant thereon are both legitimate and proper is unquestionably true. It certainly cannot be considered as a usual, customary, regular or common expense. It does not come within the scope of an ordinary expense within the meaning of the decree and the item is disallowed.

ALTERNATIVE FINDING.

I make an alternative finding at the request of the plaintiff that there was actually expended by the Commonwealth for expenses attendant upon two Constitutional Conventions, held in 1829 and in 1850, the sum of $258,906.28.

Item 3.—Slaves transported and executed, $311,168.35.

This item is admitted by the defendant.

Item 4—Boundary lines $16,704.78.

These boundary lines were run under the authority of specific acts of the legislature passed in 1822, 1833, 1847, 1858 and 1860 (App., pp. 166-171). Nothing appears in the record to indicate that this expenditure was one that could be called usual, customary, common, regular, or annual. On general principles the expense incurred in settling a boundary line could hardly be expected to recur so as to be in any proper sense, usual or customary. I disallow the item.

ALTERNATIVE FINDING.

I make an alternative finding at the request of the plaintiff that under the acts of the legislature

above referred to, the Commonwealth actually expended in running boundary lines, $16,704.78 within the time prescribed.

Item 5—Maps (Commonwealth)	$16,628.04
" (Board of Public Works)	11,446.48
	$28,074.52

The maps of the Commonwealth appear to have been made by virtue of the provisions of the statutes enacted in 1825, 1828, 1836, 1848 and 1853 (App. pp. 172-175). These acts all relate to specific maps for specific purposes, and none of them indicate that the work is to be one of a continuing character, usual, customary or common. The maps provided for once prepared, the office of the legislation was apparently accomplished.

I disallow the item.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiffs that the Commonwealth expended under and by virtue of the various acts of the legislature above referred to for maps, within the time prescribed, the sum of $16,628.04.

As to the item of $11,446.48, for maps for the Board of Public Works, I think a different rule applies.

It is conceded that the salaries and expenses of the Board of Public Works are an ordinary expense. It was a great and important branch of the government exercising control over its expen ditures and discharging responsible duties involv-

ing a great many details. It is hardly to be expected that each item of expense incurred by this Board in the discharge of its duties would be duplicated or repeated so as to become as to that item usual, customary or continuing in its character.

Yet all the expense incurred by the Board in the proper discharge of its duty would be properly incurred and within the contemplation of the legislation creating the Board as a continuing body and investing it with its duties and responsibilities. Its expenses should be treated as a whole. All expenses that were reasonably necessary to the proper discharge of its duty are proper expenses, and should be included as a part of its aggregate of expenses and are, I think, fairly within the scope of the ordinary expenses of the Board. Maps for their use in the development of public improvements were such an expense, and I therefore allow the sum of $11,446.48 as a part of the ordinary expenses of the Board of Public Works, and therefore a part of the "ordinary expenses."

ALTERNATIVE FINDING.

I find at the request of the defendant that the sum of $11,446.48 was expended by the Board of Public Works within the time prescribed for maps for its use.

Item 6—Deaf, Dumb and Blind Institution, $80,661.94.

The details making up this item are found on pages 521-522-523, Joint Ex. D-1, pp. 5, 6 and 7.

All of these items were expended either for original construction or "enlargement and improvement" of plant, each of them increasing the investment of the Commonwealth in the Institution. None of them were involved in its maintenance and operation, and under the authorities they were all extraordinary expenses and are therefore disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that the aggregate sum of $80,661.94 was expended within the time prescribed by the Commonwealth in original construction and additions and "enlargement and improvement" of the plant of the Deaf, Dumb and Blind Institution, the details of which are specifically mentioned on pages 5, 6 and 7 of Joint Exhibit D. 1 (Rec., pp. 521-2-3).

Item 7—International Exchanges, $2,836.19.

This money was expended under the provisions of a statute of 1848 (App., pp. 185-6), which authorized an exchange between the United States and the French Government of various public documents. The act contemplates a continuation of such exchanges. It requires "a report annually to the joint committee of Library" indicating that a permanent annual exchange was contemplated by the Legislature.

I allow it as an ordinary expense, $2,836.19.

Item 8—Overpayment of Treasury notes, $50.

Nothing appears to show that this was a usual or customary expense or that it occurred more than once, or as to the circumstances under which it did occur. I infer that it was paid on the error of some officer, and it could hardly be assumed that such errors would become usual and customary.

I disallow the item.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that the Commonwealth overpaid on Treasury notes within the time prescribed the sum of Fifty Dollars ($50).

Item 9—Printing Treasury Notes, $375.74.

This expense was incurred under the provisions of an Act passed in 1856 authorizing the issue of Treasury notes (App., pp. 186-187). The Act contemplated a permanent method of borrowing money by Treasury notes "issued from time to time." While an appropriation is made for only three years, there is nothing in the Act that indicates that its operation was to be confined to any limited period of time. It contemplates an indefinite continuation of the work provided for.

I allow the item as an ordinary expense, $375.74.

ALTERNATIVE FINDING.

I find at the request of the defendant that the Commonwealth paid within the time prescribed for printing Treasury notes under an Act passed in 1856, $375.74.

Item 10—Loss on account of counterfeit money, $190.

There is nothing in the record that discloses the circumstances under which the loss occurred, and I can only infer that it was one of the sporadic instances that might or might not occur in connection with a currency issued by the State. I cannot assume that such loss would be continuing, usual, or customary.

I disallow the item.

ALTERNATIVE FINDING.

I find at the request of the plaintiff that the Commonwealth lost within the time prescribed on account of counterfeit money $190.00.

Item 11—Virginia Military Institute, new buildings, etc., $151,000.00.

The items making up this aggregate (found on pp. 524 and 525 Joint Ex. D-1, pp. 8 and 9) are all for the erection of and additions to, enlargements and improvements of, buildings connected with the Institute, and installing of heating and lighting plants and are within the rules laid down extraordinary expenses, and therefore disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiffs that the Commonwealth expended in the erection of buildings and additions thereto and enlargements and improvements, and in-

stallation of heating and lighting plants, connected with the Virginia Military Institute the sum of $151,000, the details of which appear on Joint Ex. D 1, pp. 8 and 9 within the time prescribed.

Item 12—University of Virginia, Repairs and Improvements to Buildings and Water Supply, $25,000.00.

This sum was expended for "repairing and improving the buildings thereof and for furnishing a supply of water for the protection and preservation of the said buildings and other valuable property of the said Institution" (p. 526 Joint Ex. D-1, p. 10).

Repairing the buildings would undoubtedly be an ordinary expense. The burden is upon the plaintiff to establish the ordinary expenses. Nothing is contained in the record that will enable me to ascertain what part of the $25,000 was expended for repairs, and in the absence of that information, no other course is open than to disallow the item, inasmuch as a portion of it at least is for an extraordinary expense. The analogy is very close between an item of this character and a case where a non-lien and a lien claim have been joined, in which case it is well settled that the introduction of the non-lien claim, reduces the whole claim to the character of a non-lien claim.

I therefore disallow the item.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that the Commonwealth expended $25,-

000 in "repairing and improving the buildings and furnishing a supply of water for the protection and preservation of said buildings and other valuable property of the University of Virginia" within the time prescribed.

Item 13—Improvements Public Square, $1,456.91.

This item is admitted by the defendant.

Improvements Capitol Square, $12,278.47 (Rec. 528 Joint Ex. D-1, p. 12.)

All of the items making up this aggregate appear to have been either for construction of additions to buildings, "enlargements or improvements," or installation of water and light plants, and the item is therefore disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that the Commonwealth expended, within the time prescribed for additions to buildings, "enlargements or improvements" and installation of water and light plants, $12,278.47, the items of which appear on page 528 Joint Ex. D-1, p. 12.

Item 14—Fugitive Slave Expense and reward additional, $2,201.00.

This item is agreed to.

Item 15—Penitentiary Lot, New Hospital Building, etc., $13,947.48.

This item is made up of items for the erection of buildings, completing improvements, "enlargements and improvements," and installation of a water supply, and is disallowed.

ALTERNATIVE FINDING.

I find in the alternative, at the request of the plaintiff, that the Commonwealth expended, within the time prescribed, the sum of $13,947.48 for the erection of buildings, completing improvements and installation of water supply, the items of which appear on Rec. 529 Joint Ex. D-1, p. 13.

Item 16—Calling out militia at Wheeling in 1836, $1,099.

The militia appear to have been called out under the provisions of the Militia Law, and an Act was passed in 1838 (App., p. 222) giving them the "usual pay of the militia when in actual service." For the reasons hereafter given in connection with the Harpers Ferry Item, this item is allowed as an ordinary expense.

Item 17—Medical College of Virginia, additions and improvements to buildings, $25,000.

This was expended for enlarging the hospital and infirmary and extending the college buildings and for improvement and extension of the college museum, and was an "enlargement and improvement" (Rec., p. 530, Joint Ex. D-1, p. 14), and is an extraordinary expense and is therefore disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that the Commonwealth expended $25,000 for "enlarging the hospital or infirmary, for extending the college buildings and for improvement and extension of the college museum" within the time prescribed.

Item 18—Attorney General's fees, prosecuting Selden Withers & Company, $500.

This item stands with an item "Selden Withers & Co. from Miscellaneous, $9,351.45," which with other items make the aggregate of item "23 Sundry B. P. W. expenses $36,728.50" (Sup. Ex. 10). It is conceded that the Selden Withers & Co. $9,351.45 was a "part of the expense of selling the bonds of the state." This item of $500 being of the same character, an advance fee for collecting the Selden Withers & Co. item, for the reasons given under item 5 as to maps for the Board of Public Works, is allowed.

Item 19—Eastern & Western Asylums, $344,295.57.

All of the items making up this aggregate (found on pp. 531, 532, 533, 534, 535, 536, 537 and 538 of Rec. Joint Ex. D-1, pp. 15, 16, 17, 18, 19, 20, 21 and 22) are for additional buildings and completing buildings and installing water plants with the exception of an item of $5,000 (Rec., p. 532; Ex. D-1, p. 16), and $7,450.01 (Rec., p. 538, Ex. D-1, p. 22) and are therefore in the nature of construction, additions to plant and increase of the investment of the state in the plants and

are extraordinary expenses and therefore disallowed.

The item of $5,000 was expended under the Act of Feb. 14, 1844 (page 16, Chap. 11) which authorized an expenditure of $5,000 "for the purpose of remodeling and repairing the body of the old building."

Repairing is clearly an ordinary expense. Whether remodeling would be or not would depend upon the character of the work contemplated. The second section of the Act provides:

> "that before the repairs mentioned in the preceding section shall be contracted for, &c."

apparently treating "remodeling and repairing" as repairs. As to this item, I think it is reasonable to conclude that the remodeling was in the nature of repairs and that the item is an ordinary expense, and I therefore allow it as such $5,000.00.

The item "support" is admitted 7,450.01

With these exceptions the aggregate is disallowed.

The items of $7,000 on page 532, and $17,750 on page 533, include repairing among other items. It is impossible to separate the items of repair from the other items and they are disallowed for that reason.

Alternative Finding.

I find in the alternative at the request of the plaintiff under this item, that the Commonwealth expended within the time prescribed the aggregate of $331,845.56, for additional buildings, completing buildings and installing water plants.

Item 20—Gun House at Alexandria... $900.00

Item 21—Cannon House, Surrey Co... 110.00

Item 22—Cannon House for Richmond Artillery 1,079.09

These items are all for construction of buildings, the last two by virtue of special acts therefor (App., p. 246) are extraordinary expenses and are disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that the Commonwealth expended within the time prescribed for the purposes above indicated in the items 20, 21 and 22, the sum of $900, $110 and $1,079.09, respectively.

Item 23—Sundry Board of Public Works expenses $36,728.50

"Supplemental Ex. 10."

All of the items making up this sum appear to have been legitimate expenses of the Board of Public Works, reasonably and necessarily involved in the discharge of their duties and are therefore, for the reasons above given under Item 5 as to maps for the Board of Public Works, reasonably within the scope of the ordinary expenses of the Board of Public Works, and are to be treated as an ordinary expense of the State and are allowed.

Item 24—Aggregate, $18,574,747.84.

For the reasons heretofore given this item is allowed as an ordinary expense.

ALTERNATIVE FINDING.

I find in the alternative at the request of the defendant that the Commonwealth expended within the time prescribed for interest on its public debt the sum of $18,574,747.84.

HARPERS FERRY RAID.

The full amount of the expenditure for the Harpers Ferry Raid by the State of Virginia was the sum of $255,745.77. $3,982.12 should be credited to the expenditure for sundry returns, leaving the actual expenditure, $251,763.65. The question now to be determined is whether that is fairly within the scope of the term "ordinary expenses," as that term is used in the decree.

The Constitution of the United States recognizes the essential character of the militia (Con. Art. 1, sec. 8, part 15 and 16, Code of Va., 1860, p. 17). The Virginia Bill of Rights declares that a "well regulated militia * * * is the proper natural and safe defense of a free state." (Code Va., 1860, p. 34, sec. 13.) Virginia has had an active and expensive militia established since 1705 (do. 134 note). The Governor is authorized to "call forth the militia" when any

> "combination whether for dismembering the State or establishing in any part of it a separate government, or for any other purpose shall become so powerful as to obstruct in any part of this state the due execution of the laws thereof."
>
> (Code Va., 1860, page 118, sec. 2.)

Under the title head of "Public Defense" is found most extensive, detailed, and comprehensive statutory provisions providing for its organization, maintenance and control, occupying 45 pages of the statutes. (Code Va., 1860, page 134).

It provides for salaried officers (do. 142, sec. 27). For pay of certain officers (do. 148, sec. 8). For annual muster (do. 147, sec. 4); two trainings annually for "the officers of each County" (do. 147, sec. 4). For cavalry and artillery (do. page 151, sec. 11). "In case of any invasion or insurrection within the limits of any division * * * the commandant of such division" has power "to order out for the defense of the State the militia or any part thereof" (do. 161, sec. 1). "The officers and soldiers when called into the actual service of the State shall be entitled to the same camp equipage, pay, subsistence, forage and other emoluments to which similar officers and soldiers are entitled in the service of the United States." (do. page 164, sec. 14.)

The expense of this establishment was large, and the amount $1,030,594.11 is admitted to be an "ordinary expense."

It is clear that the militia is organized and maintained not for continuous active service but only that from time to time as occasion may require it may be called into "actual service." It is maintained for the express purpose of meeting exigencies the nature of which cannot be specifically foreseen. The possibility of the occurrence of the exigency is all that can justify the existence of the militia establishment. If the expense of maintaining the militia in order that a State may be prepared to meet the exigency when the occasion arises is an "ordinary expense," it is diffi-

cult to see why the expense involved in meeting the exigency itself, thus provided for, the accomplishing of the sole purpose of the militia, is not also within the fair scope of an "ordinary expense." It is a legitimate part of the whole expense of the militia establishment. Its expenses should be treated as a whole. That the appropriations were made "for the defense of the Commonwealth" has no significance as showing that they were unusual or extraordinary. This language was no doubt used, not for the purpose of indicating that the Harpers Ferry Raid was unusual or extraordinary and beyond the scope of the militia's duties, but for the purpose of referring the appropriation to that branch of the public service which the legislature had technically designated the "Public Defense." That the Harpers Ferry Raid was signalized by important and far reaching consequences without precedent in the history of the State, and impossible of duplication, does not differentiate it from other, and less significant exigencies, that may have occurred or that might be expected to occur. It is not the cause, but the result of the exigency, which obstructs "in any part of this State the due execution of the laws thereof," and that "renders it necessary to invoke the militia." The Harpers Ferry Raid, was then, an exigency which might ordinarily occur, which was clearly within the contemplation of the legislature when it created and maintained the militia, one of the specific things for which the annual expenditures were made, and I think it is for these reasons, within the fair meaning of the decree an "ordinary expense," and the sum of $251,763.65 is therefore allowed as such.

PRIMARY SCHOOLS.

The amount expended on account of primary schools was $3,056,239.84 (Rec. p. 538-H). Of this amount thus expended, the defendant admits that the sum of $655,908.73 stated by them as "paid from capitation tax" is an ordinary expense and should be so charged. They deny that the balance of $2,400,331.11 is so chargeable for the reason that it was derived from other sources than the capitation tax or "on account of the source from which it was derived" (Rec. p. 515-D-1, p. 1; 538 H. Deft.'s Ex. D-2, p. 7).

The "Literary Fund" from which these expenditures were made came from three sources; First,

> "all money, stocks or other property which now or hereafter may belong to the Literary Fund" (App., p. 207);

Second,

> "Whatever shall accrue to the State from escheats, forfeitures or fines (except militia fines) from the estate of a decedent of which there is no other distributee or from any other property or derelict and having no other owner" (Code Va. 1849—App., p. 207).

Third, The auditor of public accounts was required by law to

> "set apart and pay into the Treasury to the credit of the Literary Fund for the purposes of education in primary and free schools, the *amount* of the capitation tax for the preceding year" (Act, March 25, 1853, App., p. 208).

From the fund thus created there was expended, $45,000.; $70,000., $75,000 and $80.000 annually (Code Va. 1860, pp. 416-7 note.)

I have already held, under a preceding paragraph, that an expenditure for this purpose was an ordinary expense, and not an "expenditure." It is conceded that as to $655,908.73, that conclusion is correct, because it was "paid from the capitation tax."

I find nothing in the legislation or in the decree that sustains this distinction. The sum of $655,908.73 was not "paid from the capitation tax." Under the express provision of the Statute, the capitation tax was paid "into the Treasury to the credit of the Literary Fund", and when it arrived in the Treasury it was mingled with all the other funds that were the property of the "Literary Fund." It is only the *amount* of the capitation tax that is paid out of the Treasury for the purposes of education. There are no earmarks upon the capitation tax by which it can be traced into the Treasury, and then out of the Treasury, as a disbursement for educational purposes. The provision as to the capitation tax is not an appropriation of the tax *per se*, but is simply a provision on the part of the state determining the minimum amount that shall be contributed annually from the revenues raised by taxation to the Literary Fund, to supplement the first and second sources of income. The amount to be spent "for the purpose of education" was by no means limited to the "amount of the capitation tax." It exceeded it by the amount of $2,400,331.11. These three sources of income when they reached the Treasury constituted a common fund known as the "Literary Fund." Out of

that common fund all of the disbursements were made for the purposes of education. The decree does not authorize me to inquire into the source from which the money reached the Treasury, and determine the amount of the ordinary expenses, expended from this fund, by the amount of any particular source, from which the fund derived its revenue. If one dollar expended for primary schools from the "Literary Fund" made up from these various contributions, is an ordinary expense, I can see no reason why every dollar coming from the same fund, and expended for the same purpose, is not also an "ordinary expense."

I therefore find that the sum of $3,056,239.84 is an ordinary expense. Inasmuch as the sum of $655,908.73 has already been included among the items which make up $18,207,684.29, there is to be added to it in order to charge $3,056,239.84 as an ordinary expense the difference between that sum and $655,908.73 or $2,400,331.11.

Alternative Finding.

I find at the request of the defendant, as an alternative finding, that the amount of the capitation tax during the period in which the sum of $3,056,239.84 was expended for schools was $655,908.73.

Surveys.

I have already held under Paragraph III, that the sum of $106,983.67 expended for surveys by the Board of Public Works was general in its character, and should be charged as an ordinary expense and the item is here so charged $106,983.67.

Summary Ordinary Expenses.

	The amount agreed upon between the parties, is.....	$18,207,684.29
1.	Tobacco receipts	$353,123.96
3.	Slaves transported and executed	$311,168.35
5.	Maps, Board of Public Works	$11,446.48
7.	International Exchanges ...	$2,836.19
9.	Printing Treasury Notes ..	$375.74
13.	Improvements in public square	$1,456.91
14.	Fugitive slave expense; reward additional	$2,201.00
16.	Calling out militia at Wheeling in 1836	$1,099.00
18.	Atty.-Genl.'s fees prosecuting Selden, Withers & Co. claim	$500.00
19.	Remodeling and repairing old building of Eastern Asylum	$5,000.00
	Support Western Asylum ..	$7,450.01
23.	Sundry Board of Public Works expenses	$36,728.50
24.	Interest on public debt	$18,574,747.84
	Expenses of Harper's Ferry Raid	$251,763.65
	Expended for primary schools	$2,400,331.11
	General expenses connected with surveys	$106,983.67
		$40,274,896.70

SUMMARY ALTERNATIVE FINDINGS.

1. At the request of the defendant, that the Commonwealth received from Tobacco Receipts....	$353,123.96
2. At the request of the plaintiff, that the Commonwealth expended for two Constitutional Conventions, held in 1829 and 1850	$258,906.28
4. At the request of the plaintiff, that under the acts of the legislature above referred to, the Commonwealth expended in running boundary lines.....	$16,704.78
5. At the request of the plaintiff, that the Commonwealth expended under acts of the legislature for maps.....	$16,628.04
6. At the request of the plaintiff, that the Commonwealth expended in original construction and other additions to or increase of the plant of the Deaf, Dumb and Blind Institution, the details of which are on pp. 5, 6 and 7 of Joint Ex. D-1	$80.661.94
8. At the request of the plaintiff. that the Commonwealth overpaid on Treasury notes	$50.00
At the request of the plaintiff that the Commonwealth lost on account of counterfeit money.	$190.00

11. At the request of the plaintiff, that the Commonwealth expended in the erection of buildings and additions thereto and installation of heating and lighting plants connected with the Va. Military Institute $151,000.00

12. At the request of the plaintiff, that the Commonwealth expended in "repairing and improving the buildings and furnishing a supply of water for the protection and preservation" of buildings &c. of the University of Virginia $25,000.00

13. At the request of the plaintiff, that the Commonwealth expended for Improvements to Capitol Square, the sum of.... $12,278.47

15. At the request of the plaintiff, that the Commonwealth expended on additions to Penitentiary lot, New Hospital, Buildings, etc. $13,947.48

17. At the request of the plaintiff, that the Commonwealth expended for "enlarging the hospital and infirmary and extending the college buildings, and for improvement and extension of the College museum" of the Medical College of Virginia ..... $25,000.

19. At the request of the plaintiff, that the Commonwealth expended on the Eastern & Western Asylums for items appearing on pages 531 to 538 incl.—Joint Ex. D-1, pp. 15 to 22 incl $331,845.56

20. At the request of the plaintiff, that the Commonwealth expended for Gun House at Alexandria $900.00

21. At the request of the plaintiff, that the Commonwealth expended for Cannon House, Surrey County $110.00

22. At the request of the plaintiff, that the Commonwealth expended for Cannon House for Richmond Artillery $1,079.09

23. At the request of defendant, that the Commonwealth expended for expenses of the B. P. W. $36,728.50

24. At the request of defendant, that the Commonwealth expended for interest on its public debt $18,574,747.84

I find in the alternative at the request of the plaintiff, that the amount of the ordinary expenses and the apportionment thereof, according to the claims of the plaintiff, are correctly stated on pages 515 and 516 of the Record.

Division of Ordinary Expenses of Government by Decades.

	Total.	1st decade ending Dec. 30th, 1830.	2d decade ending Sept. 30th, 1840.	3d decade ending Sept. 30th, 1850.	4th decade ending Sept. 30th, 1860.
Agreed Amount	$18,207,684.29	$2,902,808.21	$3,975,260.33	$4,514,816.97	$6,158,845.05
Schools	2,490,331.11	330,054.08	568,328.36	715,190.24	655,903.73 / 786,758.43
Tobacco Receipts	353,123.96	71,950.84	50,246.78	62,703.07	168,223.27
Slaves Transported and Executed	311,168.35	41,491.54	53,488.95	49,497.28	166,690.58
Maps (Board of Public Works)	11,446.48	4,428.79	.....	1,500.	5,517.69
International Exchanges	2,836.19	.....	.....	550.	2,286.19
Printing Treasury Notes	375.74	.....	.....	.....	375.74
Improvements to Public Square	1,456.91	1,456.91	.....	.....	.....
Fugitive Slave Expense	2,201.	.....	.....	.....	2,201.
Militia—Wheeling, 1838	1,099.	.....	1,099.	.....	.....
Attorney Generals Fees	500.	.....	.....	.....	500.
Eastern Lunatic Asylum—Repairs	5,000.	.....	.....	5,000.	.....
Western Lunatic Asylum—Support	7,550.01	.....	7,450.01	.....	.....
Board of Public Works—Expense	36,728.50	64.50	1,579.87	1,698.92	33,385.21
Interest on the Public Debt	18,574,747.84	274,278.17	1,146,146.43	3,682,978.86	13,471,344.38
Harpers Ferry Raid	251,763.65	.....	.....	.....	251,763.65
Surveys	106,983.67	42,046.76	49,450.09	14,818.09	668.73
	$40,274,896.70	$3,668,579.80	$5,853,049.82	$9,048,798.43	$21,704,468.65

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DIVISION OF ORDINARY EXPENSES OF GOVERNMENT BY PLAINTIFF'S METHOD AS SHOWN IN JOINT EXHIBIT D-1, PAGES 2-3.

ORDINARY EXPENSES DIVIDED BY DECADES.

Mar. 19, 1823, to Sept. 30, 1830	$3,668,579.80
Oct. 1, 1830, to Sept. 30, 1840	5,853,049.82
Oct. 1, 1840, to Sept. 30, 1850	9,048,798.43
Oct. 1, 1850, to Dec. 31, 1860	21,704,468.65
	$40,274,896.70

DIVIDED ON BASIS OF AVERAGE TOTAL POPULATION *INCLUDING* SLAVES.

1st Decade—Virginia 85.9789%	$3,154,204.56		
West Virginia 14.0211%	.....	$514,375.24	
2d Decade—Virginia 83.6218%	4,894,425.61		
West Virginia 16.3782%	.....	958,624.21	
3d Decade—Virginia 80.2045%	7,257,543.54		
West Virginia 19.7955%	.....	1,791,254.89	
4th Decade—Virginia 77.5014%	16,821,267.07		
West Virginia 22.4986%	.....	4,883,201.58	
Total Virginia		$32,127,440.78	
Total West Virginia			8,147,455.92
Grand Total as above			$40,274,896.70

DIVIDED ON BASIS OF AVERAGE TOTAL POPULATION *EXCLUDING* SLAVES.

1st Decade—Virginia 79.3334%	$2,910,409.09		
West Virginia 20.6666%	.....	758,170.71	
2d Decade—Virginia 76.1625%	4,457,829.07		
West Virginia 23.8375%	.....	1,395,220.75	
3d Decade—Virginia 71.9611%	6,511,614.89		
West Virginia 28.0389%	.....	2,537,183.54	
4th Decade—Virginia 68.8438%	14,942,180.99		
West Virginia 31.1562%	.....	6,762,287.66	
Total Virginia		28,822,034.04	
Total West Virginia			11,452,862.66
Grand Total as above			$40,274,896.70

DIVISION OF ORDINARY EXPENSES OF GOVERNMENT BY DEFENDANT'S METHOD AS SHOWN IN JOINT EXHIBIT D-1, PAGE 4.

Total Ordinary Expenses to be Divided $40,274,896.70

DIVIDED ON BASIS OF TOTAL AVERAGE POPULATION *WITH* SLAVES.

Virginia	81.3718%	$32,772,408.39
West Virginia	18.6282%	7,502,488.31

DIVIDED ON BASIS OF TOTAL AVERAGE POPULATION *WITHOUT* SLAVES.

Virginia	73.3369%	$29,536,360.72
West Virginia	26.6631%	10,738,535.98

I find that the method adopted by the plaintiff of, ascertaining "the average total population", is the closest and most accurate approximation upon which the ordinary expenses can be apportioned to "the average total population", as the object to be ascertained, is the population in existence, at the time the ordinary expenses to be apportioned, were paid, and I therefore adopt the plantiff's method.

PARAGRAPH V OF DECREE.

5. "AND ALSO ON THE BASIS OF THE FAIR ESTIMATED VALUATION OF THE PROPERTY, REAL AND PERSONAL, BY COUNTIES, OF THE STATE OF VIRGINIA."

This paragraph is clearly in the alternative with the last clause of Paragraph IV. That paragraph requires "such proportion of the ordinary expenses * * * on the basis of the total average population," and Paragraph V. "*also* on the basis of the fair estimated valuation," two alternatives, each predicated upon the same "ordinary expenses." How any proportion of the ordinary expenses can be predicated upon a valuation that is not coterminous with the "ordinary expenses", but taken two and a half years later under a profound change in conditions, affecting the amount of that valuation, can serve any useful purpose in apportioning such "ordinary expenses" it is difficult to see. If an ordinary expense is a charge upon valuation, it can only be a charge upon the valuation in existence at the time the "ordinary expense" is incurred, and not upon another and entirely different valuation at a later period. The case has, however, been tried upon the hypothesis that the "fair estimated valuation," is as of June 20, 1863, and while I think January 1, 1861 is the true date, I will first find the fair estimated valuation on June 20, 1863. Both parties start with the assessed valuation of real estate made in 1856, and which it was provided by Acts passed March 27, 1862 and March 28, 1863 "shall be permanent and not be changed" for those years respectively (App. p. 133). The taxes were assessed as of February 1

(Code of Va. 1860, p. 197, sec. 48) (Acts Gen. Assembly, 1863, Chap. 1, p. 1). The rate of assessment in '61 (See Plff. Ex. H-1) was at the rate of forty cents on a hundred. The Act of 1863 increased the rate of taxation to 100 cents on a hundred and generally, one hundred and fifty per cent. The Act of 1862 contained no provisions as to changing the assessment of real estate The Act of 1863, sec. 91, provided that

> "as many tracts of land and lots with improvements thereon situate in counties invaded by the public enemy have been permanently diminished in value by said invasion and despoiled and reduced in value by military occupation and by the waste and violence incident to war, it shall be the duty of the Commissioners of the Revenue for such counties upon the requisition of the owner of any real property situate in such counties or of his agent to make a new assessment of such real property upon the following basis and mode of valuation, viz.: The commissioner shall deduct from the amount at which such property stands assessed at its last assessment such sum as is equal to a fair estimate of the permanent diminution in the value thereof caused by the invasion of such county and of the permanent injury and damage inflicted upon such property by military occupation thereof and the waste and violence incident to war" (App. pp. 133-4).

and then follows a provision that the

> "permanent diminution, injury and damage"

should be measured by the "standard and rate of valuation" as if it had "been estimated during the year 1856," the remainder to be the valua-

tion to be assessed. The change of valuation could be made only "upon the requisition of the owner." The defendant claims that it is to be presumed that the owner made the application where there was any diminution in value for that cause and that as to the counties actually subjected to "military occupation" the presumption is that the assessors valuation for 1863 represents the actual value after these proceedings had been had. The law provided also for adding to or taking from the assessment on the addition or loss of buildings (Code of Va. 1860, chap. 35, secs. 31, 32, 33 & 34, pp. 193-4). Nothing appeared in the case to indicate that any requisitions had been made by owners for a reduction in value under the provisions of Sec. 91. If there is a presumption that the requisitions were made and the values were correspondingly reduced under the provisions of this section, that presumption is overcome by the fact that the valuation of real estate for 1863, was $378,534,712.35 (Rec. p. 639—Ex. E-1, p. 1) as against a valuation for 1861 $317,330,219.26 (Plffs. Ex. H-1, p. 647), and valuation for 1860 of, $377,947,112 (do).

It will be seen that the valuations for 1863 and 1860 are substantially the same. While the valuation for '63 exceeds that given for 1861, it should be noted that quite a number of counties were omitted in 1861 which were valued in 1863 at about $36,000,000, which added to $317,330,229,26 would make an aggregate of $353,330,229.36, so that the valuation of real estate in 1863 instead of being reduced as it inevitably would have been if there had been any diminution on the requisition of the owners, shows substantially the same value as in 1860 and an increase over 1861.

The assessments as stated in the schedules for Virginia and West Virginia stand therefore unaffected by any of the considerations growing out of the war conditions on June 20, 1863, and are practically the assessments of 1856.

The plaintiff claims that because of the fact that the real estate was within the limits of the Confederacy, whose territory was to a large extent the theatre of active war, occupied by contending armies, had been ravaged and in part destroyed, with agriculture and manufactures practically paralyzed, there was a depreciation of its value by at least fifty per cent in all of Virginia and the same in the counties of Berkeley, Greenbrier, Hampshire, Hardy, Jefferson, Mercer, Monroe, Morgan, Pendleton and Pocahontas in West Virginia (Rec., p. 640, Ex. E-1, p. 2).

If this contention is sustained the "fair estimated valuation of the real property of Virginia" would be $148,042,730.15; and in West Virginia, $67,676,127.44. To establish this, they rely upon the general presumption that a marked decrease in value would result from the war conditions, the opinions of witnesses and the sale of different parcels of real estate.

My attention has been called to cases tending to show that the assessments are admissible as tending to show the value of real and personal property at the time of the assessment. Inasmuch as each party relies upon the assessment as the basis of their respective valuations, and there is no other evidence in the case, and no other is probably obtainable, that tends to show the value of the real and personal property as a whole at the time in question, I shall treat the assessments

as one of the competent elements for the purpose of determining the fair estimated valuation.

The defendant contends that Virginia is estopped from denying that the assessed valuation in 1863 is the "fair estimated valuation" and rely upon *State* v. *Turnpike Co.*, 22 Tenn. (3 Humphrey), 305, and *State* v. *Hamilton*, 30 Tenn. (11 Humphrey), 47, which hold that the analogy between the agent of the state employed to "transact its ordinary business and operations" is complete between that of an agent of an individual person, acting through his agent, and the state is equally bound thereby. *State* v. *Crutcher*, 32 Tenn., 504, 515, is to the same effect except as an additional reason for holding that the setttlement involved in that case bound the state, it appeared that it had "received the approval of the legislature."

As to these cases it is to be said that the assessors assessing property are not acting as agents of that character. As is said in *Stanley* v. *Board of Supervisors*, 121 U. S., 535, also cited by the defendant, "their action is judicial in its character."

11 Amer. & Eng. Ency. of Law, 2nd Ed., 396, and cases cited, is relied upon as establishing the doctrine that a state may be estopped by its covenants in a deed.

The cases all proceed upon the theory that as to the deed or grant, the state acts in its private capacity, and is therefore governed by the same rules that apply under the same circumstances to private individuals, a state of facts that does not obtain at bar, as there is no deed or grant here, and there is no action by the state in

its private character and no ground for an estoppel. Cases like *Stanley* v. *Board of Supervisors*, 121 U. S. 535, are cited for the purpose of showing that the assessment cannot be attacked collaterally by a tax payer, but this is not a case of a tax payer contesting either the validity or the amount of the tax assessed, and those cases proceed upon the ground that remedies are provided by statute for the tax payers. Moreover, in that case the Court held that the valuation fixed, was not conclusive even as against the tax payer, as while they hold that the tax could not be attacked collaterally, they also hold that

> "when the over-valuation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction and operates unequally not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a Court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due" (pp. 550-1).

While insisting upon the position that the assessed valuation is conclusive upon Virginia, defendant calls my attention to cases, which it is contended, require me to take judicial notice that these valuations "are far below the market value of the property assessed".

In *State* v. *Savage*, 91 N. W. 716, 720, acting upon an assessment, the Court took judicial notice that it was "notorious" that the assessment was at only twenty to ten per cent of the value of the property.

In *Railroad & Tel. Cos.* v. *Board of Equalizers*, 85 F. R. 302, the Court said, if it "may judicially know an established custom" real property was assessed "at a rate not exceeding 75 per cent. of actual value" (p. 310). And the Court also said:

> "It is a matter of familiar and common knowledge with every citizen of the State [Tennessee] that ordinary real property is assessed for general taxation at a percentage ranging from 50 to 75 per cent. of actual value" (p. 308).

The Court cited *Railway* v. *Guenther*, 19 F. R. 395 where in speaking on the same subject, the Court said:

> "But from the other proof in the cause and from what the Court may judicially know"

the assessments were

> "one-fourth below their real value" (p. 399).

The Court in that case also cited *Board of Supervisors of Bureau County* v. *Chicago B. & Q. R. Co.*, 44 Ill. 229 where the Court said:

> "It is an admitted fact on both sides of this controversy that the property of no one owner in the County of Bureau has been taxed on its real value" (p. 239).

In that case it appeared that

> "property of individuals ranged from one-fifth to one-third of its cash value" (p. 237).

These facts appeared by proof and were not a matter of judicial notice.

In *Cummings* v. *National Bank*, 101 U. S. 153, also cited in the opinion, the Court said:

> "But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded" (p. 162).

The Court had already decided the case and it appeared "by the testimony of four or five assessors" that they had established a rule by which real and personal property was assessed at one-third of its actual value. The remark made by the Court was unnecessary to the decision, general in its character and expressly declared to be in "extenuation" of the practice thus disclosed to obtain in Ohio. The Court further said for the same purpose,

> "it is believed that the valuation of real estate for the purposes of taxation rarely exceeeds half of its current salable value" (p. 163).

It is not believed that the Court in using this general language by way of illustration, as a dictum, were laying down a legal rule for determining the value of real estate, and authorizing the Court by judicial notice to make a reduction from its assessed value.

These cases may perhaps be sustained upon the theory that

> "Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence" Cyc., Vol. 16, p. 852),

and the fact that the judicial notice is confined to the particular states under discussion.

I am not advised whether it is ten, twenty, thirty-three and a third, fifty or seventy-five per cent. of the valuation that I am expected to assume as a matter of judicial knowledge. If I am asked to hold that there is a universal custom, prevailing everywhere, to undervalue real estate for the purpose of taxation, I should not feel at liberty to so hold, for I know the contrary to be true. I know localities where the full value is intended to be assessed. There is no evidence in this case by which it could be inferred that any custom to undervalue prevailed in Virginia in 1856 or in 1863. If an undervaluation was a part of the common knowledge of every person of ordinary understanding at that time, nothing appeared in the record to indicate it, and I do not feel at liberty to assume it. The Act under which the assessment was made required the assessors to "examine all the lands and the lots with the improvements thereon * * * ascertain and assess the actual value thereof" (Sec. 4, Act. Mar. 10, 1856, p. 17). By Section 5, the Courts had the power to

> "reduce the same to what is in their opinion the true value of such lands or lots,"

and if too low, "they shall increase it in like manner".

The defendant contends in connection with these assessments that

> "It is a well settled principle that the law contemplates or presumes that all public officers in the discharge of their duties have acted according to the requirements of the law and have done all things which the law requires they shall do,"

and cites authorities which amply sustain that proposition. Such being the rule, when applied to this assessment it follows that in fixing the value of the real estate in 1856 the assessors fixed the "cash value thereof".

The defendants were requested to submit authorities upon the competency of the opinions of witnesses and actual sales upon the question of values on June 20, 1863. Having submitted none, I assume that they do not contend that upon the authorities evidence of that character is inadmissible. The evidence is objected to on the ground that its effect is to impeach the judgment of the revenue officers, and it is claimed that their judgment is thus being collaterally attacked. No question of taxation is involved here. The only question is what is a "fair valuation and assessment made in 1856 is the starting point in ascertaining that valuation on June 20, 1863.

The theory of the plaintiff involves the assumption that the assessment in 1856 was the true value at that time. It is their basis. That pronounced changes in value, especially in view of war conditions, may have occurred up to June 20, 1863, is too obvious for discussion.

The opinions of witnesses, sales, and conditions in 1863, and the use sought to be made of such evidence on the part of the plaintiff does not only fail to contradict, impeach or collaterally attack, but proceeds upon the assumption, that the action of the assessors is to stand, as the basis of the valuation.

It seems inevitable, that the existence of the war and its continuance from 1861 to June 20, 1863, the presence of the contending armies and

the condition of destruction and devastation necessarily incident thereto, produced a marked diminution in the value of the real estate within the limits of the Confederacy.

The difficult question is, how much was the depreciation. Upon this point the evidence is very fragmentary, indefinite and unsatisfactory, but it is all there is in the case from which that can be ascertained. The plaintiff shows thirty sales of real estate in the territory in question during the months of April, June, July and August, 1863 (Rec. 64-5-6-7-8). These sales were all undoubtedly in Confederate money, as it does not appear to be seriously controverted that all transactions in the Confederacy at that time were in Confederate money. Reduced to a gold basis they show an average depreciation from the assessed value of 62.90 per cent.

J. M. McWhorter, a witness for the defendant says that "there was depreciation. People were ready to dispose of their property and turn it into money" (Rec., p. 715). It was on account of the raids of Confederate armies (Rec., pp. 715-716). He testifies only as to Roane and Jackson Counties (Rec., p. 717) and makes no estimate as to the amount of the depreciation in those Counties.

Ex-Governor Atkinson, also a witness for defendant, was in Kanawha, Fayette, Nicholas, Greenbrier, Jackson, Roane, Putnam and Mason counties, more or less of which, were overrun at times by both armies (Rec., p. 787). He says

> "It necessarily materially reduced the values of all kinds of property all through this region of the country" (Rec., p. 788).

From shortly after September, 1862, until the close of the war the Federal forces occupied the great Kanawha valley (Rec., pp. 787 and 790). The counties above referred to were largely situated in this valley. He had no doubt but that

> "property values did increase in the upper part of the State to some extent during the period of the War, which part was not burdened by soldiers of either side; but for the Southern portion of the State, I cannot believe, taking the whole period of the War, that the valuation of personal property and real estate increased at all" (Rec., pp. 794-5).

He says "that in the whole Southern tier of counties" real estate "did materially depreciate" (Rec., p. 795). He expresses no opinion as to the percentage of increase on the one hand or decrease on the other.

The counties that plaintiff concedes should have their values reduced are the whole Southern tier of Counties (Rec., p. 640, Ex. E-1, p. 2) and the counties as to which Mr. McWhorter and Mr. Atkinson testify are such as were substantially in the great Kanawha Valley that was under Federal control shortly after September, 1862, until the close of the War.

This is in substance the evidence upon the part of the defendant bearing directly upon the question of value.

The plaintiff relies upon a number of witnesses who appear to have had some opportunity to know of the conditions in a great deal of the territory in Virginia that was the subject of military occupation. They all agree that great damage was done and that there was great deterioration in value. (Hunter, 741; Scott, 748; Branch, 754;

Wellford, 761; Taylor, 769; Hawes, 772; Williams, 778; McCabe, 783-4).

Hunter says that it:

> "is almost entirely a matter of conjecture, but I should suppose it would be fair—of course I just hazard this—to state that the values were destroyed one-half at least, taking the whole State at large" (Rec., p. 742).

He says it was "impossible to base any satisfactory judgment as to values" (Rec., p. 742). In answer to the question as to whether real estate was worth "less than one-half," Scott says, "Undoubtedly in gold values" (Rec., p. 748).

Branch says:

> "I don't consider that I know enough to express an opinion in regard to real estate. It was very much depreciated * * * I am satisfied (though I am not speaking of any sale I now remember) that it depreciated fully one-half" (Rec., pp. 756-7).

Wellford—reducing Confederate money to gold, says the value was not "over-one-half" as before the War (Rec., p. 763).

Taylor—Fifty to Sixty per cent. depreciation (Rec., p. 770).

Hawes—Depreciation, fifty per cent. (Rec., p. 779).

Williams—Average lands in Virginia were not worth 25 per cent. in 1863 in good money (Rec., 779).

McCabe expresses no opinion as to the amount of depreciation.

Indefinite, uncertain and unsatisfactory as these statements are, the defendants though examining its witnesses upon the same general subject after this testimony was taken, made no effort to contradict their statements or opinions. This, with the sales, is all the evidence there is, and it is perhaps true that at this late day, nothing more satisfactory could be obtained. Taking it with the presumption of the great decrease in value resulting from the War conditions, I think the estimate made by the plaintiff is as close and approximate as can be reasonably made of the fair estimated value of the real estate on the 20th day of June, 1863, and I therefore find that the fair estimated valuation of the real estate in the counties in Virginia on that day was, $148,042,-730.15. The plaintiff concedes that the same reduction should be made in the Southern tier of ten counties of West Virginia. I find the value of the real estate in said counties to be $14,773,124.60.

There is no evidence that taking West Virginia as a whole there was any decrease in its value. While Ex-Governor Atkinson says, that in the upper part of the State "values had increased to some extent," and that

> "but for the Southern portion of the State I cannot believe, taking the whole period of the War, that the valuation of personal property and real estate increased at all. On the contrary, I am quite confident that it did not do so" (Rec., p. 795).

he afterwards said that in the southern tier of counties it materially depreciated. He expresses no opinion upon the question of depreciation of the state as a whole. His statement as to the in-

crease of value of the upper part of the State has some corroboration in the fact that agriculture was carried on in that section at a handsome profit in 1863 and 1864 (Rec., p. 798).

The same reduction having been made in the Southern tier of ten counties on account of the War conditions that has been made upon the real estate in Virginia, I think it reasonable to take the assessed valuation in West Virginia for the remaining counties without making any addition for any increase in value "in the upper part of the State" as the fair estimated value of the real estate in those counties on June 20, 1863.

And I therefore find that the fair estimated value of that portion of West Virginia was $52,903,002.84, which added to the valuations fixed upon the Southern tier of counties makes the aggregate of the fair estimated value of the real estate in the Counties of West Virginia the sum of, $67,676,127.44.

Alternative Finding.

I find in the alternative at the request of the defendant that the assessed valuation of the real estate in the counties constituting the State of Virginia on June 20, 1863, was $296,085,460.31 and that the assessed valuation of the real estate in the counties constituting West Virginia was $82,449,252.04.

Personal Property.

The total valuation of personal property including slaves and not including income in the counties of Virginia, was, according to the last obtainable assessment prior to June 20, 1863

(Rec., p. 639, Ex. E-1, p. 1), $403,696,228.59. The same valuation for the counties in West Virginia was $30,394,487.21 (do.).

The witnesses all agree that there was a great diminution in quantity of stock of all kinds and provisions as compared with 1860 and 1861.

Hunter says: "Very largely; very largely" (Rec., p. 743).

> Scott says: "Personal property of all sorts had become so scarce that by reason of its scarcity it had a fictitious value, almost in Confederate money. There were not any horses to spare left, very few cows, very little furniture, very few farming utensils and very little live stock."
>
> "There was ten times as much personal property in 1861 as there was in 1863" (Rec., p. 749).

The value of horses was much more in 1863 (Rec., p. 750).

Branch says: other personal property had depreciated fifty per cent. (Rec., p. 757).

Wellford: "Immense diminution in the quantity" of personal property (Rec., p. 763). Hogs made into bacon, and horses, were worth more. He says that Lincoln's Proclamation had "very little effect" upon the value of slaves "until the surrender of Vicksburg and Gettysburg. It was laughed at and ridiculed by most people" (do., p. 763). Leaving out cotton and tobacco, personal property depreciated 75 per cent. Carriages and wagons and farming utensils were pretty well worn out (do., p. 764). Nearly one-half of the horses and cattle were gone (do., p. 765).

Taylor—Depreciation 50 to 75 per cent. (do., p. 769) "except such things as were absolutely in

demand like horses, provisions and things that you would have to have'' (do., p. 769).

Hawes—Live stock and poultry were swept off. (do., p. 772). Amount carried off large (do., p. 774).

Williams—Depreciation was less than fifty per cent. (do., p. 779).

McCabe—Live stock was swept away (do., p. 785).

While these statements as to the amount of personal property destroyed are probably somewhat exaggerated I have no doubt there was a marked reduction in quantity, and an abnormal increase in demand, caused by the presence of the contending armies in large numbers for such personal property as horses, cattle, sheep and hogs which would necessarily tend to largely increase their value. All fowl and animals of every description (except horses, mules, asses, cattle, sheep and hogs), all farming implements actually used for farming purposes and all mechanics' tools used on any farm or by any person actually engaged in any other occupation or profession were exempt from taxation, and are not included in the aggregate of personal property above given.

The plaintiff claims that the assessment upon which the valuation of personal property is based was made in Confederate money on February 1, 1863, which at that date was at the rate of 4 to 1, and that therefore in order to get the valuation in gold the assessment should be reduced seventy-

five per cent. An analysis and comparison of the assessments of 1861 and 1863 does not sustain this contention. For the purpose of making this analysis and comparison I have had prepared an abstract of the personal property assessment for 1863, so far as obtainable from the records, marked "Supplemental Ex. 4", and a comparison of average assessed valuations marked "Supplemental Ex. 5." If the assessment of 1863 was made upon the same basis as the assessment of 1861 and there was an increase in the value of horses &c., cattle, sheep and hogs, we should expect to find in the assessment of 1863, a larger average sum assessed on account of such property than was assessed in 1861. If a basis of valuation four times as great as that of 1863 was adopted, we should expect to find a general increase in the value as to all the items included in the assessments, approximating at least, the basis used. In the case of pleasure carriages and other vehicles, the assessment of 1863 compared with 1861 in six instances at least is less than the assessment of 1861. In case of watches, it was less in two counties, and in case of clocks in ten counties. In the case of pianos and harps, in 19 counties.

In making these comparisons it is to be noted that the valuations in 1861 as a rule are somewhat less than the valuations in 1860. I have not made computations in connection with all of the items in all of the counties, but I have made computations enough to satisfy me that there has been no horizontal increase of the rate of assessment on the basis of four to one.

The largest increase was in connection with the items as to which the greater increase in value was to be expected. In the case of sheep, the

greatest increase that I find is 450 per cent. and I find that in only twenty-four counties was there an increase of 300 per cent. or over. In cattle, the largest increase I find is 321 per cent, and I find only three counties in which there was an increase of 300 per cent. or over. The largest increase in the case of hogs was 461 per cent. and I find only nine counties in which there was an increase of 300 per cent. or over. I find that in one county there was an increase in the valuation of clocks of 332 per cent.

The assessment of the various articles of personal property in a number of counties will show that nothing approximating a horizontal increase could have been made in 1863. I have selected for comparison in the following counties, as they show some of the largest increases in valuation and are more favorable to the plaintiff's contention. In Amherst County the increase on horses &c. was 136 per cent.; pleasure carriages, 46 per cent.; cattle, 221 per cent.; sheep 400 per cent.; hogs, 347 per cent.; watches, 99 per cent.; clocks, 16 per cent.; pianos and harps, 43 per cent. Fluvanna County, horses 122 per cent.; pleasure carriages, 54 per cent. cattle 257 per cent. sheep 300 per cent. hogs, 300 per cent. watches 55 per cent. clocks 29 per cent. pianos and harps 55 per cent.

Henrico County—Horses, 79 per cent.; pleasure carriages, 51 per cent.; cattle, 316 per cent.; sheep, 358 per cent.; hogs, 479 per cent.; watches, 58 per cent.; clocks, 63 per cent.; pianos and harps, 40 per cent.;

Goochland County—Horses, etc., 105 per cent.; pleasure carriages, 7 per cent.; cattle, 266 per cent.; sheep, 335 per cent.; hogs, 304 per cent.;

watches, 56 per cent.; clocks, 7 per cent.; pianos and harps, 10 per cent.;

Powhatan County—Horses, etc., 83 per cent.; pleasure carriages, 28 per cent.; cattle, 257 per cent.; sheep, 440 per cent.; hogs, 338 per cent.; watches, 37 per cent.; clocks, 86 per cent.; pianos and harps, 17 per cent.

The average increase per head of these various items of personal property in 1863, compared with 1861, is: Horses, 93 per cent.; pleasure carriages, 30 per cent.; cattle, 140 per cent.; sheep, 228 per cent.; hogs, 164 per cent.; watches, 58 per cent.; clocks, 34 per cent.; pianos and harps, 25 per cent.

Plaintff says that the counties of Accomac, Alexandria, Northampton, Norfolk City, Norfolk, and Portsmouth "are included in the comparison and that the assessment in those counties was made "at its full value in lawful money of the United States, and not in Confederate currency." Inasmuch as the schedule shows no assessment in Alexandria in 1861, none in Norfolk for 1863, none in Norfolk City for 1861 and 1863, and none in Portsmouth for 1863, those counties standing alone, would not appear to have much value. Alexandria comes nearest to the other counties in amounts assessed and a comparison with its values will show that there could have been no general increase of assessments on the basis of 4 to 1. There are sixteen counties where the value of horses was less than $100 and three less than $81.01, the value in Alexandria; viz., Carroll, $72.43; Highland, $45.62, and Northumberland, $79.82. Horses—Alexandria, $81.01; average for State, $125.25; Amherst, $152.49; Fluvanna, $155.67; Goochland, $171.69; Henrico, $146; Powhatan, $139.06. Carriages—Alexandria, $103.28;

average in State, $90.28; Amherst, $116.68; Fluvanna, $110.31; Goochland, $91.60; Henrico, $114.12; Powhatan, $88.93. Cattle—Alexandria, $29.50; average in State, $24.28; Amherst, $34.89; Fluvanna, $41.72; Goochland, $44.16; Henrico, $71.67; Powhatan, $33.03. Hogs—Alexandria, $5.00; average in State, $5.26; Amherst, $8.77; Fluvanna, $8.47; Goochland, $9.62; Henrico, $23.16. Watches—Alexandria, $27.85; average in State, $51.41; Amherst, $85.07; Fluvanna, $53.67; Goochland, $59.08; Henrico, $62.81; Clocks—Alexandria, $3.87; average in State, $5.64; Amherst, $6.97; Fluvanna, $5.76; Goochland, $6.59; Henrico, $6.35. Pianos—Alexandria, $111.41; average in State, $182.46; Amherst, $215.59; Fluvanna, $237.20; Goochland, $205.96; Henrico, $181.05.

The marked increases that appear are clearly in connection with the articles that must have necessarily increased in value and very few of those show an increase of 300 per cent.

It is a fair inference from all the testimony that there was an actual increase in value upon the gold basis of horses, etc., cattle, sheep and hogs. The differences in value are what would naturally be expected from the difference in location and the fact that the values were fixed by different Commissioners. The analysis of the assessments distinctly negatives the idea that there was any change in basis of valuation. If Hawes, who says (Rec., p. 774) that horses would sell for $400, $1,000 and $1,500, and Williams: "A mighty poor horse you could get for $500" (do., p. 781) are correct, inasmuch as the average assessed value in 1863 for horses was $125.25, it is impossible that the assessment could have been made in Con-

federate money on the basis of their actual value. No one having any personal knowledge testified to the assessment having been made in Confederate money.

Plaintiff claims that Taylor and Williams testified that taxes "were assessed in Confederate money." Taylor testified:

> "Q. 11. In what kind of money were taxes assessed and paid at that time—in 1863? A. Confederate money" (Rec., p. 768.)

Williams testified:

> "Q. 1. In 1863 what was the currency of the country here, the currency in which taxes were assessed and paid and transaction of all kinds had? A. The only currency in use was Confederate Treasury notes and State Bank notes."

and the rest of the answer makes no reference to the assessment.

> "Q. 2. What currency was the measure of value in 1863? A. Confederate currency. The bank notes were for a long time at a premium but they became finally as worthless as Confederate money" (Rec., p. 781).

He does not state when they were at a premium or when they became worthless. Neither of these witnesses were assessors and it does not appear that they had any personal knowledge, or how they derived such information as they have. It is not contended that real estate was assessed in Confederate money. The testimony of these witnesses covers all taxes and must be incorrect as to real estate. It may be it was intended to ask them as to personal property, but the question

was not so asked or answered. Is it true that all taxes were "paid" in Confederate money when the law in force shortly after the time of the assessment, Feb. 1, 1863 did not authorize the payment of taxes of less than five dollars in Confederate money?

I do not question the honesty or sincerity of the witnesses, but the judicial action of the assessors at the time would seem to be the better criterion of value.

The inference of assessment in Confederate money is sought to be drawn from the fact that the taxes were payable in Confederate money, and that business transactions were in Confederate money.

The Act of March 22, 1862 (Acts 1862, p. 32: App. p. 132), made Confederate notes receivable for taxes without any limit. The Act of March 28, 1863 (Acts of 1863, Chap., 1, Sec. 109: App. p. 132), made Confederate notes of the denomination of or over five dollars receivable for taxes, and the Act of Sept. 14, 1863 (Acts of 1863, Chap. 1, Sec. 1), made them receivable generally. An assessment in Confederate money (Feb. 1, 1863) as to those whose tax was less than $5.00 and could not be discharged in Confederate money would operate somewhat oppressively.

The act of March 28, 1863, raised the rate of taxation as compared with 1861 on the average, approximately, 150 per cent. The purposes for which the public expenditures were made were not increased; if anything, the purposes for which revenue was expended were less in 1863, than in 1861, as it is conceded that the discharge of many of the public functions which involved

expenditure by the Government at that time, were to quite a degree suspended. 150 per cent. more money was collected and disbursed to accomplish the same results that were accomplished in 1861.

The war expenses of Virginia it is conceded were met by loan. In the matter of taxation and the money collected therefor, the element of Confederate money was apparently reflected in the increase of 150 per cent. in the rate of taxation, rather than in the assessment.

The fact that personal property throughout the country generally very largely appreciated in value between 1861 and 1863 is of some significance. It seems clear that the basis of assessment was not Confederate money. Horses as an illustration were apparently assessed upon the same basis as in 1861 and at their fair value. If one item was assessed upon that basis, and upon its cash value, no reason is perceived why all of the other items of personal property, involved in the same assessment, were not made upon the same basis, and I see no reason why the rule does not apply to slaves, as well as to other personal property. While there are inconsistencies and incongruities in connection with these assessments which it is difficult to explain, I have to take this branch of the case upon the elements that I find, and I do not think the plaintiffs have sustained the burden of showing the horizontal decrease from thee assessed value of 75 per cent. The only other alternative is the value fixed by the assessors on the basis of the assecsment in 1861, and I therefore find that the assessed value of the personal property is the fair estimated valuation of the personal property on the 20th day of June, 1863, namely:

In Virginia	$403,696,228.59
In West Virginia	30,394,487.21

(Rec., 639, Ex. E-1, p. 1.)

It appears that the amount of income upon which an income tax was assessed in Virginia, as per the latest obtainable assessment rolls, prior to June 20, 1863, was in Virginia. $11,108,300.13
and in West Virginia 299,257.45

The defendant claims that these sums are a part of the personal property and should be so returned. These sums represent "the value of his income during the next year preceding" the date upon which the assessment was made (Code Va. 1860, Sec. 151, p. 198), where it exceeds $250. It is gross, not net income. The fact that that amount was received in income during the preceding year, by no means indicates that it was on hand at the end of the year, especially where the tax was upon incomes as small as $250 a year. The inference is that it was not so on hand. So far as it was on hand unspent, it would necessarily be represented by "money on hand or securities or other personal property," which items have already been included in the aggregate of personal property above given. If the gross income was to be treated as personal property on hand, it would result in duplicating it in the aggregate of value so far as it was on hand. I disallow the "income" as part of the personal property, June 20, 1863.

ALTERNATIVE FINDING.

I find at the request of the defendant that the amount of the income assessed for the year 1863 was for Virginia counties	$11,108,300.13
West Virginia counties.....	299,257.45

A fair estimated valuation of the property, real and personal, in Virginia counties, on January 1, 1861, I find to be as follows:

The parties agree that on that date, the fair estimated valuation of the slaves within the territory of the present Commonwealth of Virginia was at that time	$162,537,936
The fair estimated value of the other personal property in Virginia counties was	$102,114,863

This sum is reached by taking the amount of the assessment for 1861 (Rec., p. 645), $100,201,850, and adding thereto the assessment for Chesterfield for 1861 (Plff. Ex. H1., p. 355), $1,077,368, and Goochland (Plff. Ex. H1., p. 395), $835,645, these two counties not being included in the Schedule (Rec., p. 645), as no original books were found showing those assessments.

Real estate in Virginia	$293,018,031.30
Total real and personal in counties in Virginia including slaves	$557,670,830.30

And that the fair estimated valuation of such slaves at that time in the counties now constituting the State of West Virginia was	$6,319,624
Other personal property in West Virginia (Supplemental Ex. 6)	$23,469,172.
Real estate in West Virginia....	$83,600,730.55
Total real and personal in counties in West Virginia including slaves	$113,389,526.55

SUMMARY.

June 20, 1863.	
Fair estimated value of real estate in Virginia counties....	$148,042,730.15
Fair estimated valuation of personal property including slaves in Virginia counties..	$403,696,228.59
Total real and personal in counties in Virginia including slaves	$551,738,958.74
Fair estimated value of real estate in West Virginia counties	$67,676,127.44
Fair estimated valuation of personal property including slaves in West Virginia counties	$30,394,487.21
Total real and personal in counties in West Virginia, including slaves	$98,070,614.65

Fair estimated valuation of real estate in counties in Virginia	$148,042,730.15
Fair estimated valuation personal property in counties in Virginia without slaves	$152,844,637.59
Total real and personal in counties in Virginia without slaves	$300,887,367.74
Fair estimated valuation of real estate in counties in West Virginia	$67,676,127.44
Fair estimated valuation personal property in counties in West Virginia without slaves	$24,739,894.21
Total real and personal in counties in West Virginia without slaves	$92,416,021.65

ALTERNATIVE FINDING.

AT THE REQUEST OF DEFENDANT.

The assessed valuation of real estate in the counties of Virginia June 20, 1863 was	$296,085,460.31
The assessed valuation of real estate in the counties of West Virginia June 20, 1863 was	$82,449,252.04
Amount of income assessed in Virginia counties, 1863	$11,108,300.13
In West Virginia counties in 1863	299,257.45

Jan. 1, 1861.	
The fair estimated valuation of the slaves within the territory of the present Commonwealth of Virginia.....	$162,537,936.
Of the other personal property in Virginia counties was	$102,114,863.
Real estate in Virginia	$293,018,031.30
Total real and personal in counties in Virginia including slaves	$557,670,830.30
The fair estimated valuation of slaves in the counties now constituting the State of West Virginia was	6,319,624.
Other personal property in West Virginia (Supplemental Exh. 6)	$23,469,172.
Real estate in West Virginia	$83,600,730.55
Total real and personal in counties in West Virginia including slaves	$113,389,526.55

I find in the alternative at the request of the plaintiff that the apportionment of the ordinary expenses as found by me on the basis of values as claimed by plaintiff as shown in Joint Exhibit E-1, p. 2-a, excluding slaves is

Virginia, ...	$28,278,857.62
West Virginia, ...	$11,996,039.08

and on the same basis as shown in Joint Exhibit E-1, p. 3-a, including slaves,

Virginia, ...	$30,441,418.20
West Virginia, ...	$ 9,833,478.50

I find in the alternative at the request of the plaintiff that the apportionment of the ordinary expenses of the government as claimed by the plaintiff, on the basis of the values as claimed by the plaintiff, excluding slaves is as appears upon Joint Exhibit E-1, p. 2-a, and including slaves as appears upon Joint Exh. E-1, p. 3-a.

Fair Estimated Valuation—Virginia,
June 20, 1863:

Personal Property, *Including* Slaves.	$403,696,228.59	
Real Estate	148,042,730.15	
Total	$551,738,958.74	=84.9078%

Fair Estimated Valuation—West Virginia
June 20, 1863:

Personal Property, *Including* Slaves.	$30,394,487.21	
Real Estate	$67,676,127.44	
Total	$98,070,614.65	=15.0922%

Ordinary Expenses of Government.. $40,274,896.70

Divided on above basis:

Virginia	84.9078%	=$34,196,528.74
West Virginia	15.0922%	= 6,078,367.96

Fair Estimated Valuation—Virginia,
June 20, 1863:

Personal property, *without* Slaves..	$152,844,637.59	
Real Estate	148,042,730.15	
Total	$300,887,367.74	=76.5026%

Fair Estimated Valuation—West Virginia
June 20, 1863:

Personal Property, *without* Slaves..	$24,739,894.21	
Real Estate	67,676,127.44	
Total	$92,416,021.65	=23.4974%

Ordinary Expenses of Government.. $40,274,896.70

Divided on above basis:

Virginia	76.5026%	=$30,811,343.12
West Virginia	23.4974%	= 9,463,553.58

Fair Estimated Valuation—Virginia,
Jan. 1, 1861:

Slaves	$162,537,936.	
Other Personal Property	102,114,463.	
Real Estate	293,018,031.30	
Total	$557,670,430.30	=83.1029%

Fair Estimated Valuation—West Virginia
Jan. 1, 1861:

Slaves	$6,319,624.	
Other Personal Property	23,469,172.	
Real Estate	83,600,730.55	
Total	$113,389,526.55	=16.8971%

Ordinary Expenses of Government.. $40,274,896.70

Divided on above basis:

Virginia	83.1029%	=$33,469,607.13
West Virginia	16.8971%	= 6,805,289.57

Fair Estimated Valuation—Virginia,
Jan. 1, 1861:

Personal Property, *without* Slaves.	$102,114,463.	
Real Estate	293,018,031.30	
	$395,132,494.30	=78.6799%

Fair Estimated Valuation—West Virginia
Jan. 1, 1861:

Personal Property *without* Slaves.	$23,469,172.	
Real Estate	83,600,730.55	
	$107,069,902.55	=21.3201%

Ordinary Expenses of Government.. $40,274,896.70

Divided on above basis:

Virginia	78.6799%	=$31,688,248.45
West Virginia	21.3201%	= 8,586,648.25

PARAGRAPH VI OF DECREE.

"6. ALL MONEYS PAID INTO THE TREASURY OF THE COMMONWEALTH FROM THE COUNTIES INCLUDED WITHIN THE STATE OF WEST VIRGINIA DURING THE PERIOD PRIOR TO THE ADMISSION OF THE LATTER STATE INTO THE UNION."

I think the moneys paid into the Treasury of the Commonwealth from the Counties included within the State of West Virginia are intended to be the converse or complement of the expenditures made by the Commonwealth of Virginia in the same territory. These were public expenditures for public purposes. The amounts paid in are also to be public payments in discharge of some tax or public burden, or sums paid by the public, for the use of a public utility owned by the state.

The parties agree upon the sum of $5,954,395.66 (Rec., p. 805; Ex. F-1, p. 1).

The following items are in controversy:

1. Bonus received from Banks.....$96,253.62

The details which are essential to the determination of this item do not appear in the Record. They are in "Supplemental Ex. 3," certified by both accountants. The first payment of $5,000 was paid in 1838. The Act of 1837, Chap. 82, p. 66, relative to Banks, provided as follows:

> "Sec. 7. That in consideration of the privileges hereby granted, there shall be paid to the Commonwealth, by every bank hereafter chartered, out of each semi-annual dividend, a sum equal to one fourth of one per centum upon the then capital stock, which shall be paid by creating additional stock to that

amount in the name of the Commonwealth, for the benefit of the fund for internal improvement."

This Act provided for a payment of a franchise or excise tax in stock. The item of $5,000 paid in 1838 appears to be in cash. There is nothing in the Record to indicate that it was stock paid under this statute. It is entered upon the books as a cash payment by the Bank. As no other explanation is given of the item, I will assume as a fair inference from the entry, that it was a tax paid in stock, and afterwards converted into cash to the amount of $5,000 and allow it upon that assumption as a payment.....$5,000

All of the other payments were made under an Act passed March 25, 1842 (Acts of Va., 1841-2, p. 61, Chap. 105, Sec. 14) which provided that in consideration of the privileges hereby granted that a sum equal to one-fourth of one per centum upon the capital stock "shall be paid semi-annually by the said banks into the Treasury of this commonwealth."

This was a general statute and the tax imposed was a franchise or excise tax of the same kind as those referred to in the Code of Virginia, Chap. 40, Sec. 41, p. 249, the chapter defining the "Amount or rate of tax." It is included among other subjects of taxation and is clearly treated in the general statutes as a tax and I hold that it is a franchise, or excise tax, and therefore properly to be credited under that paragraph $96,253.62

ALTERNATIVE FINDING.

At the request of the plaintiff, I find that the banks located in West Virginia paid into the

Treasury of the Commonwealth for the privilege of exercising their franchises during the period above mentioned and in the manner above indicated ..... $ 96,253.62

7. Dividends from Banks in West Virginia counties $786,666.98

These are not in any sense public payments. They are dividends which the State received on its own stock held in its private capacity, and are of the same character as the dividends paid to other stockholders. They are no more a public payment, or the discharge of a public burden, than are the dividends that are paid to the other stockholders. West Virginia is not charged with the investment, and no reason is perceived why she should receive a return upon a private investment which she refuses to assume.

The item is disallowed.

8. Dividends and interest from Turnpike Companies in West Virginia counties $13,595.48
9. Dividends from Bridge Companies in West Virginia $6,028.51
10. Dividends from Interstate Turnpike Companies (proportion)... $1,355.92

are of the same character and are disallowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the defendant that the aggregate of the last four mentioned items was all paid in dividends into the Treasury of the Commonwealth upon stock held by the Commonwealth, in said companies, whose

banks and roads were located in West Virginia, with the exception of the dividends from Interstate Turnpike Companies (in which case the amount paid was in proportion to the portion of the road located in West Virginia), namely: $807,646.89.

11. Dividends from James River and Kanawha Company $352.21

14. Interest from the City of Wheeling $571.81

These items have both been withdrawn.

20. Merchants & Mechanics Bank Stock sold (bonus stock) $43,103.35

The Act incorporating the Merchants and Mechanics Bank (Acts of Virginia, 1833-4, Chap. 72, p. 84, Sec. 20), provided:

> "20. *And be it further enacted,* That in consideration of the privileges hereby granted to the said bank, there shall be paid to the commonwealth by the said bank, the sum of twenty-five thousand dollars, to be paid in twenty semi-annual instalments; which instalments when paid in shall be converted into stock, and a dividend thereon shall be declared from time to time, in the same manner as on shares held by individuals; the first instalment shall be paid one year after the first dividend be declared; *Provided,* That should the capital stock of said bank, at any time hereafter, be increased beyond the sum of three hundred thousand dollars, a similar bonus shall be paid on such increase, proportioned to the time for which this charter shall remain in force" (do. p. 92).

The Commonwealth received, under this section, from this bank 400 shares of stock which were

sold for $43,103.35 (Rec. p. 809). This was clearly a franchise or excise tax payable in stock instead of cash and is allowed.

ALTERNATIVE FINDING.

I find in the alternative at the request of the plaintiff that the Commonwealth received from the Merchants and Mechanics' Bank "in consideration of the privileges" granted to it as a franchise tax 400 shares of stock which was sold for $43,103.35.

21. Northwestern Bank—Profit on 1,082 shares sold, $5,471.42.

This item has been withdrawn by the defendant.

22. Northwestern Turnpike Road tolls, $126,339.89.

The defendant is charged with the expenditure on this road, which was a public work, and the money that was paid into the Treasury in tolls by the public for the use of the road is the converse of the public expenditure made by the State and comes fairly within the meaning of the decree and is allowed so far as it exceeds the amount of tolls expended for repairs.

23. Staunton & Parkersburg Road tolls, $17,080.71 is also allowed for the same reason.

These tolls were used for making repairs on the respective roads, $109,587.74 in the case of the Northwestern Turnpike and $21,700.74 in the case of the Staunton and Parkersburg Turnpike, in all repairs, $131,288.48. (Rec., 373, Ex. C. 1, p. 2.) The aggregate of tolls received on both roads is $143,420.60, making, taking both roads together, a

net receipt of tolls, $12,132.12. The excess of tolls all occurs in the case of the Northwestern Turnpike and strictly speaking, the account should be stated, showing the excess of receipts in connection with that item, with an excess of charge for repairs in connection with the Staunton and Parkersburg Turnpike. Both roads in the discussion, however, have been taken together and the net result is precisely the same, and I therefore take the two items together and allow as a credit the net excess as above stated $12,132.12

ALTERNATIVE FINDING.

At the request of the plaintiff, I find that in the case of the last two items, the aggregate of $143,420.60 was paid into the Treasury of the Commonwealth as tolls upon roads owned wholly by the Commonwealth as the result of public expenditure the roads being public in their character and the tolls being paid by the public for the use thereof.

SUMMARY.

Money paid into the Treasury of the Commonwealth from the counties included within the State of West Virginia:

	Amount agreed upon	$5,954,395.66
1.	Bonus received from Banks..	$96,253.62
20.	Merchants & Mechanics Bank Stock sold (bonus stock)....	$43,103.35
22. 23.	Northwestern Turnpike Road & Staunton & Parkersburg Road net tolls.....	$12,132.12
		$6,105,884.75

ALTERNATIVE FINDINGS.

1. At the request of the plaintiff; that the banks located in West Virginia paid into the Treasury of the Commonwealth of Virginia "in consideration of the privileges" granted ..... $ 96,253.62

Under Items 7, 8, 9 and 10:

At the request of the defendant, that the aggregate of these items was all paid in dividends into the Treasury of the Commonwealth upon stock held by the Commonwealth in said companies $807,646.89

20. At the request of the plaintiff, that the State received from the Merchants and Mechanics Bank, as a franchise tax 400 shares of stock which was sold for $43,103.35

Under items 22 and 23:

At the request of the plaintiff, that the aggregate of these two items was paid into the Treasury of the Commonwealth by the public as tolls upon roads owned wholly by the State $143,420.60

PARAGRAPH VII OF DECREE.

"7. THE AMOUNT AND VALUE OF ALL MONEY, PROPERTY, STOCKS AND CREDITS WHICH WEST VIRGINIA RECEIVED FROM THE COMMONWEALTH OF VIRGINIA, NOT EMBRACED IN ANY OF THE PRECEDING ITEMS AND NOT INCLUDING ANY PROPERTY, STOCKS OR CREDITS WHICH WERE OBTAINED OR ACQUIRED BY THE COMMONWEALTH AFTER THE DATE OF THE ORGANIZATION OF THE RESTORED GOVERNMENT OF VIRGINIA, TOGETHER WITH THE NATURE AND DESCRIPTION THEREOF."

Under this Paragraph I find that the State of West Virginia received nothing in money from the Commonwealth of Virginia prior to the date of the organization of the Restored Government of Virginia or subsequent thereto.

ALTERNATIVE FINDING.

I find as an alternative finding, at the request of the plaintiff, that the State of West Virginia received from the Restored Government of Virginia sums of money as follows:

July 2, 1863	$92,866.17	
July 2, 1863	$47,734.03	$140,600.20
July 9, 1863		$9,399.80
Feb. 1, 1864		$20,771.46
		$170,771.46

Under the provisions of the Act passed February 3, 1863 (App. p. 128), there was transferred

to the State of West Virginia, among other things,

> "the interest of this state or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within the said boundaries; and all stocks of any other company or corporation, the principal office or place of business whereof is located within the said boundaries, standing in the name of this state or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state" (do. p. 129).

While there is nothing in the record to show where the principal offices or places of business of the various turnpike companies, navigation companies and bridge companies are (Rec., 820 B, C, D, E. F, G, J. K), it is conceded upon the part of the defendants that the companies mentioned in said schedules had their "principal office or place of business" "located within the said boundaries," that is, the State of West Virginia, and such stock was transferred to West Virginia by the operation of said Act of February 3, 1863.

And it is conceded upon the part of West Virginia under Paragraph VII, that the stock in the various corporations above referred to, except the interstate companies, is included within the provisions of this Paragraph of the decree.

The only evidence in the Record bearing on the value of these various stocks are the facts that appear by these schedules showing the amounts paid by the State for its subscription to the stock of the various companies, and so far as dividends have been paid by said companies, the

amount of the dividends that have been paid, certain admissions relating thereto, and the testimony of a number of witnesses as to the physical condition of the property of some of the companies, and the statement of the condition of the banks. In the case of many of the turnpike companies, no dividends were paid and the only fact that I have is the amount that the State paid upon its subscription. In such cases the evidence does not seem to me sufficiently definite to enable me to find that the stock at the time of its transfer to West Virginia had any value, as the inference to be drawn from the fact that no dividends have been paid is, that the property was not able to earn any return upon the investment, and an investment that can pay no return could hardly be considered to have any market value. In the cases where dividends have been paid during a number of years, I have the amount of the investment made by the State with the rate of the dividends, and in such cases I have capitalized the dividend upon the basis of the stock being worth par with a six per cent. dividend, and have determined the value accordingly, except in cases where it appears that the property of the company may have been destroyed prior to June 20, 1863. The method that I have adopted is, I appreciate, arbitrary but it is the only method that seems to be feasible on the facts presented.

As to the Turnpike Companies intended to be covered by the stipulation (Rec., p. 864) the stipulation is too indefinite and uncertain to be of any assistance in determining the value of any particular road. The defendant contends that it covers some sixty-five roads and the plaintiff concedes only four. Only three of the roads claimed

by the defendant were paying dividends in 1860, viz.: Grave Creek and Pennsylvania Line Co.; Holiday Cove Co. and the Martinsburg & Potomac. As to these in order to eliminate any controversy, as to the construction and effect of the stipulation, the plaintiff concedes that for the purposes of this report, the interest of the Commonwealth in the stock of those companies was of no value, June 20, 1863.

As to the 18 Turnpike Companies mentioned on page 820-B Rec., only the last—Grave Creek and Pennsylvania Line Co., admitted to be of no value—appears to have ever paid any dividend. The earliest was incorporated in 1837; the latest in 1853. Under these circumstances, I find that the stock that the Commonwealth owned in those companies had no value.

None of the sixteen turnpike companies mentioned on Page 820-C, Rec., (eliminating Holiday Cove and Martinsburg & Potomac as of no value) declared any dividends, they having been organized between the dates of 1847 and 1854 and there is nothing to indicate that the stock had any market value on June 20, 1863 and I therefore find that these stocks were of no value.

The first fifteen turnpike companies mentioned on page 820-D, Rec., with the exception of the New Creek and Hardy Turnpike Company do not appear to have paid any dividends from the date of their incorporation up to 1860, the earliest being incorporated in 1830. The New Creek and Hardy Turnpike Company appears to have paid one dividend of $271.25 upon an investment on the part of the Commonwealth of $5,431.24 in 1850.

Under these circumstances, it does not appear that there are sufficient facts in the record to jus-

tify me in finding that there was any market value to the stock the Commonwealth held in any of these companies on the 20th day of June, 1863, and I therefore find that the stocks had no market value.

The Sheperdstown and Smithfield Turnpike Company, incorporated in 1816, in which the Commonwealth had invested in the stock $18,575, appears to have paid eight dividends during the period of 23 years ending in 1839 with no dividends since that date. The first dividend was paid in 1832, $399.38, and the last in 1839 of $40, showing a marked decrease in the dividend during the dividend paying period, with no dividends for the 22 years intervening between 1839 and 1861, and upon this state of facts I find that the stock in that company had no value on June 20, 1863.

Of the four remaining companies on page 820-D, Rec., only one appears to have paid any dividends. As to the other three, I find that their stock had no value on June 20, 1863.

The Sweet and Salt Sulphur Springs Turnpike Company, organized in 1849, in the stock of which the Commonwealth had an investment of $10,104, (820-D, Rec.) began to pay dividends in 1855 and paid continuously until 1859, the dividend in 1859 being $459. The average dividend paid during the five years of the dividend paying period was $491.92. No dividend appears to have been paid in 1860, but the inference from the payment of dividends of a substantial amount, for the preceding five years, makes it reasonably certain that the property was of value and had a dividend paying capacity. Why a dividend in 1860 was not paid, does not appear, but in the absence of any evidence showing any injury to the physical value

of the property, or any unusual loss or the occurrence of any fact tending to destroy its value, I think it is a reasonable inference that the failure to pay the dividend must have been for a cause other than one affecting the real value of the stock, and on the basis of the last dividend of 4½ per cent. the investment of the Commonwealth would be worth $7,578, on the 20th day of June, 1863, and I value it at $7,578.

The first five turnpike companies mentioned on page 820-E, Rec., organized from 1847 to 1851 do not appear to have paid any dividends, and I therefore find that the stock that the Commonwealth held therein was of no value on June 20, 1863.

The White and Salt Sulphur Springs Turnpike Company, organized in 1834, in the stock of which the Commonwealth had invested $4,000, paid dividends continuously with the exception of two years from 1838 to 1860, the last dividend being $400, with an average dividend of $240 a year or 6%, I therefore value the interest that the Commonwealth held in the stock of this company at par, $4,000.

The other six turnpike companies mentioned on page 820-E, Rec., with the exception of Wellsburg and Washington Turnpike Company do not appear to have paid any dividends, and I therefore find that the interest that the Commonwealth held in the stock of these companies was of no value on June 20, 1863.

The Wellsburg and Washington Turnpike Company organized in 1808, in which the Commonwealth had an investment of $7,071.01, paid two dividends in 1837 and 1838, the last being $212.13, and has declared no dividends since, and

I find that under those circumstances the stock of that company on June 20, 1863 had no value.

The four navigation companies mentioned on page 820-F, Rec., organized between 1817 and 1853 do not appear to have ever declared any dividends and I find that the stock of the Commonwealth in these companies had no value June 20, 1863.

It is admitted that the bridge of the Buchannon Bridge Company was destroyed April 1863, and that the bridge of the Cheat River Toll Bridge Company was destroyed in the same month, and that the bridge of the Elk River Bridge Company, was destroyed in 1862. The bridge of the North Branch Bridge Company was destroyed in 1862, and the bridge of the South Branch Bridge Company was destroyed in 1862, and that the bridge of the Virginia and Maryland Bridge Company was destroyed in 1861 (Rec., p. 863).

I find that the stock in these companies was of no value on June 20, 1863.

The Fairmont and Palatine Bridge Company, in the stock of which the Commonwealth had invested $12,000 it is admitted paid a six per cent. "dividend for several years after the end of the war on the par value of the stock of $12,000 assigned to the State of West Virginia therein," and for that reason I find that that stock was of the value on June 20, 1863 of $12,000 (Rec., p. 863).

The Guayandotte Bridge Company and the Morgantown Bridge Company, incorporated respectively in 1848 and 1850, have never paid any dividends and for the reasons given above, I find that the stock that the Commonwealth held in those companies was of no value on June 20, 1863.

The four turnpike companies referred to on

page 820-G, Rec., organized respectively in 1832, 1837 and 1851 do not appear to have ever paid any dividends and for that reason, I hold that the stock in those companies on June 20, 1863 was **of no value.**

The five turnpike companies referred to on page 820-H, Rec., with the exception of the Hillsborough and Harpers Ferry Turnpike Company and the Martinsburg and Winchester Turnpike company, while organized in 1846, 1851 and 1856, respectively, do not appear to have ever paid any dividends, and for that reason I hold that the stock was of no value on June 20, 1863.

The Hillsborough and Harper's Ferry Turnpike Company, incorporated in 1849, in the stock of which the Commonwealth invested $6,000 declared only one dividend of $240 in 1856, and upon that state of facts I am not able to find that the stock had any value on the 20th day of June, 1863.

The Martinsburg and Winchester Turnpike Company, organized in 1838, in the stock of which the Commonwealth had invested $27,000 declared two dividends one in 1859 and one in 1860 of $803.27 and $405 respectively. Taking the last dividend as the basis of valuation which was at the rate of one and ½ per cent. or ¼ of 6 per cent., I find that the stock in that company was on June 20, 1863 of the value of $6,750.

There is nothing in the record to show where "the principal office or place of business" of this road is located and I do not understand that the admission of the defendant applies to interstate roads. I am not able to find that this stock was ever transferred to West Virginia. This is an interstate road 59.09% being within the counties included within the State of West Virginia.

Of the two corporations mentioned on page 820-J, Rec., one the North Frederick Turnpike

Company in which the Commonwealth invested in its stock $11,325 in 1851, paid only one dividend and that in 1857, and upon these facts I do not feel authorized to find that the stock had any value on the 20th of June, 1863.

The Raleigh and Wythe Line Turnpike Company, organized in 1860, in which the Commonwealth paid on an authorized stock subscription of $4,800, $400 only, does not appear to have paid any dividend that year and apparently could hardly have been fully constructed. There is not sufficient data in the record to enable me to form any opinion as to its value, and therefore, I do not find that the stock had any value on June 20, 1863.

On the 20th of June, 1863, the Commonwealth held 3,418 shares of the capital stock of the Northwestern Bank of Virginia of a par value of $100, which if worth par would be worth $341,800. This par value was at first conceded by the defendant to be chargeable to West Virginia (Rec., p. 280-A, Deft.'s Ex. G-1, p. 1). Since filing the schedule making this admission, West Virginia withdrew the admission and changed it to $136,630., and that sum was reached as follows:

It appears from the testimony of Mr. Dering (Rec., p. 892) and the certificate of J. S. Darst, the auditor of West Virginia (do., p. 851) and supplemental brief filed by defendant, that West Virginia received on account of the original stock in the Northwestern Bank of Virginia at Wheeling, 300 shares of stock in the National Bank of West Virginia in the City of Wheeling, 400 shares of stock in the Parkersburg National Bank of Parkersburg, West Virginia, and 351 shares of stock, in the first National Bank of Wellsburg,

at Wellsburg, West Virginia, these being the banks that were the successors of the Northwestern Bank of Virginia, known as the parent bank and of its branches at Parkersburg and Wellsburg, respectively. The par value of the shares was $100. At their par value they would be worth $105,100. The record contains nothing as to the assets of these banks, upon which an estimate of the value of this stock can be made. It further appears that dividends from the remaining assets of the Northwestern Bank of Virginia were received by West Virginia as follows:

July 9, 1867	$10,510.00
August 12, 1868	$10,510.00
Sept. 1, 1871 (in deft.'s brief)	$10,510.00
	$31,530.00

which added to the $105,100 makes the total amount now admitted by West Virginia as the value of the 3,418 shares of the stock of the Northwestern Bank. There is nothing in the record to show when this bank was reorganized or the circumstances under which the reorganization took place. The auditor's report of West Virginia shows the stock was delivered July 1, 1866. The reorganization and the distribution of the stock in the various banks, and of the cash dividends, appear to have taken place three years and more after June 20, 1863. Upon the other hand, as indicating the value of the stock, there is a joint "Supplemental Ex. 8" certified by the accountants for both parties, showing that the dividend for 1860 upon the stock of the Northwestern Bank was eight per cent. and the average dividend from

1844 to 1860 inclusive was 7½%, or 1-4 more than 6%. The statement of the condition of the Bank in a return made February 27, 1861, showing the condition on Jan. 1, 1861, and one of the Fairmont bank dated Apr. 27, 1861, showing its condition Apr. 1, 1861, are marked "Supplemental Ex. 9."

The defendant concedes that the Fairmont bank that was paying only a 4% dividend was worth par June 20, 1863 (Rec., p. 820-A).

There is nothing to indicate any change of any kind in the condition of the Northwestern Bank, either by way of assets or business or capacity to declare dividends between Jan. 1, 1861 and June 20, 1863. That it met with some serious financial difficulties between January 1, 1861, and July 1, 1866, would seem to be a necessary conclusion from the condition of the bank at the time of its reorganization, but as to what they were, or when they occurred, the record is silent.

A comparison between the Fairmont Bank and the Northwestern will be instructive on the question of value. The notes due from other banks in Virginia to the Northwestern increased from 1860 to 1861 approximately 100%, and there was substantially the same percentage of increase of similar notes due to the Fairmont Bank. The surplus and profits of the Northwestern decreased from 1860 to 1861, 10%. In the Fairmont Bank there was an increase of 11%. If the Fairmont Bank had paid a dividend of 6% instead of 4% the decrease would have been substantially the same. The surplus of the Northwestern was nearly 12% of its capital, of the Fairmont about 5¾%. In the Northwestern the deposits decreased 4% and in the Fairmont 20%. The Fairmont Bank appears to have paid but one dividend

of 4%. The Northwestern had an established business and had been paying dividends regularly since 1843 at an average rate of 7½% (for four years 10%), and was paying 8% in 1860. If under these circumstances the Fairmont Bank stock was worth par, it seems that the Northwestern stock should be worth at least ¼ more than par, and I would be justified in applying the same rule as to value, that I have applied to the public service corporations, and I therefore add ¼ to the par value and find the value of the stock June 20, 1863, to be $427,250.00.

I think it clear that this is a conservative value Jan. 1st, 1861, two years and five months prior to the time when the valuation is made. There is a presumption of continuance. There was great expectation of success in the Confederacy, until Gettysburg in July, 1863, which had some tendency to maintain credit conditions, and while my conclusion is largely arbitrary, taking everything into account, I think the valuation reached reasonable.

ALTERNATIVE FINDING.

I find in the alternative at the request of the defendant that West Virginia received on account of the reorganization of the Northwestern Bank in stock and cash $136,630. between July 1, 1866, and Sept. 1, 1871, and it does not appear that at that time the Northwestern had any other assets.

I find pursuant to the admission of the defendant (Rec. 820 A) that the stock of the Fairmont bank was of the value of $50,000.

A detailed statement of the investment of the Commonwealth in the capital stock of the James

River and Kanawha Company appears on pages 820-L and 820-M, Rec. By this it appears that 3.49 per cent. of the improvement was located in West Virginia (p. 820-M). The only dividend that the company appears to have ever paid is $10,092. in 1836 (p. 820-L).

Under these circumstances I find that the stock of this Company had no value on June 20, 1863.

Summary.

I find the values set against the respective companies as follows:

Sweet & Salt Sulphur Spring Co. stock	$7,578.
White & Salt Sulphur Spring Co. stock	$4,000.
Fairmont & Palatine Bridge Co. stock	$12,000.
Northwestern Bank of Va. stock	$427,250.
Fairmont Bank stock	$50,000.
Total	$500,828.

Alternative Findings.

Received by West Virginia from the Restored Government	$170,771.46
Received by West Virginia between July 1, 1866 and Sept. 1, 1871, from the reorganization of the Northwestern Bank in stock and cash	$136,630.

GENERAL SUMMARY.

Paragraph I.

Amount of the Public Debt of the Commonwealth of Virginia January 1, 1861, $33,897,073.82.

Stated as a Special Circumstance:

Amount of bonds of Commonwealth held by Sinking Fund, $1,369,243.92.

Amount of bonds of Commonwealth held by Literary Fund $1,116,843.35.

Amount of Bonds Chesapeake & Ohio Canal Co. guaranteed by Virginia in 1847 $300,000.

Paragraph II.

1. Extent:			
Land Area:			
Virginia	40,262	Square Miles =	62.6314%
West Virginia	24,022	do. =	37.3686%
Total	64,284	do. =	100%
Total Area:			
Virginia	42,627	Square Miles =	63.8157%
West Virginia	24,170	do. =	36.1843%
Total	66,797	do. =	100%
2. Assessed Valuation:			
Real Estate:			
Virginia	$296,085,460.31	=	78.2188%
West Virginia	82,449,252.04	=	21.7812%
Total	$378,534,712.35	=	100%
Population:			
With Slaves:			
Virginia	1,221,319	=	75.4855%
West Virginia	396,633	=	24.5145%
Total	1,617,952	=	100%
Without Slaves:			
Virginia	748,171	=	66.4769%
West Virginia	377,289	=	33.5231%
Total	1,125,460	=	100%

ALTERNATIVE FINDINGS.

At the request of defendants, I make an alternative finding that the population of the counties now forming the State of Virginia, as shown by the census of the United States for 1860, is as follows:

Without slaves,	747,136=67.5864%
With slaves,	1,219,630=76.4027%

And for the counties now forming the State of West Virginia:

Without slaves,	358,317=32.4136%
With slaves,	376,688=23.5973%

The assessed valuation of the territory of Virginia for 1860 was: $293,105,895.55

The assessed valuation of the territory of West Virginia for 1860 was: $83,814,355.61

PARAGRAPH III.

Expenditures made by the Commonwealth of Virginia within the territory now constituting West Virginia are as follows:

1.	Amount agreed upon by both parties	$1,251,288.92
2.	Covington & Ohio R. R.	$1,146,460.42
10.	Kanawha Turnpike	$ 152,130.54
11.	" "	$ 2,593.92
12.	" "	$ 7,189.65
13.	" "	$ 80,955.28
14.	Kanawha River Improvements	$ 59,572.36

25. Brandonville, Kingwood & Evansville Road	$	10,595.73
28. Clarksburg & Buchannon Turnpike (Macadamizing)	$	19,259.36
35. Kingwood & West Union Turnpike	$	18,140.61
55. Surveys—expended directly within the territory	$	60,873.19
150. Road from Bath to St. Johns River	$	2,500.00
Total		$2,811,559.98

ALTERNATIVE FINDINGS:

At the request of defendant.

The Commonwealth received on account of the Blue Ridge Railroad in bonds and interest	$625,348.08
and was relieved from a contingent liability upon a guarantee of	$100,000.00

3. At the request of the plaintiff, the Commonwealth subscribed and paid for capital stock of the Winchester & Potomac Railroad Company, to the extent of. $120,000.00

The Commonwealth loaned to the said company	$150,000.00
Upon the basis of mileage, the proportion of these sums that would be chargeable to West Virginia, is	$170,532.00

I state as a special circumstance important to be taken into account that as a result of legislation predicated upon both the

stock and loan that the Commonwealth had in this Road, there was paid into the Commonwealth in 1886, the sum of $118,518.12

6. At the request of the plaintiff, that the Commonwealth subscribed and paid for stock in the Berryville and Charlestown Turnpike Co. and upon the mileage basis of 58 1/3 per cent. the amount chargeable to West Virginia would be $11,932.52

15. At the request of the plaintiff, that the Commonwealth loaned to the Kanawha Board of its bonds ..... $60,000.

56. At the request of the plaintiff, that ..... $27,000 was in the hands of the Treasurer of the Trans-Allegheny Lunatic Asylum, deposited in the Weston Branch of the Exchange Bank of Virginia, unexpended, January 1, 1861, which was afterwards taken from the Bank by the Restored Government of Virginia and subsequently returned to the Asylum.

At the request of the plaintiff, that in the various bridge companies, located in West Virginia. Items 57 to 65, inclusive, the Commonwealth subscribed and paid for stock $78,412.50

That in the various navigation companies located in West Virginia Items 66 to 69, inclusive, the Commonwealth subscribed and paid for stock $210,500.00

That in the various Turnpike companies, Items 70 to 147, inclusive, all of which were in the territory now constituting West Virginia, the Commonwealth subscribed and paid for stock $803,555.83
700,103.49 of which was wholly in Virginia and $103,452.34 was West Virginia's portion in case of companies partly within her limits.

That in the two banks mentioned in Items 148 and 149, within the territory now constituting the State of West Virginia the State subscribed and paid for stock $391,800.00

At the request of the defendant, I find that the sum of $2,500 was invested under circumstances where the trustees of the Town of Bath assumed a contingent liability, only, of paying the interest upon the sum expended by the State, after the tolls remaining from the operation of the road after the payment of "necessary expenses and repairs" and profits received from the operation of a spring,

were applied thereto, and that this was the only liability that the trustees of the Town of Bath assumed in connection with this expenditure of..... $2,500.

PARAGRAPH IV.

SUMMARY ORDINARY EXPENSES.

	The amount agreed upon between the parties, is.....	$18,207,684.29
1.	Tobacco receipts	$353,123.96
3.	Slaves transported and executed	$311,168.35
5.	Maps, Board of Public Works	$11,446.48
7.	International Exchanges	$2,836.19
9.	Printing Treasury Notes....	$375.74
13.	Improvement in public squares	$1,456.91
14.	Fugitive slave expense; reward additional	$2,201.00
16.	Calling out militia at Wheeling, in 1836	$1,099.00
18.	Atty.-Gen.'l fees prosecuting Selden, Withers & Co. claim	$500.00
19.	Remodelling and repairing old building of Eastern Asylum	$5,000.00
	Support Western Asylum....	$7,450.01
23.	Sundry Board of Public Works expenses	$36,728.50
24.	Interest on public debt.....	$18,574,747.84
	Expenses of Harper's Ferry Raid	$251,763.65
	Expended for primary schools	$2,400,331.11

General expenses connected with surveys	$106,983.67
	$40,274,896.70

SUMMARY ALTERNATIVE FINDINGS.

1. At the request of the defendant, that the Commonwealth received from Tobacco Receipts	$353,123.96
2. At the request of the plaintiff, that the Commonwealth expended for two Constitutional Conventions, held in 1829 and 1850	$258,906.28
4. At the request of the plaintiff, that under the acts of the legislature above referred to, the Commonwealth expended in running boundary lines.....	$16,704.78
5. At the request of the plaintiff, that the Commonwealth expended under acts of the legislature for maps	$16,628.04
6. At the request of the plaintiff, that The Commonwealth expended in original construction and other additions to or increase of the plant of the Deaf, Dumb and Blind Institution, the details of which are on pp. 5, 6 and 7 of Joint Ex. D-1.....	$80,661.94

8. At the request of the plaintiff, that the Commonwealth overpaid on Treasury notes.....	$50.00
10. At the request of the plaintiff, that the Commonwealth lost on account of counterfeit money	$190.00
11. At the request of the plaintiff, that the Commonwealth expended in the erection of buildings and additions thereto and installation of heating and lighting plants connected with the Va. Military Institute.....	$151,000.00
12. At the request of the plaintiff, that the Commonwealth expended in "repairing and improving the buildings and furnishing a supply of water for the protection and preservation" of buildings &c. of the University of Virginia	$25,000.00
13. At the request of the plaintiff, that the Commonwealth expended for Improvements to Capitol Square the sum of....	$12,278.47
15. That the Commonwealth expended on additions to Penitentiary lot, New Hospital, Buildings, etc.	$13,947.48
17. At the request of the plaintiff, that the Commonwealth ex-	

pended for "enlarging the hospital and infirmary and extending the college buildings, and for improvement and extension of the college museum" of the Medical College of Virginia $25,000.00

19. At the request of the plaintiff, that the Commonwealth expended on the Eastern & Western Asylums for items appearing on pages 531 to 538 incl. —Joint Ex. D-1, pp. 15 to 22 incl. $331,845.56

20. At the request of the plaintiff, that the Commonwealth expended for Gun House at Alexandria $900.00

21. At the request of the plaintiff, that the Commonwealth expended for Cannon House, Surry County $110.00

22. At the request of the plaintiff, that the Commonwealth expended for Cannon House for Richmond Artillery 1,079.09

23. At the request of defendant, that the Commonwealth expended for expenses of the B. P. W... $36,728.00

24. At the request of the defendant, that the Commonwealth ex-

pended for interest on its public debt	$18,574,747.84

I find in the alternative at the request of the plaintiff, that the amount of the ordinary expenses and the apportionment thereof, according to the claims of the plaintiff, are correctly stated on pages 515 and 516 of the Record.

PARAGRAPH V.

June 20, 1863.	
Fair estimated value of real estate in Virginia counties	$148,042,730.15
Fair estimated valuation of personal property including slaves in Virginia counties	$403,696,228.59
Total real and personal in counties in Virginia including slaves	$551,738,958.74
Fair estimated value of real estate in West Virginia counties	$67,676,127.44
Fair estimated valuation of personal property including slaves in West Virginia counties	$30,394,487.21
Total real and personal in counties in West Virginia, including slaves	$98,070,614.65
Fair estimated valuation of real estate in counties in Virginia	$148,042,730.15

Fair estimated valuation personal property in counties in Virginia without slaves	$152,844,637.59
Total real and personal in counties in Virginia without slaves	$300,887,367.74
Fair estimated valuation of real estate in counties in West Virginia	$67,676,127.44
Fair estimated valuation personal property in counties in West Virginia without slaves.....	$24,739,894.21
Total real and personal in counties in West Virginia without slaves	$92,416,021.65

ALTERNATIVE FINDING.

AT THE REQUEST OF DEFENDANT.

The assessed valuation of real estate in the counties of Virginia June 20, 1863 was.....	296,085,460.31
The assessed valuation of real estate in the counties of West Virginia June 20, 1863 was..	$82,449,252.04
Amount of income assessed in Virginia counties, 1863	$11,108,300.13
In West Virginia counties in 1863	299,257.45

Jan. 1, 1861.

A fair estimated valuation of the property, real and personal, in Virginia counties, on January 1, 1861, I find to be as follows:

The parties agree that on that date, the fair estimated valuation of the slaves within the territory of the present Commonwealth of Virginia was at that time.....	$162,537,936
The assessed value of the other personal property in Virginia counties was	$102,114,863

This sum is reached by taking the amount of the assessment for 1861 (Rec., p. 645), 100,201,-850, and adding thereto the assessment for Chesterfield for 1861 (Plff. Ex. H1., p. 355), 1,077,368, and Goochland (Plff. Ex. H1., p. 395), 835,645, these two counties not being included in the Schedule (Rec., p. 645), as no original books were found showing those assessments.

Real estate in Virginia	293,018,031.30
Total real and personal in counties in Virginia including slaves	$557,670,830.30
And that the fair estimated valuation of such slaves at that time in the counties now constituting the State of West Virginia was	$6,319,624

Other personal property in West Virginia (Supplemental Exh. 6)	$23,469,172
Real estate in West Virginia	$83,600,730.55
Total real and personal in counties in West Virginia including slaves	$113,389,526.55

I find in the alternative at the request of the plaintiff that the apportionment of the ordinary expenses as found by me on the basis of values as claimed by plaintiff as shown in Joint Exhibit E-1, p. 2-a, excluding slaves is

Virginia, ...	$28,278,857.62
West Virginia, ...	$11,996,039.08

and on the same basis as shown in Joint Exhibit E-1, p. 3-a, including slaves,

Virginia, ...	$30,441,418.20
West Virginia, ...	$9,833,478.50

I find in the alternative at the request of the plaintiff that the apportionment of the ordinary expenses of the government as claimed by the plaintiff, on the basis of the values as claimed by the plaintiff, excluding slaves is as appears upon Joint Exhibit E-1, p. 2-a, and including slaves as appears upon Joint Ex. E-1, p. 3-a.

PARAGRAPH VI.

Money paid into the Treasury of the Commonwealth from the counties included within the State of West Virginia:

Amount agreed upon	$5,954,395.66
1. Bonus received from Banks....	$96,253.62
20. Merchants & Mechanics Bank Stock sold (bonus stock).....	$43,103.35
22. Northwestern Turnpike Road 23. Staunton & Parkersburg Road net tolls	$12,132.12
	$6,105,884.75

ALTERNATIVE FINDINGS.

1. At the request of the plaintiff, that the banks located in West Virginia paid into the Treasury of the Commonwealth of Virginia "in consideration of the privileges" granted ..... $ 96,253.62

Under items 7, 8, 9 and 10:

At the request of the defendant, that the aggregate of these items was all paid in dividends into the Treasury of the Commonwealth upon stock held by the Commonwealth in said companies $807,646.89

20. At the request of the plaintiff, that the State received from the Merchants and Mechanics Bank, as a franchise tax 400 shares of stock which was sold for $43,103.35

Under items 22 and 23:

At the request of the plaintiff, that the aggregate of these two items was paid into the Treasury of the State

by the public as tolls upon public roads owned wholly by the State....	$143,420.60

PARAGRAPH VII.

I find the values set against the respective companies as follows:

Sweet & Salt Sulphur Spring Co. stock	$7,578.
White & Salt Sulphur Spring Co. stock	$4,000.
Fairmont & Palatine Bridge Co. stock	$12,000.
Northwestern Bank of Va. stock..	$427,250.
Fairmont Bank stock	$50,000.
Total	$500,828.

ALTERNATIVE FINDINGS.

Received by West Virginia from the Restored Government ...	$170,771.46
Received by West Virginia between July 1, 1866 and Sept. 1, 1871, from the reorganization of the Northwestern Bank in stock and cash	$136,630.

Dated, New York, March 17, 1910.

CHARLES E. LITTLEFIELD,

Special Master.

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VIRGINIA *v.* WEST VIRGINIA.

IN EQUITY.

No. 3. Original. Motion to proceed with the further hearing and determination of the case. Submitted October 10, 1911.—Motion overruled October 30, 1911.

Even if the question in litigation is important and should be disposed of without undue delay, a State cannot be expected to move with the celerity of an individual; a motion made in this case by complainant that the court proceed to determine all questions left open by the decision in 220 U. S. 1, denied without prejudice.

The conference suggested by this court, 220 U. S. 36, is one in the cause to settle the decree and not to effect an independent compromise out of court.

THE facts are stated in the opinion.

Mr. Samuel W. Williams, Attorney General of the State of Virginia, for the complainant in support of the motion.

Mr. W. G. Conley, Attorney General of the State of West Virginia, for the defendant in response to motion.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a motion on behalf of the Commonwealth of Virginia that the court proceed to determine all questions

left open by the decision of March 6, 1911. 220 U. S. 1. The grounds of the motion are these: On April 20, 1911, the Virginia Debt Commission wrote to the Governor of West Virginia, referring to the suggestion of a conference between the parties in the decision, and requested that he would take steps that would lead to such a conference at an early date. At that time the Governor of West Virginia had called an extra session of the Legislature upon another matter. The constitution forbad the Legislature, when so convened, entering upon any business except that stated in the call, but as there were twenty-six days between the call and the session that followed it, there was time for the Governor to issue a further proclamation on the subject of the debt. The Governor in his message to the Legislature referred to the matter, and put, as questions to be considered, whether the appointment of the Virginia Debt Commission was enough to require West Virginia now 'to take the initiative,' and whether a Commission should be appointed to meet the Virginia Commission. He also stated that if, without formal action of three-fifths of the body under the Constitution, a majority should express to him the opinion that the Legislature ought to be called into extraordinary session to consider the matter, he should deem it sufficient reason for a call. But it seems that he did not use his power of his own motion or receive such an expression as induced him to use it, and the Legislature does not meet in regular session until January, 1913. The Commonwealth of Virginia concludes from these facts that there is no likelihood of a conference with any satisfactory results.

The Attorney General of West Virginia answered that the members of the Legislature convened in May, 1911, were elected before this cause had been argued and under conditions that left them uncertain as to the wishes of their constituents; that the Governor was of opinion that he could not constitutionally amend his proclamation so

as to embody consideration of the debt, and that there is no one in West Virginia except the Legislature that has power to deal with the matter. He then suggested a doubt whether the Virginia Debt Commission was empowered to deal with the case in its present phase, in view of the provision in the Resolution creating it that it should not negotiate except upon the basis that Virginia is bound only for the two-thirds of the debt that she had provided for, and concluded that this court ought not to act before the West Virginia Legislature at its next regular session can consider the case in the spirit anticipated by the opinion of the court.

With regard to the doubt implied by the Governor of West Virginia whether it now is incumbent upon that State to take the initiative, and that suggested by its Attorney General whether the Virginia Debt Commission has the necessary power, we are of opinion that neither of them furnishes a just ground for delay. The conference suggested by the court is a conference in the cause. The body that directed the institution of the suit has taken the proper step on behalf of the plaintiff, and it is for the defendant to say whether it will leave the court to enter a decree irrespective of its assent or will try to reach a result that the court will accept. The conference is not for an independent compromise out of court, but an attempt to settle a decree. The provision as to negotiations, in the Virginia Resolution preceding the statute authorizing this suit, refers, we presume, to a settlement out of court and has nothing to do with the conduct of the cause. If the parties in charge of the suit consent, this court is not likely to inquire very curiously into questions of power, if, on its part, it is satisfied that they have consented to a proper decree.

A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if

it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace.

Motion overruled without prejudice.